

THE
Calcutta Weekly Notes.

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

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AT THE
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JUDGES OF THE HIGH COURT.

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Justice Judges:

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Respondent pending appeal—Dismissal of application for setting aside abatement—Effect of abatement of appeal as against one Plaintiff-Respondent, if renders whole appeal incompetent—Application in such circumstances for adding legal representative of deceased Respondent as party, maintainability of—Civil Procedure Code (Act V of 1908), Or. 22, r. 4, cl. (3), Or. 41, rr. 4, 20 and 33—Or. 41, r. 20, scope of, if overrides provisions of Or. 22—Addition of party—Court's inherent power.] The Plaintiffs jointly sued for recovery of possession of certain lands on declaration of title thereto and obtained a decree for joint possession. The Defendant appealed to the High Court. During the pendency of the appeal one of the Plaintiffs-Respondents died. The Appellant applied after the period of limitation to have the abatement of the appeal as against that Respondent set aside and for substitution of his legal representative. A Rule was issued but it was discharged. Thereupon the Appellant filed an application to have the legal representative of the deceased Respondent added as a party. At the hearing of the appeal a preliminary objection was taken to the competency of the appellant. Held—That the appeal was incompetent and could not proceed in the absence of one of the Plaintiffs-Respondents. <i>Kali Dayal Bhattacharja v. Nagendra Nath Pakrashi</i> , 24 C. W. N. 41; s. c. 30 (C. L. J. 217 (1919)), followed. <i>Dharanjit Narain Singh v. Chandreswar Prosad Narain Singh</i> , 11 C. W. N. 504 (1907), referred to. <i>Chandertangh v. Khimabhai</i> , I. L. R. 22 Bom. 716 (1897) and <i>Upendra Kumar Chakravarti v. Sham Lal Mandal</i> , I. L. R. 34 Cal. 1020 (1907), dissented from. That the provisions of Or. 41, rr. 4, 20 and 33 of the Civil Procedure Code were not applicable, and the Appellant's application to add the legal representative of the deceased Respondent as a party was incompetent. Or. 41, r. 4 is limited to the case of Appellants and does not entitle a person against whom the decree is passed to have it varied in the absence of a person in whose favour it was made. Or. 41, r. 20 is not intended to override the provisions of Or. 22 of the Civil Procedure Code. <i>Pulin Behari Roy v. Mahendra Chandra Ghosal</i> , 34 C. L. J. 405 (1921), referred to. The right obtained by a Respondent when the appeal abates is a valuable right and should not be lightly treated. Held, further—That whatever view might be taken with regard to the inherent power of the Court as contained in Or. 41 of the Civil Procedure Code or outside the Code, the present case was not one in which such power should be exercised. <i>MANINDRA CHANDRA NANDI v. BHAGABATI DEVI</i> ... 45		BENGAL CESS ACT (IX of 1880, B. C.), s. 95—Return of cess filed by co-sharer landlord, if admissible in favour of another co-sharer—Bengal Cess Manual, Rule 57.] The effect of sec. 95 of the Cess Act is to prohibit the admissibility of road-cess returns when tendered in favour of the person filing it. Provided this prohibition is not offended against, such a return may be adduced in evidence, if otherwise it is admissible under the Indian Evidence Act, e.g., by or against a third party who was no party to the preparation of the return. <i>Promode Chandra v. Binayak Das</i> , 27 C. W. N. 543 (1922), explained. B. 57 in the Bengal Cess Manual (per Cuning, J.) has not the force of law, and if made under sec. 182 of the Cess Act is ultra vires, and (per Page, J.) cannot be looked at for the purpose of construing sec. 95 of the Act. <i>SHEIKH INTAZ v. DINANATH DE SARKAR</i> ... 803	
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		(III B. C., of 1884)—Election rules framed by Local Government under the Act for Mofussil Municipalities—Candidate for election, if can withdraw at any time before closing of poll.] Under the rules framed by the Local Government under the Bengal Municipal Act for elections in the Mofussil Municipalities of Bengal (excluding Howrah) a candidate is entitled to withdraw at any time before the closing of the poll. <i>NAGENDRA NATH ADITYA v. COMMISSIONER OF THE PRESIDENCY DIVISION</i> ... 670	
		Sec. 102, 103—Re-valuation of holdings without a fresh determination of percentage rate. If ultra vires—Sec. 113—Privy and water tax, assessment of owner for occupier and vice versa—Remedy—Civil action. If maintainable where remedy given by Act not availed of.] Sec. 102 of the Bengal Municipal Act provides that once a percentage on the valuation of holdings at which the rate shall be levied has been fixed it shall remain	

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in force until rescinded or until the Commissioners at a meeting determine some other percentage at which the rate will be levied from the next year. Reading the Act as a whole, it is not required that whenever a fresh valuation is made the Commissioners must hold a meeting to fix the percentage. It is open to them by not holding any meeting to levy at the old rate of percentage on the new valuation. Though it may be business-like, after a valuation has been made, to consider how much money is required and therefore what the percentage rate should be, the omission to do so does not render the preparation of the valuation and rating list null and void. *Per Cuming, J.*—Where the Municipality erroneously assesses the owner with the water and privy tax where they ought to assess the occupier and vice versa, the aggrieved person has his remedy by application to the Commissioners under sec. 113 of the Act, and he is not entitled to invoke the assistance of the Civil Courts until he has exhausted his remedies which the Act provides. **BHUBAN MOHAN BASAK v. CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF DACCA** ... 405

BENGAL TENANCY ACT (VII of 1885), ss. 3, cl. (9), 178, sub-sec. (3), cl. (d)—Undivided share in parcel of land, if "holding"—Abandonment—Kabuliyat by tenant in possession of undivided share of lands of a holding—Stipulation in such kabuliyat restraining alienation and reserving right of re-entry by landlord in case of breach of covenant, if contravenes provisions of sec. 178, B. T. Act—Breach of covenant—Landlord's right to re-enter.] B and G jointly held a non-transferable occupancy holding in equal shares and afterwards there was an amicable partition between them. G's share was inherited by N who executed a kabuliyat in favour of the landlord by which the rent was increased for excess area and it was stipulated that N would not be competent to transfer the leasehold lands in any way and in case of transfer the landlord would be entitled to take khas possession of the same. It appeared that undivided portions of lands of the holding were included within this kabuliyat. After N's death the Defendants came into possession of these lands by purchase from P who was the daughter's son of G. Plaintiff thereupon sued the Defendants for khas possession. *Held*—That N's tenancy did not constitute a holding as defined by the Bengal Tenancy Act, inasmuch as undivided portions of the holding were included within that leasehold, and the sale of that tenancy being of a part of the holding the landlord was not entitled to recover possession on the ground of abandonment of the holding. *Held*—That though N's tenancy did not constitute a holding still the landlord was entitled to khas possession of the said leasehold lands on the ground of transfer of the same in breach of the covenant contained in N's

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kabuliyat which did not contravene the provisions of sec. 178 of the Bengal Tenancy Act and which was valid under that Act. Plaintiff's claim for khas possession was allowed. **BAHADUR AHMED MOULAVI v. HEMANTA KUMAR ROY** ... 613

50, sub-sec. (2), presumption under—Nature of proof required to be entitled to presumption—Rent receipts for each of the twenty years, if must be produced—Finding arrived at without considering other evidence relating to the wanting years, if can be set aside in second appeal—High Court, if competent to deal upon admitted facts and decide case in second appeal.] For the purpose of the presumption arising under sec. 50 (2) of the Bengal Tenancy Act, in order to prove that a tenant has been holding at a uniform rate of rent for twenty years it is not necessary that he should prove payment of rent for all those years and produce dakhilas for every one of those twenty years. Uniform payment for the wanting years may be proved otherwise, by other proof and from surrounding circumstances. Where the Special Judge arrived at a finding against the tenant merely relying on the dakhilas produced and not considering the oral evidence adduced: *Held*—That the finding having been arrived at on a misunderstanding of the principle laid down in judicial decisions was liable to be set aside and it was open to the High Court to deal with the case upon the admitted facts and to hold that in view of the circumstances proved in the case the tenants were entitled to the presumption contained in sec. 50, sub-sec. (2) of the Bengal Tenancy Act. **GULAM HUSAIN PRADHANJA v. K. S. BONNERJEE** ... 520

s. 50 (2), presumption under, if can be rebutted by confirmatory kabuliyats containing agreement to pay rent at an enhanced rate at a future time.] An agreement to pay rent at an enhanced rate at some future time does not constitute a change in the rate of rent under sec. 50 of the Bengal Tenancy Act. Such an agreement by itself does not rebut the presumption under cl. (2) of the section. The Court refused to grant relief on the basis of the agreement in a suit for enhancement instituted under sec. 30 of the Bengal Tenancy Act on the ground of rise in the prices of staple food crops. **JITENDRA NATH ROY v. ABENJANNESSA BIBI** ... 1038

s. 50 (2)—Presumption under s. 50, rebuttal of—Previous tenancy—Recognition of purchaser of non-transferable occupancy holding—Stipulation for enhancement of rent upon measurement in future—New tenancy—Kabuliyat, construction of.] Where a purchaser of a non-transferable occupancy holding was recognised as a tenant of the previous jama upon his executing a kabuliyat in which shares separately purchased were amalgamated and there was a sti-

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pulation of enhancement of rent at specified rates for different classes of land upon a measurement in future: Held—That in the circumstances of the case the kabuliya created a new tenancy, and the tenant was not entitled to the presumption under sec. 50 of the Bengal Tenancy Act. *Abhaya Sanker Mazumdar v. Rajani Mandal*, 23 C. W. N. 904 (1918), referred to. *DHIRENDRA NATH ROY v. AHMED MIA* ... 765

..., s. 52—Claim for additional rent for additional area—Kabuliya, construction of—Intention of parties.] Where it was stipulated in the kabuliya that the rent would be payable at certain rates with regard to a certain quality of land which would be found on measurement by a certain unit under a survey at which the tenant bound himself to be present: Held—That it might be inferred from that stipulation that the lands as described within the boundaries were not let out at the fixed jama mentioned in the kabuliya but it was the intention of the parties that the rent should be assessed upon a survey of the lands within the boundaries having regard to each class of land and area of each plot. *HEMANTA KUMAR ROY v. MESER BIBI* ... 640

..., s. 52—Claim for additional rent for additional area—Kabuliya, construction of—Intention of parties.] Where there was a stipulation in a kabuliya as to the standard of measurement and also the rate of rent to be paid per bigha with regard to each class of land: Held—That the land within the boundaries was not let out at a fixed rent but it was the intention of the parties that there should be a survey and rent should be assessed upon the measurement of the lands within the boundaries having regard to the class of land to which each plot falls and its area. *HEMANTA KUMAR ROY v. BELATALI MUNSHI* ... 643

..., ss. 182, 183B, 186, 147B—Indian Evidence Act (I of 1872), sec. 35—Whether entry in record-of-rights, presumptive evidence, only in suit between landlord and tenant as such or in all suits.] Sec. 147B of the Bengal Tenancy Act does not in any way limit the operation of sec. 183B of that Act, under which the presumption of correctness of an entry in a finally published record-of-rights arises generally and not merely in suits between landlords and tenants. The record-of-rights being a public record prepared by public officers appointed under the statutory authority of the Local Government is admissible under sec. 35 of the Evidence Act, and the record being an official act done within the jurisdiction of the public officer, it has a presumptive value of its correctness. *Raj Bahadur Dey v. Das Bahadur v. Beni Mahto*, 23 C. W. N. 439 (P. C.) (1917), relied on. *Raj Bahadur Dey v. Beni Mahto*, 23 C. W. N. 439 (P. C.) (1917), referred to. An entry in the record-of-

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rights operates in the same way between landlord and tenant as between the landlords of the same or neighbouring estates and between tenant and tenant. *Sibi Wakilan v. Deo Nandan Prosad*, 5 P. L. J. 681 (1930) and *Mazhar Ekbai v. Raja Gopal Lal Rai*, [1924] Pat. 213, approved of. *Sheikh Barkat Ali v. Basant Munia*, 21 C. W. N. 375 (1915) and *Gajadhar Prosad Singh v. Sheo Nandan Prosad Singh*, 23 C. W. N. 304 (1918), referred to. *FAZLAR RAHAMAN BISWAS v. GOLAM KAIDER MIA* ... 689

..., s. 105—Settlement of fair and equitable rent—Operation of sec. 105, B. T. Act, as to the maintainability of a suit under sec. 105—Jurisdiction of Revenue Court, when to be challenged.] The Defendants-Appellants who were the landlords applied under sec. 105, Bengal Tenancy Act, for settlement of fair and equitable rent of certain holdings including one held by the Plaintiffs-Respondents which were recorded in the record-of-rights as appertaining to their estate. The issue was raised before the Revenue Officer whether the suits were barred by sec. 105, Bengal Tenancy Act, and was decided in favour of the Appellants, it being held that it was not proved that the Appellants were landlords jointly with others. Some of the Defendants in those suits appealed against the decision of the Revenue Officer and were successful on the ground that the Appellants were landlords jointly with others, but the Plaintiffs-Respondents did not file any appeal. The Plaintiffs-Respondents subsequently brought a suit for declaration that the decree of the Revenue Officer was without jurisdiction and null and void: Held—That the Revenue Officer had jurisdiction to decide whether or not the Appellants when they made the application to him under sec. 105, Bengal Tenancy Act, were joint landlords and his decision on this point not having been questioned by the Plaintiffs-Respondents by appeal was final and binding on them. That the decision of a Court in favour of a jurisdictional fact and therefore of its own jurisdiction cannot be impeached collaterally and is conclusive of jurisdiction except against a direct attack. *CHAUDHURY UPENDRANANDAN DAS MAHAPATRA v. UMAI SET* ... 974

..., s. 108—Application for revision made within 12 months of order revised, but order passed after—Jurisdiction.] To enable a Settlement Officer to revise an order under sec. 108 of the Bengal Tenancy Act, it is sufficient if the application by the party for revision be made within 12 months of the order sought to be revised, even though the passing of the order revising it takes place more than 12 months after the order revised. *RAJA KESHEE CASE LAW v. KEDARNATH MAHIK* ... 639

..., s. 108, scope of, as to bar of suits involving subject-matter

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decided under sec. 105—Settlement record that land rent-paying.—Application by landlord under sec. 105 for settlement of fair and equitable rent decreed ex parte—Suit by tenant for declaration that land lakhiraj—Maintainability of suit—Decree, if can declare decision of Revenue Court not binding.] In the course of settlement proceedings certain holdings were recorded as rent-paying and liable to assessment of rent. Thereafter the landlord applied under sec. 105, Bengal Tenancy Act, to have fair and equitable rent settled in respect of these holdings. These proceedings were decided ex parte against the tenants. The landlord then sued the tenants for rent whereupon the latter sued for a declaration that they were lakhirajdars in respect of the lands in suit, that the lands did not appertain to the jama as alleged by the landlord and that the decision of the revenue officer was not binding on them; Held—That the suit was not barred by sec. 103, Bengal Tenancy Act. To attract the operation of sec. 103, Bengal Tenancy Act, it is essential to establish that the civil suit had for its object a matter which had already formed the subject of an application under sec. 105. The matter of the Plaintiffs' suit which was for a declaration that the entry in the record-of-rights describing their holding as liable to assessment of rent was wrong was not before the revenue officer or the subject of any application made before him when he decided the case under sec. 105. *Nawab Bahadur of Murshidabad v. Ahmad Hossain*, I. L. R. 44 Cal. 763; s. c. 21 C. W. N. 1004 (1916). The decision of the Full Bench* in *Purna Chandra Chatterjee v. Narendro Nath Chowdhuri*, 29 C. W. N. 755 (F. B.) (1926), is not intended to give such a wide meaning to the words of sec. 103, Bengal Tenancy Act, as to lay down that any matter which though not directly the subject-matter of an application before the revenue officer under sec. 105 was indirectly or impliedly involved in the determination of that application should be taken as a matter which was the subject of the application made before the revenue officer. But the Plaintiffs were not entitled to a declaration that the order passed under sec. 105, Bengal Tenancy Act, by the revenue officer was not binding upon the Plaintiffs as that was a matter which was the subject of the application before the revenue officer. *PRIYAMRADA DEBI v. PRIYA NATH BANERJI* ... 187

... s. 147A (as applicable to Eastern Bengal and Assam)—Omission to record reasons required by section in passing compromise decree in suit for enhancement of rent—Such decree, if can be treated in subsequent suit for rent between the parties as without jurisdiction and a nullity—Landlord, if entitled to decree for rent at rate settled by such compromise decree—Proper way of assailing such decree.] A decree for enhanced rent made on compromise between the parties under

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the provisions of sec. 147A, Bengal Tenancy Act, cannot in a subsequent suit for rent between the parties be treated as without jurisdiction and a nullity on the ground that the procedure laid down in that section as to the recording of reasons by the Court for being satisfied that the terms of the compromise were such that if embodied in a contract they could be enforced under the Act and that the enhancement was fair and equitable and in accordance with the rule laid down in the Act for the guidance of Courts in increasing rents was not complied with. Such a decree may be assailed in proper proceedings as erroneous but cannot be said to have been passed without jurisdiction and is valid and binding and the landlords are entitled to a decree for rent at the rate settled by the former decree. *Sarjughsharan v. Dukhit Mahto*, 17 C. W. N. 486 (1913), dissential from. *Hriday Nath v. Ram Chandra*, I. L. R. 48 Cal. 128; s. c. 24 C. W. N. 723 (F. B.) (1920), followed. *ISHAN CHANDRA BANIKYA v. MOOM-RAJ KHAN* ... 940

... s. 148A—Suit for rent by co-sharer landlord—Purchaser of portion of holding who was recognised by other co-sharers, not made Defendant—Decree against recorded tenants of holding, if rent or money decree.] Where subsequently to the recognition by the 14 as co-sharer landlords of a purchase of a moiety of a non-transferable occupancy holding, the remaining 2 as landlords instituted a suit for rent under sec. 148A of the Bengal Tenancy Act, making parties Defendants to the suit the original owners of the holding and the 14 as co-sharer landlords but not the purchaser: Held—That the decree obtained in the suit was a rent decree, and the entire holding passed to the purchaser at the sale in execution of the decree and not merely the right, title and interest of the tenant Defendants. To obtain a rent decree the Plaintiff landlord is not required to bring on the record a purchaser of an interest in the holding whom he has not recognised as a tenant. *BAMAPADA SARKAR v. SM. SAKUNTALA DASI* ... 494

... s. 153—Amount of rent annually payable—Decree passed upon finding that the landlord has no co-sharer, if amounts to a decree as to the share of rent payable by the tenant.] The trial Court awarded a decree to the Appellant for the full amount of rent claimed, finding that he had no co-sharer. The first Appellate Court dismissed the Respondents' appeal on the ground that sec. 153 of the Bengal Tenancy Act was a bar to its maintainability. A single Judge of the High Court on second appeal set aside the decree of the first Appellate Court holding that the appeal to it was competent, because the decree of the trial Court decided a question of the amount of rent annually payable by the tenant: Held, on appeal under the Letters Patent—That the primary

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Court having found that the landlord Appellant had no co-sharer, it had no occasion to decide and in fact it did not decide the question as to the share—the amount of the rent which he was entitled to. The finding that the landlord has no co-sharer and is therefore entitled to the whole rent claimed is not a decision of the question as to the amount of rent annually payable by the tenant. *Sudhanna Santra v. Basanta Kumar Sarkar*, I. L. R. 49 Cal. 538: s. c. 28 C. W. N. 96 (1921). *Narain Mahaton v. Manofi*, I. L. R. 17 Cal. 489 (F. B.) (1890). *Wafuzuddin Pramanik v. Mohammed Balaki*, 28 C. W. N. 1xxii (1924). *Parashmoni Dasi v. Nabo Kishore Lahiri*, I. L. R. 30 Cal. 773: s. c. 8 C. W. N. 193 (1903). *Bashiram Nath v. Srinath*, 23 C. W. N. 1xxvi (1919) and *Fakeer Mandal Gain v. Arshed Mulla*, 10 C. W. N. cclxxx (1905), referred to. **MUNSHI SALIMUDDIN AHAMMAD v. RAHIM SHEIKH** ... 850

... s. 153—Suit for rent dismissed for misjoinder of parties and absence of separate collection—Appeal, if lies—Second appeal, if lies to High Court when appeal entertained by lower Court was incompetent.] The Plaintiff's suit for his share of rent amounting to less than Rs. 100 was dismissed on the ground of misjoinder of parties and also that there was no separate collection. In appeal this decision was reversed and there was a second appeal to the High Court: Held—That none of the grounds on which the decision of the Court of first instance was arrived at came within the exception to the rule that in a suit for rent below a certain value no appeal lies and an appeal against that decision was incompetent. It is settled law that if the Court of Appeal below entertains an appeal which it has no jurisdiction to do, an appeal will lie from the decrees of that Court. **WAJUDDI PRAMANIK v. MD. BALAKI MORAL** ... 63

... s. 158, order of decree—Limitation, if runs from date of order or decree—Limitation Act (IX of 1908), s. 5—Appeal filed beyond time under wrong legal advice—"Sufficient cause." Under sec. 158, cl (3) of the Bengal Tenancy Act, the order on any application made under that section should be regarded as a decree under Sch. III, cl. (4) and time for appealing therefrom should run from the date of such order. Formal decrees following such orders are memorandum of appeal. *Kamala Dasi v. Tarapada Mukherji*, 15 C. L. J. 493 (1910), considered and dissented from. If the Appellants relying on the advice of their pleader filed the appeals within 30 days not necessary to be filed along with the from dates of decrees, they should be excused under sec. 5, Limitation Act. *Sunderbai v. The Collector of Belgaum*, I. L. R. 43 Bom. 376: s. c. 23 C. W. N. 753 (P. C.) (1918); followed. The true guide is whether the Appellant acted with reasonable

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diligence in the prosecution of the appeal. *Brij Indar Singh v. Kanshi Ram*, I. L. R. 45 Cal. 94: s. c. 22 C. W. N. 169 (P. C.) (1917), followed. **DEBENDRANATH SINHA v. NAGENDRANATH SINHA** ... 479

... ss. 160, 161—Permanent tenure, nature of tenant's interest—Tenant's duty to protect himself from illegal encroachment—Trespasser acquiring title to lands of tenancy by adverse possession against tenant—Tenant, if may claim abatement of rent against landlord—Stipulation by tenant not to claim abatement of rent, if binds purchaser at rent sale—Failure of landlord to give tenant possession of all land leased, when ground for suspension of rent—Tenancy at lump rental and at a rate per bigha, difference between.] The tenant under a permanent and transferable lease held at a fixed rent virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lessor and the succeeding landlords have no interest in the lands except in so far as they form a security for the payment of rent. The purchaser of the tenure at a rent sale acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants, not being a protected interest within secs. 160, 161 of the Bengal Tenancy Act. The duty of a tenant under such a perpetual tenure is to protect himself against illegal encroachment by others on the lands of which he has exclusive possession. If he fails to do so, he cannot prejudice the landlord's claim for rent. *Womesh Chunder Goopie v. Raj Narain Roy*, 10 W. R. 15 (1868), referred to. Where a purchaser of such a tenure at a rent sale suffered a person who at the date of the purchase was in adverse possession of some lands of the tenure to remain in such possession for the statutory period: Held—That the purchaser could not claim an abatement of rent against the landlord in respect of the land the possession whereof he lost by his own neglect. The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha. The Judicial Committee accepted the soundness of the long and consistent body of judicial decisions referred to in the judgment under appeal [*Uday Kumar v. Katyani*, I. L. R. 49 Cal. 948 (1922)], denying the validity of the argument that a trespasser, being liable to ejectment by the lessor, acquires title by limitation against the lessor as well as the tenant and that when this happens the tenant is entitled to an abatement of rent. **Quare**—Whether a compromise by a former landlord and the tenant under which the latter stipulated not to apply for abatement on any ground whatever in respect of the area then found on measurement to be in their occupation would necessarily bind a

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purchaser of the tenure at a rent sale.
SRIMATI KATYAYANI DEBI v. UDOY KUMAR DAS ... 1

s. 170 (3)—Purchaser of non-transferable occupancy holding not recognised by the landlord cannot make deposit, under section. The purchaser of the whole or portion of a non-transferable occupancy holding who has not been recognised by the landlord has not an interest in the holding which is voidable on the sale and is not entitled to make a deposit under sec. 170 (3) of the Bengal Tenancy Act.
JHARU MONDAL v. KHETRA MOHAN BERA ... 723

BOARD OF REVENUE, suit to contest order of, declaring land claimed as part of permanently settled estate liable to assessment of revenue—Such suit, if barred by one year's rule of limitation **SECRETARY OF STATE FOR INDIA v. RAI KADHA KANTA AICH BAHADUR** ... 774

BREACH OF PROMISE TO MARRY—Woman married at time of promise but expecting to be divorced and divorced subsequently—Promise, if actionable—Implied new promise after divorce—Damages, measure of—Seduction, proof of, if relevant—Privy Council—Practice, not to review measure of damages.] A promise to marry a woman who at the time of the promise was a married woman, though it was understood between them that a divorce was going to take place and a divorce did afterwards take place, is a void promise. Where the parties, nevertheless, considered themselves as engaged persons and behaved as such, and after the termination of the divorce proceedings when the woman became a free woman, the man bought her a ring and actually arranged the date on which they were to be married: Held—That the Courts in India properly inferred that there was in law a new promise to marry.
Ditcham v. Worrall, L. R. 5 C. P. D. 410 (1880) and **De Thoren v. Attorney-General**, L. R. 1 App. Cas. 686 (1876), referred to. The Judicial Committee would not interfere with a measure of damages which had been fixed by a Judge unless they saw that there was something very clearly wrong with the figure which he had fixed upon.
THOMAS CHARLES WILLIAM SKIPP v. LILIAN MILDRED KELLY ... 841

Onus to prove contract discharged—Promise to marry lady of German extraction—Marriage deferred till termination of war—Silence till then, if sufficient to discharge contract.] In a suit for damages for breach of promise of marriage, if the contract of marriage is proved, it is for the defence to establish that the contract was rescinded and dissolved by agreement of both the parties to the contract. In certain circumstances silence, absence, conduct, expressions in letters may be amply sufficient to lead a Court of Law to such a conclusion, but silence for years, in the extraordinary circumstances of the present case, was held not to be sufficient.
LUCIA JACOB v. DAVID ALEXANDER WILLS ... 248

BRITISH PROTECTORATE, definition of—

Sovereignty thereof and limitations thereon—Protected State (Swaziland) in South Africa—Semi-sovereignty—Foreign Jurisdiction Act, 1890 (53 & 54 Vict., ch. 37), secs. 1, 3 and 11—Acquisition of rights and territory by Crown thereunder—Order in Council and powers thereunder—Acquisition of land by Crown and extinction of native subjects' rights in South African Protected State by such Order—Act of State.] In the general case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. Sir Henry Jenkin's definition in "British Rule and Jurisdiction Beyond the Seas" at p. 165 referred to. A Protected State is only a semi-sovereign State. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act of 1890. The Foreign Jurisdiction Act appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. The case of the Appellant was that certain lands formed part of an area subject to a concession granted by the former King of the Swazis in 1889 to two Europeans, conferring exclusive right of grazing and agricultural and planting rights over the unoccupied land within the concession for 50 years but it provided that the grantees were in no way to interfere with the rights of the Swazi-King's subjects. The subjects of the Appellant and their predecessors had been for a long time in occupation of portions of the land included within the concession and the first Respondent, who was the manager of a Corporation to whom the grantees had transferred the area including the land in dispute, trespassed on the existing rights of native occupiers and caused them to be ejected from the land they occupied. Swaziland was formerly a protected dependency administered by the South African Republic and was treated as an independent Native State both by the South African Republic and by the British Government. The Convention of 1894 between Great Britain and the South African Republic recognised the latter's right of protection, legislation, jurisdiction and administration over Swaziland and the inhabitants thereof but it guaranteed the grazing and agricultural rights of the natives of Swaziland with a proviso that no law thereafter made was to be in conflict with the rights so guaranteed by the Convention. In 1903 by conquest South African Republic became British territory and Swaziland a British Protectorate. Thereupon the British Crown ordered that

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the Governor administering Transvaal might exercise all powers and jurisdiction of the Crown and do all things that were lawful. The powers of the Governor were subsequently transferred to the High Commissioner of South Africa. Under an Order in Council of 2nd November 1907, portions of certain lands in Swaziland, the subject of concessions by the paramount Chiefs aforesaid, were set apart and demarcated by the High Commissioner for the exclusive occupation of natives and the remaining portions for being leased to Europeans claiming under such concessions. Under a Proclamation of the High Commissioner of the 16th March 1917 certain area including the land in the Concession of 1899 was proclaimed as Crown land and under a Crown grant of the same date, the High Commissioner granted to the second Respondents (the Corporation) a part of the land now in dispute, as compensation for lands which the Respondents had relinquished in his favour. The Appellant contended that the Crown has no power over Swaziland except those which it had under the Convention aforesaid and those it acquired by the conquest of South Africa: Held—That the limitation in the Convention of 1894 on interference with the rights and laws and customs of natives cannot legally interfere with the subsequent exercise of the sovereign powers of the Crown or invalidate subsequent Orders in Council. The Order in Council of 1907, after providing for power to set apart certain lands, enabled the High Commissioner to acquire the remaining land and to deal with it. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act or as an act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these are inconsistent with previous order. *SORRUZA II v. MILLER* ... 961

CALCUTTA RENT ACT (III, B. C. of 1923), s. 2 (c)—“Premises,” if includes fans, lights, &c.—Intention of parties and nature of agreement are the determining factors—Sec. 15—Standardization of rent.] It depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether such things as fans and lights are intended to go with and to form part of the premises or building demised: Held in the circumstances of the case—That the fans and lights which were attached to the part of the building demised and which were intended to be used with it must be taken according to the intention of the parties, to be part of the demised building for the purposes of the Rent Act and that it was open to the Rent Controller to fix a standard rent which comprised these. *D. D. BARBER v. W. C. DEBENHAM* ... 274

s. 2 (c)—Premises. It can include different blocks—*See* *Standard Rent (2) (g), prev.* (ii)—Standardization of rent—Improvement made

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by landlord to be taken into consideration—Landlord, if includes lessee from landlord in proceedings between lessee and sub-lessee.] The fact that a building consists of several blocks does not take it out of the definition of premises in sec. 2 (c). Under sec. 15 the standard rent is to be fixed on the application by the landlord or the tenant and under proviso (ii) of cl. (c) the Controller shall not increase the rent by more than ten per cent. per annum on the amount expended on the improvement or structural alteration of the premises as provided in sec. 5. This implies that the expenditure to be taken into account must be made by the landlord who applies for standardisation of rent or against whom an application for standardisation has been made. Thus in proceedings for standardisation of the rent of premises which have been sublet at the instance of the sub-lessee the improvement made by the superior landlord cannot be taken into consideration. *S. G. P. SINGH v. PROBODH KUMAR DAS* ... 308

s. 2, cl. (f), sub-sec. (5), and sec. 15—Standard rent, what is—Tenant, when entitled to the benefit of the Act—Fair and reasonable compensation for use and occupation, basis of.] The standard rent as defined by sec. 2, cl. (f), sub-cl. (1) of the Calcutta Rent Act should be taken to be the rent at which the premises were let out on the 1st of November 1918 with the addition of ten per cent. as provided in the section, in the absence of any application by the landlord to fix it at a higher rent under sec. 15. This is fixed by statute and does not depend upon any action taken before the Rent Controller. *Jetha Bhulchand v. Grace*, 28 C. W. N. 678 (1922), referred to. A tenant claiming the benefit of sec. 11 of the Act is entitled to it only if he has complied with the two following conditions of sub-sec. (5), viz., firstly, if he has paid all arrears of rent that might be due at the time of the passing of the Act and, secondly, he must pay the rent to the full extent allowable by the Act, within the time fixed by the contract, if any, or within the 15th day of the month next following that for which the rent is payable. He does not get three months to pay the rents of the first three months after the commencement of the Act, the second condition applying to them. When the position of a tenant has been reduced to that of a trespasser, he is no longer entitled to the benefit conferred by the Act. *W. & T. AVERY, LD. v. KESORAM PODDER* ... 152

as amended by Act II of 1923 and Act I of 1924, sec. 11, sub-secs (1) and (2)—Expiry of lease—Breach of covenant during subsistence of original lease—Waiver of such breach by subsequent acceptance of rent with knowledge of such breach—Whether landlord is entitled to a decree for possession.] The Plaintiff, a trustee of the estate of Anna Appa, deceased, of which J. Appa

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was the beneficiary, on 20th November 1919, demise the premises to the Defendant for a period of four years to expire on 30th September 1923. The lease contained a covenant—"not to assign, sublet or part with possession of the said premises, or any part thereof without the previous consent in writing of the lessor." The Defendant sublet the upper flat of the premises to a tenant in April 1921 who continued to be in occupation till April 1923. Before the expiry of this lease the Plaintiff gave notice to the Defendant to quit and vacate the premises as the same was required for the use and occupation of the beneficiary and brought this suit for a decree for possession and for mesne profits at Rs. 650 per month till the recovery of possession. The Defendant denied that the premises were required for the use and occupation of the beneficiary and claimed benefit of the Calcutta Rent Act. Buckland, J., found that the Plaintiff did not bona fide require the premises for use and occupation as alleged but allowed the Plaintiff to amend the pleadings in order to raise the issue whether the Defendant could claim the benefit of the Rent Act in view of the said breach of covenant regarding subletting. On the amended pleadings it was found by Ghose, J., on evidence, that the Plaintiff accepted rent with knowledge of the breach in August and September 1923, so that there being waiver of forfeiture the suit was dismissed. Held—That subletting the premises without written consent was a technical breach of covenant but there was complete waiver of the breach by subsequent receipt of rent after the landlord had that knowledge. In those circumstances it could not be said that the tenant failed to perform the conditions of the tenancy. Per Rankin, J.—By the last words of proviso to sub-sec. (1) of sec. 11 of the Calcutta Rent Act, the Court could in a proper case take into account breaches of the conditions of the tenancy committed during the course of the original tenancy in granting a decree in ejectment at the termination of the lease. But sub-sec. (1) of sec. 11 does not mean that because a perfectly harmless technical breach was committed in 1921, the Court cannot give the tenant in 1924 the benefit of the Calcutta Rent Act. OFFICIAL TRUSTEE OF BENGAL v. W. G. BOWDEN ... 190

s. 15—Tenant whose lease has been validly terminated, if may apply for standardization of rent—Decree for ejectment passed on a subsequent date—Position of tenant during interval that of trespassers—High Court's power of revision.] Where the landlord served a notice on the tenant on 15th August 1923 terminating the lease on the ground of breach of covenants in the lease, and his suit for ejectment on the ground was decreed on 24th April 1925; Held—That an application for standardization of rent made by the tenant on 1st December 1923 was incompetent and the order of the Rent Controller, dated 11th March 1924, fixing the standard rent was without jurisdiction.

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The position of the applicant on 1st December 1923 was that of a mere trespasser. The fact that the decree in ejectment was passed after the order of the Controller did not make any difference as the decree did not terminate the tenancy but on the other hand decided that the landlord was justified in terminating the tenancy on 15th August 1923. The fact that the order of the Rent Controller did not admit of revision by the President of the Tribunal did not preclude interference with the order in revision by the High Court. SATYA NERANJUN SHAW v. KARNANI INDUSTRIAL BANK 236

s. 18—Point not taken before Controller, if can be tried by the President of the Tribunal—Revision, meaning of—Sec. 24, scope and effect of—Section, if authorises President to start a new case irrespective of what took place before Controller.] When before the Rent Controller no question was raised as to whether the rent was unduly low or not on the 1st November 1918, the President of the Tribunal has no jurisdiction under sec. 18 or sec. 24 of the Rent Act to express his opinion on the point, in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point. It is a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision. The proper reading of sec. 24 of the Act is that the President of the Tribunal is to follow the procedure laid down in revising a decision of the Controller and not that he can treat the application for revision as a suit irrespective of what was done before the Rent Controller. The section apparently lays down that where there is a decision of the Controller on a particular question, the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him. L. R. COUNSELL v. SM. SUKUMARI DEBI ... 116

CAUSE OF ACTION, when arises of suit on contract of loan. See C. P. C. BANSHI LAL ARYACHAND v. GHULAM MAHBUB KHAN ... 577

splitting of.] It is the policy of the Code of Civil Procedure of 1908, as it was the policy of the Code of 1882, that parties should not split up a cause of action against Defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. SOURENDRA MOHAN SINHA v. HARI PRASAD SINHA ... 469

CHAUKIDARI CHAKKAN ACT (VI, B. C., of 1870), sec. 51—Resumed Chakran lands included within putni tenure—Right of putnidar to take possession—Right of zamindar to additional rent.] Putnidars are entitled to have possession of Chankidari Chakran lands included within their putni tenure and resumed under Act VI, B. C., of 1870.

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but subject to the right of the zamindar to have additional rent fixed for such land. The decision of the trial Court holding that the putnidar should pay to the zamindar such increased putni rent over the doul jumma as might be proportionate to the increase of the present collection over what it had been when the putni mahal was created was affirmed by the Judicial Committee. **RAJAH BHUPENDRA NARAYAN SINGH v. NARAPAT SINGH** ... 553

CIVIL PROCEDURE CODE (Act V of 1908), s. 2, cl. (11).—Legal representatives—Executors

de son tort it and when can be added as parties Defendants to the suit when a legal representative within the meaning of the term who represents the estate exists—[Executor de son tort, meaning of.] The Defendant L having died pending this suit against him on a hand-note, the two Appellants were also brought in on the record along with his widow as his legal representatives within the meaning of sec. 2, cl. (11) of the Code, on the ground of their having been his executors de son tort as they appropriated some bricks of his kiln under the orders of the District Board, and a decree was passed against the two Appellants as also against the widow: Held—That the mere taking away of a portion of a deceased Defendant's property does not make the person who takes away the same his executor de son tort, in the absence of proof of an intention that he intended to act as a legal representative of the deceased, and to represent his estate by intermeddling with it. That when a legal representative of the deceased Defendant within the primary meaning of the term is in existence, the executors de son tort should not also be added as parties to the suit in addition to such legal representative. **SATYA RANJAN ROY v. SARAT CHANDRA BISWAS** 565

... s. 2 (2), Or. 41, r. 11 (1), Or. 47, r. 1.—Court Fees Act (VII of 1870), secs. 4 and 5, and Sch. 1, Art. 4, Sch. II, Art. 17 (vi) and Art. 1 (d) (ii).—Bengal Court Fees Amendment Act (IV of 1922, B. C.)—Partition suit—Second appeal, summarily dismissed—Application for review—Court-fee, payable.] On a reference made by the Stamp Reporter under sec. 5 of the Court Fees Act (VII of 1870) as to the amount of court-fee leviable on an application for review under Or. 47, r. 1, C. P. C., of a summary decision dismissing a second appeal under Or. 41, r. 11 (1) of the Civil Procedure Code: Held—That the summary dismissal of an appeal under Or. 41, r. 11 (1), operates as a decree and falls within the definition of a decree in sec. 2 (2) of the Civil Procedure Code of 1908. The expression of opinion dismissing an appeal is a judgment although as a matter of practice such judgments are not pronounced in the form prescribed under Or. 41, r. 81 and the application is one for review of judgment. **Uma Sundari v. Bindu Basmal, I. L. R. 24 Cal. 759 (1927)**. **Muniswami v. Muttuswami, K. L. R. 22 Mad. 293 (1928)**. **Aasma Bibi v. Ahmad Hussain, I. L.**

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R. 30 All. 200 (1908) and Chandra Kanta v. Lakshman, 21 C. W. N. 439 (1916), referred to and followed. On a proper construction of sec. 4 of the Court Fees Act, an application for review presented, under Or. 47, r. 1 of the Code of Civil Procedure, after the ninetieth day of a decision dismissing a second appeal under Or. 41, r. 11 (1) arising out of a suit for partition the plaint and memorandum of appeal wherein bore a court-fee stamp of Rs. 15, should also bear a court-fee stamp of Rs. 15 as enacted in column (3), Art. 4, Sch. I of the Court Fees Act of 1870, as amended by the Bengal Court Fees Amendment Act of 1922. Schedules annexed to an Act and the headings under which they are placed are parts of the enactment, but they are not to be taken into consideration if the language of the enactment is clear. *Crales on Statute Law*, 3rd Edition, Page 188, referred to. **ALTAF ALI v. JAMSUR ALI** ... 331

... s. 11—Res judicata, as amongst co-Defendants, conditions necessary therefor—Construction of deed by Court, if necessarily res judicata as between co-Defendants.] Per Mukerji, J.—In order that a decision of a conflict between co-Defendants should operate as res judicata, it is enough that its adjudication was necessary to determine the claim put forward by the Plaintiff whether in the Plaintiff's favour or against him. When a Plaintiff asked for the construction of a deed in order to determine whether the Plaintiff or her heirs had any right to a certain property thereunder, and certain Defendants filed a joint written statement denying her title, and the Court in determining the issue held that the property in question had by the deed been absolutely given to one of the latter: Held, per Curiam.—That the decision was not res judicata as between the co-Defendants. Per Mukerji, J.—The decision was not res judicata as between the co-Defendants in the absence of anything to show that a conflict was raised as between them and such a conflict could not be presumed by reference to the doctrine of constructive res judicata contained in Expl. IV to sec. 11 of the Civil Procedure Code. In the absence of a conflict as between the co-Defendants, the other Defendants could not appeal against the adverse finding when no relief was given to Plaintiff. Nor was it a case in which all the parties to the litigation invited the Court to construe the deed in order to ascertain or adjust their respective rights. The rulings in **Hook v. Administrator-General, L. R. 48 T. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 915 (1921)**, **Ram Kripai Sukul v. Run Kuari, T. R. 11 I. A. 37; s. c. I. L. R. 8 All. 269 (1883)**, **T. B. Rama Chandra v. A. N. S. Rama Chandra, 20 C. W. N. 718; s. c. 35 C. T. J. 545 (P. C.) (1923)** and **Badar See v. Habib Merican Noordin, (1908) A. C. 615**, do not in any way qualify the provisions of sec. 11 of the Civil Procedure Code in their application to cases coming within the scope of the section or affect the question

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of res judicata when a previous decision in a suit is alleged to operate as a bar in a subsequent one as between persons who were co-Defendants in the previous suit. *Gokul Mandar v. Pudmanand Singh*, I. L. R. 20 Cal. 707; s. c. 6 C. W. N. 825 (P. C.) (1902), referred to. **GANGAPHOSAD CHAUDHURY v. KULADANANDA ROY** 415

ss. 13, 44--

Decree of Court in Native State transferred for execution to British Court--Objection as to jurisdiction, if maintainable.] The provisions of sec. 13 of the Civil Procedure Code apply to decrees that are transferred to British Courts for execution under the provisions of sec. 44 of the Code. It is open therefore to the British Court to which a decree has been transferred for execution under sec. 44 to go into the question whether the decree was passed without jurisdiction or was obtained by fraud. *Veera-raghava v. Muga Salt*, I. L. R. 39 Mad 24 (1911) and *Jivappa Timmappa v. Jeorgi Murgappa*, I. L. R. 40 Bcm. 551 (1916), referred to. **PANCH KARI MAJUMDAR v. GIRIDHARI MAL MOHESRI** ... 783

s. 20 (c)--Suit on contract of loan--Cause of action, where arises--Suit brought against non-resident foreigner in British Court to avoid bar of limitation--British Court established in cantonment by cession from the Nizam--Jurisdiction--Debtor and creditor--Duty of former to pay latter at his place, if arises when creditor out of realm.] The Plaintiff who had a place of business at Secunderabad, a British cantonment in which jurisdiction was exercised by certain British Civil Courts, from cession by the Nizam, sued the Defendants, both residents of Hyderabad, in the Nizam's dominions, one as principal debtor and the other as surety, in one of such Courts, asserting that the loans were both made and re-payable at Secunderabad. The claim, if brought in Hyderabad Court, would be time-barred but would be within time in the Secunderabad Court on account of the foreign residence of the Defendants. The finding upon the contract of the parties being that no part of the obligation either of the principal debtor or of the surety was to be discharged at Secunderabad and no obligation was assumed there: Held--That the question of jurisdiction was different in character from such a question when it arises between one Court and another in British India but that no part of the cause of action arose at Secunderabad even within the meaning of sec 20 (c) of the Code of Civil Procedure. The duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. **BANSTILAL ABIRCHAND v. GHULAM MAHBUB KHAN** ... 577

s. 47, Or. 41, rr. 4 and 33--Appellate Court, if competent to make an order in favour of a person who is no party to the appeal before it.] Upon appeal by one judgment-debtor alone as regards the portion of the decreed amount payable by her only, the lower

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Appellate Court dismissed the Appellant decree-holder's entire application for execution as time-barred, although her co-judgment-debtor was no Respondent to the appeal before it. Held--That the lower Appellate Court was competent, in acting under Or. 41, r. 33 of the Code, to dismiss the decree-holder's entire application for execution, as against both the judgment-debtors as time-barred upon appeal by one judgment-debtor alone, although her co-judgment-debtor was not made a party Respondent to the appeal and there was thus no cross-objection on her behalf and notwithstanding that the appeal was not directed against the entire decree but only as to a part of it, viz., as regards the proportionate share of the decreed amount payable by the Appellant. The Appellate Court may decide any question under this rule in favour of a party to the suit though he is not a Respondent to the appeal. *Hari Das Dey v. Kailash Chandra Bose*, 41 Ind. Cas. 480 (1916), dissented from. *Anubika Charan Chakravarti v. Sasitara Debi*, 22 C. L. J. 61 (1915) and *Gangadhar Muradi v. Banabashi Padihari*, 22 C. L. J. 390 (1914), followed and relied on. *Abjal Majhi v. Intu Bepari*, 22 C. L. J. 394 (1915) and *Akiman-nassa Bibi v. Bepin Behary Mitter*, 22 C. L. J. 397 (1915), referred to. **RHUTNATH DEB v. SASHIMUKHI BRAHMANI** ... 885

s. 47--Mortgage decree--Execution--Objection by judgment-debtor's son that property belonged to his mother and not father, and want of legal necessity--Objection regarding substitution of heirs out of time in the suit, if tenable in such application--Limitation for an application under Or. 21, r. 90 if can be saved by purporting to make it under s. 47--Non-service of notice of execution on minor's guardian, if vitiates the execution sale.] An application purporting to be under sec. 47 and Or. 21, r. 90, C. P. Code, was made for setting aside a sale in execution of a mortgage decree. The objections that were put forward to bring the application under sec. 47 were that the properties were not liable for the decree inasmuch as they belonged to the mother of the applicant and the decree had been passed not for the debts of the mother but for those of her husband and that the latter had no legal necessity to mortgage the properties, and consequently the properties of the applicant were not liable for the mortgage: Held--That these objections which had been raised and overruled in the suit could hardly be considered as falling under sec. 47, C. P. C. Where an application really came under Or. 21, r. 90, the mere fact that in the application sec. 47 was mentioned would not enable the applicant to save limitation if the application was not filed within 30 days of the sale. Where it was contended in an application under sec. 47 and Or. 21, r. 90 that a final mortgage decree was bad, inasmuch as the judgment-debtor's heirs were not brought on the record within the time allowed by law: Held--That this was not

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an objection which could be taken either on an application under sec. 47 or in an application under Or. 21, r. 90, C. P. Code. The executing Court was not competent to go behind the decree and enquire into any question challenging the validity of the decree itself. Where no guardian ad litem for a minor judgment-debtor was appointed in the execution proceedings and notice of execution in connection with the issuing of sale proclamation was served upon the minor judgment-debtor: Held—That this only amounted to an irregularity, and this irregularity could not be taken to have vitiated the sale, for non-representation of an infant by a guardian in execution proceedings is not itself a sufficient ground for avoiding an execution sale. *Malkarjan v. Nakhari*, L. R. 27 I. A. 216; s. c. I. L. R. 23 Bom. 337; 5 C. W. N. 10 (1900) and *Fani Bhushan v. Surendra Nath*, 35 C. L. J. 9 (1921), relied on. **MATEUR RASUL v. ABDUL SOID** ... 86

s. 47 (1), Or. 21, r. 95—Order passed on an application under Or. 21, r. 95, by an auction-purchaser who was a decree-holder, if an order under sec. 47 (1) of the Civil Procedure Code and as such, it appealable.] Per Curiam (Cuming, J., contra).—Where a decree-holder as an auction-purchaser applies for the possession of property under Or. 21, r. 95, he comes under sec. 47 of the Civil Procedure Code, as it is a question arising between the parties and it is a proceeding relating to execution, discharge or satisfaction of the decree. Order passed in such a proceeding is appealable. **KAILASH CHANDRA TARAFDAR v. GOPAL CHANDRA PODDAR** ... 649

s. 47, Or. 41, r. 23, Or. 43 (1) (n)—Decree as drawn up alleged to include more land than claimed in the suit—Matter, if for executing Court or for fresh suit—Remand order—Appeal.] The Appellant sued the Respondents for recovery of possession of 5 bighas of land alleged to be within specified boundaries and got an ex parte decree. In a suit by the latter against the former to set aside the decree on the grounds, first, that the decree had been obtained by fraud, and secondly, that it was beyond the Court's jurisdiction in that it gave the Plaintiffs in that suit more land than he had claimed, the trial Court held that no fraud had been made out and that there was no substance in the other objection. On appeal, the Appellate Court without displacing the finding of the trial Court on the question of fraud remanded the suit for trial on the merits, being of opinion that the decree made in the previous suit was in excess of the Court's jurisdiction, having included land outside the subject-matter of the claim: Held, on further appeal to the High Court—That an appeal lay to the High Court as the order though irregular was in form and substance one made under Or. 41, r. 23 of the Civil Procedure Code. *Basumati Debi v. Tarit Basini Das*, 31 C. L. J. 354 (1918) and *Prasanna Chandra*

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Chattopadhyaya v. Baroia Nath Mistry, 31 C. L. J. 360 (1920), followed. That the Court in the previous suit had territorial jurisdiction over the land in suit, and if the area specified in the decree in that suit which in terms gave them the 5 bighas claimed included any land which did not form the subject of the suit, that was a matter for determination under sec. 47 of the Code and not by a suit. **KAYEM BISWAS v. BAIADUR KHAN** ... 41

sec. 47—Decree for redemption—Whether certain new shares were issues of pledged shares within the meaning of the decree, a question for the executing Court—Contract Act (IX of 1872), sec. 163—Accession to bailed goods.] H obtained a decree for redemption of certain pledged shares "together with all the issues thereof," and applied for execution thereof by transfer to H of certain newly allotted shares which H claimed to be accessions to the pledged shares: Held—That the question to be determined depended upon considerations which necessarily were connected with the original case and was therefore a matter which the executing Court was fully competent to go into under sec. 47 of the Civil Procedure Code. That having regard to sec. 163 of the Contract Act the newly allotted shares were "issues" of the pledged shares and recoverable as such. **SETH MOTILAL HIRABHAI v. BAI MANI** ... 8

s. 48—Execution of decrees against a Defendant more than 12 years after the original decree, but within 12 years of the appellate decree, if barred by limitation, when the said Defendant was not a party to the appeal—The decree of the trial Court, if merged in the appellate decree in respect of the said Defendant.] A decree was obtained against several Defendants, two of whom appealed, but a certain Defendant was not impleaded in the appeal. The appeal was dismissed. After several applications for execution, the decree-holder made the present application for execution more than 12 years after the date of the decree of the trial Court but within 12 years from the date of the decree of the Appellate Court: Held—That in this case the decrees of the trial Court did not merge in the decree of the Appellate Court, as the particular Defendant was not a party to the appeal and as such no order would have been made as against him by the Appellate Court by its decree. Therefore under the provisions of sec. 48 of the Civil Procedure Code, the application for execution, made more than 12 years after the decree of the trial Court, was barred as against the said Defendant. *Lake Nath Singh v. Guju Singh*, 20 C. W. N. 78 (1915), distinguished. **AMIR ALI v. HARISH CHANDRA DAS** ... 306

s. 60 (n)—Maintenance receivable out of immoveable property—Decree against maintenance holder—Execution—Whether right can be attached and sold—Equitable execution by appointment of Receiver, proper remedy.] A right to receive maintenance out of certain proper-

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ties, provided for in a compromise decree, is not attachable or saleable in view of sec. 60, cl. (h) of the Civil Procedure Code. The proper remedy lies in the appointment of a Receiver for realising the rents and profits of the property, paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt. **LAL RAJINDRA NARAIN SINGH v. MUST. SUNDAR BIBI** ... 818

... sec. 66—Civil Procedure Code (Act XIV of 1882), sec. 317—Suit against certificated purchaser for confirmation of possession upon declaration that purchase was benami, if lies.] A suit for confirmation of possession, equally with one for recovery of possession, comes within the prohibition of sec. 317 of the Civil Procedure Code of 1882 (sec. 66 of the present Code) when the Plaintiff's case is that the Defendant certificated purchaser at a Court sale purchased on the Plaintiff's behalf as the latter's benamdar. **Sasti Charan v. Annapurna**, I. L. R. 23 Cal 693 (1895), dissented from. **UMASATI DEBI v. AKRUR CHANDRA MAZUMDAR** ... 160

... s. 73, Or. 22, r. 12—Money decrees against same judgment-debtor, applications for execution by two decree-holders—Death of one before assets received—No application by legal representative to continue proceeding when money received and paid to surviving decree-holder—Suit by legal representative of deceased decree-holder to recover share of assets, if lies under sec. 73 (2) or on equitable principles.] Where one of two persons who had applied to the same Court for execution of their respective decrees for money against the same judgment-debtor died before the assets were received by the Court: Held—That under Or. 22, r. 12, C. P. C., it was not necessary for the representative of the deceased decree-holder nor was it competent for him to apply for substitution in the execution proceedings. It was open to him to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution under Or. 21, r. 16 of the Code. Failing such an application and in the absence of anyone between whom and the surviving decree-holder a rateable distribution could be ordered, the Court acted correctly in allowing the latter who had bid at the execution sale to set off his decretal money against the purchase money, and a suit by the legal representative of the deceased decree-holder under sec. 73 (2) of the Code for a share of the assets was not maintainable, nor was he entitled to any such relief on equitable principles. No relief can be granted on equitable principles about a cause of action which is created by and specially provided for in a statute if it does not fall within its provisions. **AKHOY KUMAR TALUKDAR v. SURENDRA LAI PAL** ... 735

... s. 98—Difference of opinion in Division Bench hearing appeals from mofussil Court.] Per

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Walmsley and Page, JJ.—Sec. 98 of the Civil Procedure Code and not cl. 36 of the Letters Patent applies where there is a difference of opinion between two Judges sitting as a Division Bench in appeal from a subordinate Court. **Purna Chandra v. Narendra Nath**, 29 C. W. N. 755 (1925) and **Bhaidas v. Gulab**, L. R. 48 I. A. 184; s. c. I. J. R. 45 Bom. 718; 25 C. W. N. 605 (1921), considered **SM. PRAFULLA KAMINI ROY v. BHABANI NATH ROY** ... 1011

... s. 110—Decree involving indirectly claim to property of appealable value—Connection must not be too remote.] Without attempting to define the word "property" as used in the second clause to sec. 110 of the Civil Procedure Code, the Judicial Committee held that in the present case where the actual subject of the suit was only Rs. 3,000 odd, the other claim alleged to be affected by the decree was not really consequential on the decree under appeal and too remote to be entitled to the description of being property indirectly involved in the issue of the suit. **UDOY CHAND PANNALAL v. P. E. GAZDAR & CO.** ... 99

... s. 115—Interlocutory order, if may be revised—Irremediable injury—Order and adequate remedy existing.] Per **Cunning, J.**—The High Court has no power under sec. 155 of the Civil Procedure Code to interfere in revision with an interlocutory order. Per **Page, J.**—It is well-settled, at any rate in this Court, that the High Court has jurisdiction under the section to revise interlocutory orders passed by Subordinate Courts from which no appeal lies to the High Court. The powers of revision with which the High Court is entrusted should not be restricted. But it is only when irremediable injury would be done and a miscarriage of justice would inevitably issue if the Court held its hand, that the Court ought to intervene in current litigation and disturb the normal progress of a case by revising an interlocutory order passed by a Subordinate Court. Per **Cunning, J.**—This Court does not interfere as a general rule in revision where the aggrieved party has another and adequate remedy. **SALAM CHAND KANNYRAM v. BHAGWAN DAS CHILHANIA** ... 907

... ss. 115, 141, Or. 9, r. 4, Or. 21, rr. 90, 92, Or. 43, r. 1 (i)—Application to set aside sale dismissed, in the absence of both parties, for default—Application to set aside order of dismissal for good cause, if entertainable under Or. 9, r. 4—Proceeding, if proceeding in execution and so proceeding in suit or miscellaneous proceeding in the nature of suit—Order, if bars fresh application—Revision, interference in—Appeal, remedy by, if available.] An application under Or. 21, r. 90 of the Civil Procedure Code, to set aside a sale of immovable property in execution of a decree was dismissed for default, neither party being present when the case was called. An application to set aside the order of dismissal and for a re-hearing of the matter

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was refused by the trial Court on the ground that Or. 9, r. 4 of the Civil Procedure Code did not apply. On an application to the High Court for revision: Held—That the procedure in Or. 9, r. 4, which applies to suits, did not become applicable to proceedings under Or. 21, r. 90 by force of sec. 141 of the Code. That, in any case, there was nothing to prevent the Petitioner from making, subject to the law of limitation, a fresh application under Or. 21, r. 90, and there being this alternative remedy, the High Court ought not to interfere in revision. *Per* Cuming, J.—The error of the trial Court, if any, was an error of law and not one calling for revision under sec. 115 of the Code. *Per* Page, J.—An order dismissing an application to set aside a sale merely on default of appearance of the parties is not appealable under Or. 43, r. 1 (j) of the Code unless that order also confirms the sale within the meaning of Or. 21, r. 92 of the Code. The importance of doing away with uncertainties on questions of practice and procedure adverted to by Page, J. *BASARATULLA MEAN v. REAZUDDIN MEAN* ... 570

..., s. 145, scope of—
Security given by stranger, enforcement of—
—Suit or application in execution—Or. 34, r. 14, scope of, much more limited than of sec. 99 of the Transfer of Property Act (IV of 1882).] In a suit brought by M against G, G was allowed an adjournment of trial of the suit, on his creating a charge to secure M's claim in favour of the Registrar, on certain immoveable properties, in which G's wife, the Appellant, had certain interests. In the trial a consent decree was passed on certain terms and the Defendant undertook through his Counsel to obtain consent of the Appellant to the terms. The terms, *inter alia*, were that the decretal amount would be paid in certain instalments, and the security would continue until fresh security was furnished instead, and on failure to pay three consecutive instalments, the whole of the decretal amount would be payable. "Decree-holders in such case may execute the decree irrespective of their rights against the security and may execute against the security." The Appellant by a letter agreed to the terms of the consent decree. Default was made and the decree-holders applied for execution, *inter alia*, by sale of the properties secured to the Registrar: Held—On the facts of the case, that G as also the Appellant agreed to the terms of the consent decree and as such the security might be realised by means of execution and no separate suit to enforce the charge was necessary. Held further—That sec. 145 of the Civil Procedure Code did not (the surety not having made herself personally liable) apply to the matter. *See* *Mahalakshen Bai v. Badan Singh*, I. L. R. 45 All. 649 (1923), dissented from. *Raj Raghuber Singh v. Jai Indra Bahadur Singh*, I. L. R. 46 I. A. 228; s. c. I. J. R. 42 All. 708 (1923), relied on. *Per* Rankin, J.—The true construction of sec. 145 is that which has been laid down in the case of

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Amir v. Mahadeo Prasad, I. L. R. 39 All. 325 (1916), but where the security is given to the Court itself, a fresh suit is not necessary, irrespective of sec. 145. In view of the fact that sec. 47, C. P. C., makes it difficult as regards a judgment-debtor to insist upon or permit a separate suit for the enforcement of the security, it seems that it is open to a person giving security to waive the necessity for a suit subject at least to the remarks made by Lord Davey in the case of *Khiraj Mal v. Diam*, I. L. R. 32 Cal. 296; s. c. 9 C. W. N. 201 (P. C.) (1904), *Sadasiva v. Ramalinga*, I. L. R. 2 I. A. 219; s. c. 24 W. R. 193 (1875) and *Subramania Chettiar v. Raja of Ramnad*, I. L. R. 41 Mad. 327 (1917), referred to. Or. 34, r. 14, C. P. C., is of much more limited application than what had been sec. 99 of the Transfer of Property Act. *Tokhan Singh v. Girwar Singh*, I. L. R. 32 Cal. 491; s. c. 9 C. W. N. 372 (1905), explained. *Indrapal v. Mewa Lal*, I. L. R. 33 All. 264 (1914), referred to. *SUKUMARI DEBI v. MUGNERAM BHANGER* ... 683

..., s. 145—Contract of suretyship, if may be embodied in petition of compromise filed in execution case—Whether it must be in favour of the Court—Proper stamp which such a petition should bear—Insufficiently stamping such petition, effect of—Stamp Act (II of 1899), secs. 35 and 36, effect of, when such document admitted in evidence—In an execution case a joint petition was filed by the judgment-debtor, the decree-holder and the surety embodying the terms of the agreement arrived at. The petition bore the court-fee stamp appropriate to a petition: Held (on an application for execution of the decree against the surety)—That the contract contained in the petition amounted to a contract of guarantee within sec. 126 of the Contract Act and the surety having expressly contracted in the petition that he should be personally liable to perform the decree as provided in the compromise the instrument in question was within sec. 145 of the Code of Civil Procedure, under which it is not incumbent that the contract of suretyship must be in the form of a security bond in favour of the Court. That the contract must be stamped not only as a petition but also with a further stamp appropriate to a contract of guarantee as provided by the Stamp Act and under sec. 35 of the Stamp Act the instrument in question ought not to have been received in evidence or acted upon unless it was duly stamped; but it, having been admitted in evidence, fell within the ambit of sec. 36 and could not be called in question. *JOYMAN BEWA v. EASIN SARKAR* ... and

..., Sch. II, secs. 20, 21—Application to have award filed—Award found not binding on minor parties—Refusal to file award on that ground only—Effect—Suit to set aside award—Specific Relief Act (I of 1877), sec. 39 or 42, whether applicable to such suit—Limitation Act (IX of 1908), Sch. I, Art. 91.] Where upon an

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application under Sch. II, secs. 20 and 21 of the Civil Procedure Code, to have an award filed, the District Judge found that three of the alleged parties to the reference were not bound by the award, because they were minors and the reference purported to be made on their behalf by persons who had no legal authority to represent them, and passed order to the effect that though he was not prepared to hold that the award was not binding on the adult parties the award in his opinion was not one which should be filed, and dismissed the application: Held—That the dismissal might have per se deprived the adult parties to the award of the power of enforcing it by certain effective statutory methods, but it did not render the award void or otherwise unenforceable as against those parties. That a suit to set aside the award by parties thereto fell within sec. 39 and not sec. 42 of the Specific Relief Act and was governed by Art. 91 of the Limitation Act. **KIRKWOOD v. MAUNG SIN** ... 529

—, Or. 2, r. 2, scope and applicability of—Exhaustion of reliefs in respect of one cause of action as distinguished from inclusion in the same action of different causes of action. See Limitation. **RAHINI NANDAN CHAUDHURI v. JADUNANDAN CHAUDHURI** ... 573

—, Or. 5, r. 17—“Due and reasonable diligence” meaning of, test of.] What is “due and reasonable diligence” within the meaning of Or. 5, r. 17, C. P. C., depends on the facts of each particular case. Generally if a process-server goes to a place on a day and hour when he may expect to find the Defendant there and does all that is required under the section, if he cannot find the Defendant (and could not find him whatever further steps he took by reason of his absence), then it is not necessary for him to repeat his attempts to make personal service. **BALDEODAS LOHEA v. SHUBCHURN-DAS GOENKA** ... 104

—, Or. 21, r. 2, cls. 1 and 2—Certification of payment made out of Court—Application by decree-holder to Court, if necessary—Limitation Act (IX of 1908), Art. 18, if applies, to certification of payment by decree-holder—Instalment decree—Application of Art. 75—Waiver on the part of decree-holder of the right to execute decree on default of payment of any one instalment by accepting payment of default instalment—Cl. 7, Art. 182—Time to run from date of actual default.] It is not necessary that the decree-holder should make an application to the Court within three years from the date of payment for certifying payment made out of Court in order to save limitation. The word “certify,” as used in cl. 1 of r. 2, Or. 21, is synonymous with the word “inform” as used in cl. 2 of that rule. It is not therefore incumbent upon the decree-holder to certify payment by making an application

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and as he is not required to make an application the residuary article of the Limitation Act (181) does not apply. In order to certify payment it is enough that the decree-holder mentions the fact of such payment in the application for execution of the decree in respect of the balance. The observations in **Baley Mahomed Shahy v. Aijamal**, 35 C. L. J. 71 (1921), are obiter dicta. The principle of the law of limitation as laid down in Art. 75 of the Limitation Act has been applied to the case of instalment decrees and it is well-settled that waiver being allowed under cl. 7 of Art. 182, Limitation Act, time runs from the date of the actual default. In an instalment decree in which it is provided that in default of one instalment the whole decretal amount would be recoverable, the right which accrues to the decree-holder from time to time from non-payment of any instalment may be waived by receipt of default instalments which the judgment-debtor neglected to pay in time **JALIM CHAND PATWARI v. YUSUF ALI CHOWDHURY** ... 945

—, Or. 21, rr. 11, 15—Execution, application for, by one of several decree-holders—Omission to specify names and interests of other decree-holders in petition, if vitiates proceedings—Other decree-holders appearing and consenting to execution, effect of.] Omission on the part of one of several decree-holders to state, in his application for execution, the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings. The names of the parties required by Or. 21, r. 11 of the Civil Procedure Code is for purposes of identification only. Upon an application for execution by one of several decree-holders under Or. 21, r. 15, it is for the Court to pass proper orders to protect the interests of the other decree-holders. Where the other decree-holders appeared and consented to the execution proceeding, their interests were sufficiently safeguarded. **NAWAB NUZHATUDDOWLA v. BENI MADHAB** ... 563

—, Or. 21, r. 50, sub-rr. (2) and (4)—Decree against partnership firm—Application to execute personally against person alleged to be partner, but not served with summons in the suit, if maintainable—Procedure for determining individual liability of such person.] Or. 21, r. 50, sub-rr. (2) and (4) of the Civil Procedure Code are intended to give persons other than those referred to in cls. (b) and (c) to sub-r. (1) an opportunity in the execution proceedings to dispute their individual liability as partners in respect of the decree made against the firm. A person who has been served with the writ of summons in the suit is not one of those contemplated by sub-r. (2). Per **Buckland, J.**—Sub-r. (4) of Or. 21, r. 50 is intended to apply to persons against whose property execution is sought under sub-r. (2). **JAGAT CHANDRA BHATTACHARYA v. GUNNY HAJEN AHMED** ... 11

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71, 86—Court sale—Sale proclamation containing particulars showing existence of an incumbrance and referring to documents creating same—Purchaser, if has notice of contents of documents—Liability for loss on resale.] A purchaser at a Court sale must be taken to have known the effect of documents bearing on the properties to be sold and mentioned in the sale proclamation as constituting some sort of a charge on the properties whether he actually examined the documents or not. Such a purchaser, should he default in paying the purchase price, make himself responsible for the loss caused on resale to the decree-holder when such resale has taken place in pursuance of a sale proclamation substantially containing the same particulars. **RAMAGIRJI NEELAKANTAGIRJI v. ANNAVAJHALA VENKATACHALLAM** ... 268

Order setting aside sale in execution of rent decree, if a decision of conflicting titles to land—Bengal Tenancy Act (VIII of 1835), s. 153 proviso.] An order setting aside a sale in execution of a rent decree on an application under Or. 21, r. 90 is not excepted from the operation of sec. 153 of the Bengal Tenancy Act, the operation of the Full Bench decision in **Kali Mandai v. Ramsarbaswa**, I. L. R. 32 Cal. 957; s. c. 9 C. W. N. 721 (1905), having been restricted by the proviso added to the section by the Amending Acts, I. B. C., of 1907 and I. E. B. & A. C., of 1908. Where an appeal against such an order was improperly entertained and the same was reversed, and a second appeal was filed in the High Court: Held—That no second appeal lay. But the High Court set aside the decision of the lower Appellate Court in the exercise of its powers of revision. **GOUR ROUTI v. DIGAMBOR GIRI** ... 586

101, 103—Alleged dispossession by auction-purchaser—Order of Court restoring possession—Suit by auction-purchaser—Limitation—Nature of suit which properly comes within r. 103—Suit must be brought in the capacity of auction-purchaser to come under Art. 11A, Limitation Act (IX of 1908).] The Plaintiffs landlords as decree-holders auction-purchasers took possession of a holding which they purchased in execution of a decree for rent but were dispossessed therefrom by order of Court by the Defendants claiming to possess the property on their own account and not on behalf of the judgment-debtor. The Plaintiffs, on coming to know that their tenants had wrongfully parted with the holding, brought a suit for ejectment more than one year after the order under Or. 21, r. 103, and the question whether the tenants had a transferable or a non-transferable interest in the holding: Held—That the suit was not barred under Art. 11A of the Limitation Act. That the suit

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contemplated by r. 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction-purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the Defendant. If a suit is not brought under r. 103 within the statutory period the right to bring a suit to establish the claim of the Plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the opposite party it cannot be said that this provision in the chapter relating to execution of decrees bars his suit based on such cause of action. **AMBICA CHAPAN BAKTA v. RAM PRASAD CHATTERJEE** ... 163,

Or. 22, r. 3 (2) (1) and r. 12—Decree under old Code for ascertainment of mesne profits in execution—Death, if causes abatement—Substitution, if necessary.] Proceedings for ascertainment of mesne profits under a decree passed, when the Civil Procedure Code, Act XIV of 1882, was in force are proceedings in execution and not proceedings in the suit. Or. 22, r. 12, of the Civil Procedure Code, applies to them, so that no substitution is necessary in the case of death and no abatement under Or. 22, r. 3 (2), sub-r. (1). **KEDARNATH GOENKA v. ANANT PRASAD SINGH** ... 361

Or. 41, r. 14, Or. 5, r. 12—Words "on the Respondent" as used in Or. 41, r. 14, meaning of—Minor Respondent—Service of notice of appeal only upon guardian ad litem and not upon minor Respondent, if good service—Waiver of objections as to service by guardian ad litem.] In a case where there has been a guardian ad litem appointed by the Court on behalf of a minor, service of notice of the date of hearing of appeal on such guardian is sufficient. Or. 41, r. 14 read with Or. 5, r. 12 does not mean that the service must be on the minor himself and not on the guardian ad litem. The language of the Code does not admit that there should be service on both these persons. **Surash Chandra Wum Chowdhury v. Jugal Chunder Deb**, I. T. R. 14 Cal. 204 (1898) and **Jatindra Mohan Poddar v. Sri-nath Roy**, I. L. R. 26 Cal. 267; s. c. 3 C. W. N. 281 (1898) referred to **RANK MORAL V. KUMAR JYOTISH KRANTHA ROY** ... 940

Or. 45, r. 15 (1b). Neglect on the part of Defendants substantially successful in appeal before Privy Council to lodge Order in Council in High Court—Proper remedy for Plaintiffs to get execution **SOTTRENDRA MOHAN SINHA v. HARI PRASAD SINHA** ... 938

Or. 47, rr. 1, 4, 7—Review improperly granted—Jurisdiction of Appellate Court.] Under Or. 47, r. 7 read with rr. 1 and 4 it is open to the Appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come

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within the words of Or. 1 then the Appellate Court is competent to hold that the review was improperly admitted and should have been rejected. Where the review was granted by the District Judge against the judgment passed by his predecessor for re-consideration of the evidence in the case: Held—That the review was not permissible on the ground on which it was admitted and the judgment reviewed must be restored. **NRITYA GOPAL MITRA v. JARIT MANJURI DAS** ... 584

Or. 49, r. 1—R. 14 of Chap. VIII of the Rules of the High Court, Calcutta—Service of summons, how to be effected, by person employed by the attorney or employed by the client. Summons should be served by the attorney's employee and not by an individual specially employed for the purpose by the client. **SUGAN CHAND DAGA v. KANAPPA CHETTY** ... 734

CONTRACT—Sterling drafts on London, contract to buy from Bank—Custom of the Exchange Banks in Calcutta—Option to grant an extension after due date on a penalty or to declare the contract cancelled—Suit for difference in exchange—Contract, if validly cancelled according to such custom—Cancellation, when effective—Mistake—Surrounding circumstances.] The Plaintiff firm contracted to buy on demand sterling drafts on London from the Defendant Bank for £5,000, £2,500 to be delivered in July 1920 and the balance £2,500 in August 1920. The Plaintiff firm failed to pay and take delivery on due date. According to the custom of the Exchange Banks in Calcutta the Defendant Bank had the option either of granting extension after due date on payment of a penalty or to declare the contract cancelled. The Plaintiff applied for extension of the due date of delivery under the said contract which was not granted and the Defendant Bank exercised the alternative option and declared the July portion of the contract cancelled on 7th September 1920. The August portion of the said contract was likewise cancelled on 30th November 1920 but made operative from 30th November with a view to give the Plaintiff firm the benefit of the rate of exchange. The Defendant Bank by letter, dated 30th November 1920, gave notice to the Plaintiff firm of the cancellation of the August portion but by inadvertence in the said letter referred to the July portion as having been also cancelled on the said date, although the said portion was in fact cancelled as aforesaid on 7th September 1920. The Plaintiff firm accepted cancellation of both portions of the said contract as on 30th November 1920 in terms of the said letter and claimed Rs. 7,124 in respect of the entire contract on the basis of the note of exchange prevalent on 30th November. The Defendant Bank pleaded custom as to their right of cancellation at any time after the due date and con-

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tended that in exercise of the said right the July and August portions were cancelled on 7th September and 30th November respectively and that the July portion was not cancelled on 30th November and the reference to the same in the letter of that date was a mistake and did not alter the fact of cancellation of the said portion as on 7th September 1920: Held—That the Defendant Bank had proved the existence of the custom and practice of the Exchange Banks in Calcutta, namely, that the Bank had an option to grant to the buyers of sterling drafts an extension of time after due date on a penalty or to declare the contract cancelled. That the Defendant Bank had acted in accordance with the said custom and that in exercise of the option given to them by such custom cancelled the July and August portions of the contract on 7th September and 30th November respectively. That the reference to the July portion in the letter of 30th November was a slip or mistake on the part of the writer and that great hardship amounting to injustice would be inflicted on the Defendant Bank by holding them strictly to their letter of 30th November and that the surrounding circumstances were all in favour of the Defendant Bank. **Webster v. Cecil**, [1861] 30 Beav. 68, **Tamplin v. James**, [1879] 15 Ch. D. 215 and **Aspinall v. Powell**, [1889] 60 L. T. 595, referred to. **S. MAHROOB ELLAHIE & CO. v. MESSRS. COX & CO.** ... 775

enforcement of, by third party—Contract between durputnidar and seputnidar that the latter will pay durputni rent to putnidar out of seputni rent payable to durputnidar, if may be enforced by putnidar—Equitable rule, applicability of, where third person is cestui que trust.] As a general rule a contract cannot be enforced except by a party to the contract. That rule, however, is subject to this exception: If the contract, although in form it is with A, is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as cestui que trust under that contract, then B is entitled to enforce the contract in a Court of equity. A mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract will not make that person a cestui que trust. Where there was a contract between a durputnidar and a seputnidar that the latter would pay the durputni rent to the putnidar out of the seputni rent payable to the durputnidar and the seputnidar paid the durputni rent to the putnidar for a number of years: Held, in a suit by the putnidar against the seputnidar for the durputni rent, that the instrument creating the seputni was not executed for the benefit of the Plaintiff in any sense and so far as the Plaintiff was concerned the only effect of the instrument was that the seputnidar agreed with the durputnidar to pay a portion of the rent due under the seputni to the Plaintiff as a nominee of the durputnidar, and as such

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the equitable rule had no application and the Plaintiff was not entitled to sue the septutnidar. *Dob Narayan v. Chuni Lal*, I. L. R. 41 Cal. 137: s. c. 17 C. W. N. 1148 (1913). *Touche v. Metropolitan Railway Warehousing Company*, L. R. 6 Ch. App. 671 (1871). In re *Empress Engineering Co.*, L. R. 16 Ch. Div. 125 (1880). *Gandy v. Gandy*, L. R. 30 Ch. Div. 57 (1885). *Gregory v. Williams*, 3 Mer. 582 (1817). *Khawaja Muhammad Khan v. Husaini Begam*, L. R. 37 I. A. 125: s. c. 1. L. R. 32 All. 410: 14 C. W. N. 886 (1910). and *Dwarika Nath v. Priya Nath*, I. L. R. 41 Cal. 137: s. c. 22 C. W. N. 279 (1916), referred to. The general terms used in *Touche v. Metropolitan Railway Warehousing Company*, L. R. 6 Ch. App. 671 (1871), must be taken with some qualification as laying down the general law. *JIBAN KRISHNA MULLIK v. NIRUPAMA GUPTA* ... 812

of managing agency to Limited Company for a fixed period—Difference between partners of firm of managing agents resulting in deadlock in business—Circumstances justifying dismissal of managing agent before termination of stipulated period—Insubordination and misconduct of managing agent, what constitutes.] The Defendant Company, a limited concern, entered into an agreement with a firm of which the Plaintiff and the second Defendant were the partners whereby the said firm were appointed managing agents for a fixed period of years. Under the agreement, subject to the supervision and control of the directors the managing agents were to manage, conduct and carry on the business of the Company both at the head office and at all branches and agencies and were to have and possess all powers, authorities and discretions necessary for or incidental to the purpose. Before the termination of the period of contract difference arose between the Plaintiff and the second Defendant and the latter cancelled the power-of-attorney which he had given to the Plaintiff whereby the Plaintiff was conducting the affairs of the Company and those of the firm of managing agents and served him with a notice of dissolution of partnership and the Plaintiff in his turn cancelled the power-of-attorney in favour of the second Defendant, removed certain books and documents from the office which, in consequence of the situation created, was closed. The directors thereupon passed a resolution whereby the second Defendant was appointed the managing agent of the Company. The Plaintiff sued to recover damages for the alleged breach of the agreement whereby the managing agency was created alleging that the second Defendant had acted in concert and collusion with the directors. The Defendant Company amongst other alleged specific charges of misconduct and insubordination on the part of the Plaintiff: Held—That the Plaintiff failed to prove the second Defendant's collusion with the directors and

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the Company also failed to prove misconduct and insubordination on the part of the Plaintiff; but having regard to the state of affairs which had arisen it was necessary to appoint somebody as managing agent and the Defendant Company were justified in putting an end to the managing agency agreement and the Plaintiff was not entitled to recover damages from the Company. What constitutes insubordination and misconduct of managing agent discussed by Pearson, J. *GUS ALEXANDER MACKENZIE v. HIMALAYA ASSURANCE CO., LTD.* ... 410

Breach—Time, if of essence of contract—Party entitled to rescind after expiry of time but continuing to treat contract as subsisting, if commits a breach by treating contract later on as rescinded on ground of the other party's default.] Shortly after the war broke out, the Defendant Company agreed to supply to the Plaintiff 50 railway wagons for an agreed price, the terms of payment being that the Plaintiff should pay a third of the price on the order being given, another third when the underframes of the wagons should be wheeled and the balance on delivery. The Plaintiff did not pay the second instalment when, the underframes having been wheeled, the Defendant Company asked for its payment; nevertheless the Defendant Company delivered 8 wagons and these were received by the Plaintiff. The Defendant Company thereafter asked for but failed to obtain from the Plaintiff the second instalment of the contract price and the price of the 8 wagons delivered, and then refused to perform the rest of the contract unless the balance of the contract price was first paid to them. Thereafter the Plaintiff sent to the Defendant Company a cheque to cover the second instalment and asked for the delivery of the remaining 42 wagons, the third instalment of payment to be made upon such delivery: Held—That in the circumstances of the case, the intention of the parties when the contract was made was that time should be of the essence of the contract, as to the time when the three instalments of the contract price were to be paid; and therefore when the second instalment was not paid by the Plaintiff, the Defendant Company might rescind the contract; but by delivering 8 of the wagons after the default they treated the contract as subsisting. The Defendant Company could not insist on the payment on delivery of the price of the 8 wagons only, and they committed a breach of the contract in refusing to deliver the remaining wagons without payment of the balance of the contract price. *BURN & CO., LD. v. THAKUR SAHIB SREE LUKHDIRJI* ... 145

CONTRACT ACT (IX of 1872), ss. 68, 70—Contribution, suit for—Duty to contribute, arising from equity, apart from statute—"Interested," meaning of, in sec. 68—"Benefited," meaning of, in sec. 70—

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Court's duty to decide all matters finally in suit for contribution—Purchaser of a share of a tenure, if "bound" to contribute towards arrears of rent accrued due before purchase—A co-sharer, if one "interested" in paying up the whole rent—Rent, a first charge—Liability, if must be personal—Liability for rent as between mortgagor and mortgagee.] The Plaintiff and the Defendants except Defendant No. 12 were the owners of a permanent tenure. Defendant No. 12 purchased the shares of Defendants Nos. 13, 14 and 15 and was also the mortgagee of the share of Defendant No. 1. In execution of a decree for arrears of rent obtained by the landlords the property was put up to sale and was purchased by Defendant No. 12. The Plaintiff thereupon deposited the decretal money together with the usual compensation and had the sale set aside. The Plaintiff brought a suit claiming contribution from the several Defendants in proportion to their respective shares and contended that the Defendant No. 12 was liable to contribute to the extent of the shares in which he was interested, viz., the shares of Defendants Nos. 13, 14 and 15 acquired by purchase and the share of Defendant No. 1 of which he was the mortgagee. Held—That the liability to contribution is not entirely contained in secs. 69 and 70 of the Contract Act although generally speaking a large number of cases do come within the purview of these two sections. The Court as a Court of justice, equity and good conscience may, in certain circumstances, although such circumstances do not bring the case strictly within the purview of these two sections, allow contribution if the claim appears to be either just or equitable. That both secs. 69 and 70 of the Contract Act were applicable to the facts of the present case so far as regards the shares which were purchased by Defendant No. 12. That the Plaintiff was interested in the payment of the money within the meaning of sec. 69 although he was also liable to pay a portion of the money. That the Defendant No. 12 was bound to pay the money although he was not a party to the decree for rent and the period for which the rent was claimed was previous to his purchase, inasmuch as that rent was charged on the property purchased by him, and the section does not require the liability to be a personal liability. That the argument that the Defendant No. 12 was not benefited because in the result he lost the benefit of his purchase of the entire property and was left only with the share which he held before was fallacious. The character in which the Plaintiff sued the Defendants and the character in which the Defendant No. 12 was charged with the liability was the character of co-sharers as between themselves and as the property was saved by the deposit the Defendant No. 12 was

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benefited to the extent of his share. In a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. The Court below therefore erred in making Defendants Nos. 1 and 12 jointly liable in respect of the share mortgaged by the former to the latter. The liability for the rent of this share being primarily Defendant No. 1's the decree in regard to this share should be against Defendant No. 1 alone. REGISTERED JESSORE LOAN CO v. GOPAL HARI GHOSH CHOWDHRY 366

ss. 83, 95, 121—Shares, transfer of, by delivery of certificates and blank transfers signed by registered holder, if effective—Choses in action—Goods—Sale of unascertained goods, when complete—Right to rescind sale, when arises—Vendor, when has lien in shares—Bombay Stock Exchange Rule No. C, true meaning and effect of.] The Plaintiff, a certified share-broker, sold on the Bombay Stock Exchange to D. 1 a certain number of shares of a Company, and in order to make delivery acquired the requisite number of shares in the market from various brokers taking from the latter blank transfers, signed by the registered holders along with the corresponding certificates. The certificates and blank transfers were handed to D. 1, who purported to pay by a cheque which, however, was dishonoured. The blank transfers and certificates were then handed over in succession to two other persons, D. 2, D. 3, on certain propositions as to raising money. In a suit by Plaintiff against D. 1, D. 2 and D. 3 for return of the certificates and blank transfers or otherwise for damages: Held—That though full property in shares in a Company is only in the registered holder, the title to get on the register consists in the possession of certificates together with transfers signed by the registered holder and these constitute choses in action, which, by the terms of the Contract Act, are goods. These goods which were not ascertained at the date of the contract became ascertained when the certificates and blank transfers were handed over to D. 1 and were accepted by him and thereupon, under sec. 83 of the Contract Act, the sale became complete and the property passed. Thenceforward Plaintiff could only sue D. 1 on the cheque or for the price of the shares unpaid in respect of the cheque which was dishonoured. Having parted with possession, Plaintiff had under sec. 95 of the Act no lien in the goods and could not sue the subsequent transferees for delivery of the shares. Rule C of the Bombay Stock Exchange cannot be read into the contract of sale as an express stipulation to rescind within the meaning of sec. 121 of the Act. It had, in any case, nothing to do with the perfection of con-

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tracts or the passing of property. **MA-NECKJI PESTONJI v. WADILAL SAKA-BHAI** ... 980

... s. 130--Surety for Receiver appointed by Court--Continuing guarantee, it can be discharged by notice--Consent of Court necessary.] Notwithstanding sec. 130 of the Contract Act, it is not competent for a surety to a Receiver appointed by Court, who has been accepted by Court as such, without the consent of the Court to discharge himself from liability for future transactions by merely giving notice to the decree-holder or other person at whose instance or for whose benefit the Receiver was appointed. **Rajnarayan Mukerji v. Phulkumari Dasi**, I. L. R. 29 Cal. 68 (1902), considered in the judgments of the High Court which were affirmed by the Judicial Committee. **MAHOMED ALI v. HOWE-SON BROTHERS** ... 260

... sec. 163--Accession to bailed goods. See under C. P. C., sec. 47. **SETH MOTILAL HIRABHAI v. BAI MANI** ... 5

CONTRIBUTION, suit for--Respective liabilities of parties--Liability to contribute arising out of equity apart from statute. See Contract Act. **REGISTERED JESSORE LOAN CO. v. GOPAL HARI GHOSH** ... 366

COURT FEE--Partition suit--Second appeal, summarily dismissed--Application for review--Court-fee payable. See C. P. C. **ALTAP ALI v. JAMSUR ALI** ... 334

CUSTOM, proof of--Right of brother's daughter to succeed in place of deceased brother--Proof of succession by uncle's daughter, if sufficient for the purpose.] If there be a customary rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and the High Court was right in holding the custom proved in the case of the latter though no instance was proved of an actual succession by a brother's daughter. **HASHMAT ALI v. MUSST. NASIBULNISA** ... 196

DAMAGES, measure of--Privy Council, practice of, as to interference. See Breach of promise. **THOMAS CHARLES WILLIAM SKIPP v. LILIAN MILDRED KELLEY** ... 841

... suit for--Civil action brought maliciously and without reasonable and probable cause--Damage to property and trade resulting in consequence--Temporary injunction obtained in such suit--Maliciously causing detention of goods in the Customs House--Sea Customs Act (VIII of 1878), secs. 18, 19A--Cause of action--Civil Procedure Code (Act V of 1908), sec. 95--Limitation Act (IX of 1908), Arts. 42, 36, 25, 48.] Where upon representations made by the Defendant maliciously and without reasonable and probable cause, the Collector of Customs detained goods imported by the Plaintiff under sec. 19A of the Sea Customs Act, the Defendant was liable in damages to the Plaintiff for the injury the latter suffered in consequence. **Momi Chand v. Wallace**, I. L. R. 34 Cal. 465: s. c. 11 C

DAMAGES--consid.

W. N. 537 (1907), referred to. In a suit brought maliciously and without reasonable and probable cause, the Defendant obtained a temporary injunction which resulted in damages to the Plaintiff's trade: Held--That the proceedings having formed part of a suit which itself was affected by malice in its entirety, the Defendant was answerable for such damages, apart from the questions whether a cause of action existed independently for these proceedings. A suit lies for damages caused by wrongful interference with the property rights of the Plaintiff resulting from a proceeding in Court brought maliciously and without reasonable and probable cause. **Mohini Mohan v. Surendra Narayan**, I. L. R. 42 Cal. 550: s. c. 18 C. W. N. 1189 (1914). **Bishun Singh v. Wayatt**, 16 C. W. N. 540: s. c. 14 C. L. J. 515 (1911). **Bhut Nath v. Chandra Binode**, 16 C. L. J. 31 (1912). **Narendra Nath v. Bhusan Chandra**, 31 C. L. J. 495 (1920). **Madras Steam Navigation Co. v. Shalimar Works, Ltd.**, I. L. R. 42 Cal. 85 (1914). **Gilesold v. Gratchley**, [1910] 2 K. B. 244. **Kissorymohan v. Hurrook Dass**, I. R. 17 I. A. 17 (1889) and **Smith v. Day**, 21 Ch. Div. 421, 428 (1882), referred to. No inference that such a suit does not lie can be reasonably drawn from the provisions of sec. 95 of the Civil Procedure Code, nor is the existence of Art. 42 of the 1st Schedule to the Limitation Act in itself an argument that a suit is maintainable for damages for an injury caused by an injunction wrongfully obtained for a Limitation Act cannot create a cause of action, if it does not already exist independently. The suit in so far as it related to detention of the goods by the Collector was governed by Art. 36 of the Limitation Act and not by Art. 48, since the detention was not by the Defendant but by the Collector who could not be looked upon as the Defendant's agent. In so far as the cause of action might be slander of title or slander of goods, Art. 36 applied and not Art. 25. **ALBERT BONNAN v. IMPERIAL TOBACCO CO.** ... 465

DEBTOR and creditor--Duty of former to pay latter at his place, if arises when creditor out of realm. See C. P. C. **BANSTILAL ABIRCHAND v. GHULAM MAHBUB KHAN** ... 577

DECREE tainted with fraud, voidable or void--Suit for declaration that mortgage decree and sale thereon were fraudulent and void, in effect a suit for setting aside decree on ground of fraud--Such suit brought after three years from knowledge of fraud, if barred by limitation--Limitation Act (IX of 1908), Art. 85.] The Plaintiffs sued to have their possession confirmed after declaration of their alleged title to the lands in suit or in the alternative for recovery of possession of the disputed lands after declaration that an ex parte mortgage decree passed against them and the auction sale in execution thereof were fraudulent and void, and if necessary, after setting aside the decree. It was found that the suit was

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brought more than three years after the Plaintiffs came to know of the decree and the sale: Held—That a decree tainted with fraud is not void but only voidable and must be avoided within the statutory period in an appropriate proceeding. That the Plaintiffs' suit was for all intents and purposes a suit for setting aside the decree and the sale and having been brought more than three years after they came to know of the fraud was barred by limitation under Art. 25 of the Limitation Act. **AMBICA MONI DASI v. KHETRO GHOSAL** ...

DIVORCE ACT (IV of 1865), s. 14, proviso—

—Fact of husband causing or conducing to the wife's adultery, if may be considered in granting divorce.] The proviso to sec. 14 of the Indian Divorce Act is similar to the proviso to sec. 31 of the English Matrimonial Causes Act and as under the latter the fact that the husband caused or conduced to the adultery of the wife can be taken into consideration by the Court in granting a divorce to the wife. **MRS. MARY REBERIO v. MR. V. S. REBERIO** 820

ENDOWMENT—Alienation by Mahant of Muth—Limitation for suit by successor to recover possession. See Limitation Act. **LAL CHAND MARWARI v. RAMRUP SINGH** ... 721

by a Hindu—Dedication of property to deity and appointment of trustees to manage—Properties, if vested in trustees for a specific purpose—Limitation—Limitation Act (IX of 1908), sec. 10—Trustee, if may prescribe against deity.] Where the effect of a deed of endowment executed by a Hindu was to vest the properties in the deity and not in the trustees for a specific purpose, though trustees were appointed for the management of the properties, sec. 10 of the Limitation Act had no application, in view of the pronouncement of the law made in *Vidyavaruthi Tirtha v. Balusami Ayyar*, L. R. 48 I. A. 302 at p. 315; a. c. 28 C. W. N. 537 (1921), and a trustee in such a case could prescribe against the deity either by disclaimer or by open and clear assertion of hostile title. *Abdur Rahim v. Narayan Das Aurara*, L. R. 80 I. A. 84; a. c. 28 C. W. N. 121 (1922), relied on. *Srinivasa Moorthy v. Venkata Varada Iyyengar*, L. R. 33 I. A. 129; a. c. 15 C. W. N. 741 (1911), distinguished. **GANGA PRASAD CHAUDHURY v. KULADANANDA ROY** ... 415

PARSI—Fire Temple of Rangoon, beneficiaries of, who are—Right of non-Parsi convert to Zoroastrianism to enter and worship in Temple—Ceremonies necessary for initiation—*Burushnun*, if an essential ritual—Person whose mother only Parsi, if a racial Parsi—Stranger, if may be excluded at suit of beneficiary—Trustees, if bound to treat stranger coming to worship as trespasser—Wounding of religious feeling and desecration of temple, if grounds for action in trespass by beneficiaries—Allowing stranger to participate in benefit of trust, when malversation and when not.]

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Held, upon the evidence—That the trusts of the Fire Temple at Rangoon were intended for the professing members of the Parsi community, i.e., racial Parsis or people deemed after a long lapse of ages to be racial Parsis, professing the Zoroastrian religion. As regards the racial claim, maternity is of no importance; and a person whose mother was a Parsi, though actually and validly converted and initiated into the Zoroastrian religion, was not entitled, as of right, to use the Temple or to attend or to participate in any of the religious ceremonies performed therein. Such a person entering into the Temple may be excluded or excluded from the Temple as a trespasser by the persons in possession, viz., the trustees of the Temple. But a beneficiary or two or three or more of them cannot sue such a person as a trespasser or claim an injunction to restrain the entry by such a person into the Temple on the mere ground that such entry wounds their religious feelings and desecrates the Temple. The beneficiaries as such may not be allowed to recover damages for or restrain such entry as trespass unless, at least, they establish that the intrusion of such a person is so repugnant to their habits of mind that the entrance of such a person must entail their own departure, so that it is as it were trespass to the person. *Anandray Bhikaji Phadke v. Shankar Daji Charya*, I. L. R. 7 Bom. 323 (1933), referred to. *Qumre*:—Whether the presence of a convert to Zoroastrianism causes desecration of the Temple. Cases of application by trustees of the funds of a public or charitable trust for persons not objects of the trust stand on a different footing from cases where the benefits of a trust created only for rendering some convenience or service are extended by the trustees to persons other than the lawful recipients thereof. In the former class of cases the act of the trustees will be a malversation, for only those who are objects of the trust must have all the benefits they require and if there be a surplus it must be left to the Courts to make a cy-pres application of it; in the latter, the trustees are not bound to exclude persons who have no legal title to share in the benefits or to treat them as trespassers. *Rex v. Grunden, Exp. Davison, Cooper's Rep. 319*, referred to. The ritual called *Burushnun* is not an essential part of the ceremony for initiation into Zoroastrianism. *Dinsha Manekji Petit v. Jamestji Jijibhai*, I. L. R. 33 Bom. 500 (1908), referred to. **SAKLAT AND ORS. v. BELLA** ... 280

EVIDENCE ACT, INDIAN (I of 1872), s. 49—Special custom of succession in family or tribe—General evidence by members, without proof of specific instances, if sufficient to establish custom.] Where the Plaintiff, as sister, claimed to inherit the self-acquired properties of her brother under a special custom: Held—That a custom of the kind alleged may be proved by general evidence

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as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy, and the trial Court was in error in putting aside a large body of such evidence adduced by the Plaintiff and wholly un rebutted by the Defendants, merely on the ground that specific instances had not been proved. AHMAD KHAN v. MUST. CHANNI BIBI ... 506

ss. 9, 11 (b), 13 and 32, cl. (3)—Instruments not between parties to the suit in which they are produced—Recitals in, if admissible in evidence.] Recitals of boundaries of lands other than those in suit, contained in documents between third parties who are strangers to the suit, are not admissible and cannot be relied upon in evidence, and such recitals cannot be treated as evidence in the case under sec. 32, cl. (3) of the Evidence Act, nor under secs. 9, 11 or 13 of the said Act, recitals in an instrument being evidence only as against the parties who make them and not as against third persons. Radha Krishna Marwari v. Sarbeswar Nag, 29 C. W. N. 469 (1925), Pramatha Nath Choudhuri v. Krishna Chandra Bhattacharjee, 28 C. W. N. 1692 (1924), Chooni Lal Khemani v. Nilmachhab Barik, 41 C. L. J. 374 (1924), Soraj Kumar Acharji Chowdhury v. Umedali Howladar, 25 C. W. N. 1022; s. c. 35 C. L. J. 19 (1921), Shrinivasdas Bavri v. Meherbai, L. R. 49 I. A. 36; s. c. I. L. R. 41 Bom. 300; 21 C. W. N. 558; 25 C. L. J. 311 (1916) and Brajeshwari Peshakar v. Budhanudhi, I. L. R. 6 Cal. 268 (1890), followed and approved. Chooni Lal Khemani v. Nilmachhab Barik, 41 C. L. J. 374 (1924) Abdulla v. Kunj Behari Lal, 16 C. W. N. 252; s. c. 14 C. L. J. 467 (1911), Dwarkanath Bakshi v. Mukund Lal Chowdhury, 5 C. L. J. 55 (1906), Abdul Ali v. Syed Rejan Ali, 19 C. W. N. 468 (1913), Bisheswar Doyal v. Harbans Sahay, 6 C. L. J. 659 (1907) and Imrit Chamar v. Sidhari Pandey, 17 C. W. N. 108 (1911). BROJO MOHAN DAS ADHIKARI v. GATA PROSAD KARAN ... 761

s. 33—Requirements laid down in section—Proviso 2, scope and effect of—Suit to recover possession by party dispossessed under sec. 145, Cr. P. C.—Evidence given in the criminal proceeding by one of the Defendants as a witness for the other Defendant, if admissible under sec. 33—Admission made in the previous deposition, if may be used against co-Defendant—Sec. 18, effect of—Kohala, purporting to deal with property in suit, not completed and registered—Legitimate purpose for which such document may be admitted in evidence—Sec. 91.] The Plaintiff sued to recover possession of property from which he had been dispossessed by the Defendant by virtue of an order under sec. 145, Cr. P. C. In that proceeding, U, a co-Defendant in the present suit, was examined as a witness on behalf of the Defendant and a

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certified copy of his deposition was put in by the Plaintiff at the time of the argument and admitted in evidence. On behalf of the Plaintiff a kohala purporting to have been executed by the Plaintiff's vendor in Defendant's favour in respect of the property in suit valued at Rs. 99 but which was not completed and registered was also put in evidence. Held—That notwithstanding that the value of the property which the document purported to convey was less than Rs. 100, a sale of the property if it was made by a document could only be made by a registered instrument under sec. 54 of the Transfer of Property Act, but having regard to sec. 91 of the Evidence Act, it might be used as evidence of the nature and terms of the transaction which fell through to corroborate the Plaintiff's story that the Defendant negotiated for the purchase of the property from the vendor of the Plaintiff who had title to the property. That a certified copy of the deposition of a witness would not come in by itself; in any case it would be necessary to adduce evidence proving the identity of the person who gave the deposition. Evidence is admissible under sec. 33 of the Evidence Act only when the requirements of that section are fulfilled. The mere fact that a witness did not appear as a witness when cited on behalf of the Plaintiff or that he appeared as a witness on behalf of the Defendant on one occasion but was not examined, it being found that he was not kept out of the way by the Defendant, would not be a ground for admitting the deposition under sec. 33 of the Act. The conditions laid down in sec. 33 being absent and the second proviso to that section to the effect that the adverse party in the first proceeding should have had the right and opportunity to cross-examine the witness not having been satisfied the deposition could not go in under the section. The admission made by U in the proceeding under sec. 145, Cr. P. C., when examined as a witness therein is evidence against him as a piece of admission but as to the admissibility of the admission against the co-Defendant the words of sec. 18 of the Evidence Act were perfectly clear and inasmuch as U made the statement when he had parted with his interest in favour of his co-Defendant in the present suit, the admission made by him could not be treated as evidence of admission as against the co-Defendant. BROJA BALLAV GHOSH v. AKHOY BAGDI ... 254

s. 92—Simultaneous mortgage and prospecting lease—Option to lease to convert prospecting to mining lease after a term—Option exercised—Oral evidence to prove that parties agreed that mortgage debt should stand discharged in lieu of payment of selami of lease—Eviction by title paramount—Actual

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ouster, if must be proved, if not, what.] Sec. 93 of the Evidence Act which excludes evidence of oral agreement or statement to contradict, vary, add to or subtract from the terms of a written instrument is no bar to such evidence being admitted to prove a discharge of the debt secured by the instrument. *Mohim Chandra Dey v. Ramdayal Dutta*, 30 C. W. N. 371 (1925), referred to. Actual physical ouster by a title paramount is not necessary to prove eviction, but there must be clear proof of the title of the person claiming paramount title and consequently proof of the absence of the title of the lessor. *RAM RANJAN ROY v. JAYANTI LAL PATEA* ... 710

... preamble, s. 92—Shares, transaction in—Bought and sold notes passed—Transaction, whether sale or mortgage—Surrounding circumstances, reference, to, to prove ostensible sale a mortgage—Chattel mortgage—Redemption after default, if permissible.] Sec. 92 of the Evidence Act merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. *Balkishan Das v. Legge*, L. R. 27 I. A. 58: s. c. I. L. R. 23 All. 149; 4 C. W. N. 153 (1899), and sec 93 of the Evidence Act held not applicable to the present case in which in view of the surrounding circumstances certain bought and sold notes passed in respect of certain shares were held to be mortgages and not sale out and out of the shares. *BAIJNATH SINGH v. HAJEE VALIY MAHOMED HAJEE ABBA* ... 242

... s. 92, prov. (4)—Mortgage—Oral evidence to prove discharge partly by payment and partly by release, if admissible.] Oral evidence may be admitted to prove that a mortgage has been discharged partly by payment and partly by release of debt and there is nothing in sec. 93 of the Evidence Act to prevent such evidence being admitted. *G. P. Mallappa v. Matum Nagu Chetty*, I. L. R. 42 Mad. 41 (1918), distinguished. *Jajannath v. Shankar*, I. L. R. 41 Bom. 55 (1919), dissented from. *Ariyaputhria Padayachi v. Multhukomaraswami Padayachi*, I. L. R. 37 Mad. 423 (1912), referred to. *MOHIM CHANDRA DEY v. RAMDAYAL DUTTA* ... 371

... s. 108—Presumption of death, nature of, under—Onus of proof as to time of death. See under Limitation Act. *LAL CHAND MARWARI v. RAMRUP GIR* ... 721

... s. 115—Landlord permitting tenant to build, representing that written lease conferred permanency of tenure but at a variable rent—Landlord, if may eject tenant—Estoppel.] A tenant desiring to erect pucca structures on the leased land asked the permission of the landlord whose agent in reply wrote to say that the lease was a permanent lease and

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gave the tenant right to erect buildings but it did not entitle him to hold at fixed rate and that the rent was liable to enhancement after proper legal notice and that pending consideration of a proposal to fix the rent permanently, the tenant might commence the house if he liked. Held—That the statement in the letter was a statement of fact and not an expression of opinion, and the house having been erected the landlord was estopped from ejecting the tenant by sec. 115 of the Evidence Act. *A. H. FORBES v. SIR L. E. RALLI* ... 49

EXECUTION OF DECREE—Application for execution returned for amendment—Formal defect—Application amended but not refiled within time allowed—Application, if in accordance with law so as to save limitation. See Limitation. *PITAMBAL JANA v. DAMODAR GACHAIT* ... 918

EXECUTOR, de son tort, meaning of—When such executor de son tort can be made party Defendant when legal representative exists. See *C. P. C. SATYA RANJAN ROY v. SARAT CHANDRA BISWAS* ... 565

FOREIGN JURISDICTION ACT, 1890 (53, 54 Vict., ch. 37), ss. 1, 3, 11—Acquisition of rights and territory by Crown thereunder. See under British Protectorate. *SOBHUA II v. MILLER* ... 961

FRAUD, effect of, on decree. See Decree. *AMBIKAMONI DAS v. KHETRA GHOSAL* ... 59

FRAUDULENT ex parte decree, suit for setting aside, if lies, when summonses had been served and Defendant was aware of the suit—Falsity of claim and adducing of false evidence, if constitute sufficient fraud for vacating the previous decree.] B. obtained an ex parte decree against P. and others and on compromise against some others. Summonses had been duly served and as a matter of fact P. had watched the progress of the suit on behalf of some of the Defendants. P. subsequently brought a suit to set aside the ex parte decree on the ground that it was obtained by suppression of processes, and by adducing false evidence in support of a false claim. The lower Courts found that there was no suppression of processes and that P. was fully aware of the progress of the suit, but that B.'s suit was wholly false and that the decree was obtained by the production of false evidence and by the practice of fraud on the Court and therefore set aside the previous decree. Held—That the balance of authority is that it is not open to a party to raise pleas of this nature, and no suit lies to vacate a previous decree if the suit had been decreed on contest or if the suit had been decreed ex parte and it was established that summonses had been served on the Defendants. *Nalini Kanta Mukherji v. Hari Nigari*, 29 C. W. N. 325 (1925), followed. *Kedar Nath Das v. Hamanta Kumari Deb*, 18 C. W. N. 447 (1913) and *Lekhmi Churn Shaha v. Nur Ali*, 15 C. W. N. 1010 (1911), dis-

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tinguished. BAIKUNTA CHANDRA DHU-PI v. PRAHLAD CHANDRA DHUPI ...	500	idol, the mere fact that the donor by the deed appointed himself and other members of the family shebait in succession and provided that the shebait for the time being would at the end of every three years receive as remuneration a half of the surplus income of the endowed properties (which taking the income as at the date of the deed proved a trifling sum) and would be entitled to reside with his family in the thakurbari, in a portion of which only the thakur was located, did not affect the absolute debutter character of the endowment. Jadu Nath v. Sita Ramji , L. R. 44 I. A. 187; s. c. 21 C. W. N. 953 (1917), applied. Sonatan v. Juggut Sundar , 6 M. I. A. 68 (1899) and Ashutosh v. Durga Charan , L. R. 6 I. A. 182 (1879), referred to. Qumra .—Whether in the case of a family idol, the consensus of the family can convert debutter property into secular? But if it can, such consensus must be of all the members, male and female, interested in the worship of the deity. Dictum of Sir Montague Smith in Doorganath v. Ram Chandra , L. R. 4 I. A. 52; s. c. I. L. R. 2 Cal. 341 (1876), commented on. Gobinda Kumar v. Debendra Kumar , 12 C. W. N. 98 (1907), Sri Sri Gopal Jiu Thakur v. Radha Binode , 41 C. L. J. 396, 426 (1924), Pramatha Nath Mullick v. Pradyumna Kumar Mullick , I. L. R. 53 Cal. 809; s. c. 36 C. W. N. 25 (P. C.) (1925), Mon Mohan v. Siddatwar , 27 C. W. N. 218 (1922) and Dharmadas v. Gosta Behari , 16 C. W. N. 29 (1911), referred to. Per Page, J. —By absolutely dedicating property to a thakur, the founder divests himself of all right and title thereto. Having appointed himself the first and other members of his family the succeeding shebait, he as founder became functus officio. Gauri Kumari v. Ramanilmoyi , I. L. R. 50 Cal. 197 (1922), Nagendra Nath v. Rabindra Nath I. L. R. 53 Cal. 132; s. c. 30 C. W. N. 389 (1925) and Lalit Mohan v. Brojendra Nath I. L. R. 53 Cal. 251, 257 (1925), referred to. CHANDI CHARAN DAS v. DULAL PAIK ...	330
HINDU LAW— Gift by Hindu widow followed by surrender to next reversioner—Latter, if may recover before widow's death—Valid surrender, what is—Difference of opinion in Division Bench hearing appeal from mofussil Court—Civil Procedure Code (Act V of 1908), sec. 98, or Letters Patent, 1885, cl. 36, if applicable.] A Hindu widow purported to make a gift of a portion of her husband's immovable properties to one T. Later on she executed a deed of relinquishment in favour of the next reversioner B, but it appeared that she did this in consideration of a sum of money paid in cash and an annuity to be paid to her during her life. In a suit by B to recover from T the properties gifted to him: Held (by Chatterjea, C. J., Rankin and Chakravarti, JJ).—That the fact that some maintenance has been agreed to be paid by the reversioner to the widow does not affect a surrender, but whether there was a surrender or relinquishment such as would accelerate the succession of the reversioner or whether the transaction was a transfer for valuable consideration depended on the facts of each case and in this case the circumstances showed that the transaction was a transfer for valuable consideration. That the Plaintiff's suit must therefore fail and the question whether upon a valid relinquishment by a Hindu widow the reversioner becomes entitled to recover from a previous alienee without legal necessity, immediately or upon the death of the widow, did not arise. Per Walmsley, J. —In the event of a valid surrender by the widow, the right of the reversioner to recover from the previous alienee is postponed to the widow's death. Per Page, J. —The right to recover arises immediately upon such surrender. The authorities discussed. SM. PRAFULA KAMINI ROY v. BHABANI NATH ROY ...	1011	Mitakshara— Mortgage by ancestors for necessity—Subsequent sale of portion to pay off mortgage, if binds descendants—Antecedent debt.] According to Sahu Ram Chandra v. Bhup Singh , L. R. 44 I. A. 126; s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917), as explained in Brji Narain v. Mangla Prasad , L. R. 51 I. A. 129; s. c. I. L. R. 46 All. 95; 28 C. W. N. 255 (1923), debts secured by mortgages executed by members of a Mitakshara family are antecedent debts which would justify for their liquidation a sale of family property not otherwise improper, so as to make such sale binding upon their descendants. But there is no necessity to invoke this rule to support such a sale where the mortgages themselves were such as to bind the descendants. LAL BAHADUR v. AMBIKA PRASAD ...	701
Dedication of property to family idol— Appointment of members of family as shebait and allowing shebait to appropriate a small portion of the income as remuneration and to reside in the thakurbari with family, if affects absolute debutter character of the property—Consensus of family, if can convert debutter property into secular—Consensus, if to be that of all persons interested in the sheba or of shebait only. The question whether an absolute debutter is created or there is merely a charge in favour of the deity sheba depends upon the terms of the deed and the circumstances of each case. Where the language of a deed of endowment prima facie showed that there was absolute dedication to a family		Mitakshara family— Antecedent debt, what is—Contract of sale to pay off	

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mortgages frustrated by intervention of pre-emptor—Sale to pre-emptor, if to pay off antecedent debt—Suit to set aside sale by younger sons, after eldest son's claim had become barred through attaining majority earlier, if also barred—Limitation Act (IX of 1908), secs. 7 and 8.] A Mitakshara father entered into negotiations for sale of family property with one U in order to discharge certain debts due to money-lenders upon mortgages and a deed of sale for a consideration of Rs. 13,000 was actually drawn up in favour of U, when D intervened as pre-emptor and obtained a decree for purchasing the property on payment of Rs. 13,000. D accordingly paid the amount and the property passed to him. The mortgages had been paid off pending the suit: Held—That the sale to D could in no sense be regarded as a sale to pay off the antecedent debt due to the mortgagees. A contract for a loan which never was completed to pay off a previous debt otherwise discharged is not an "antecedent debt" as defined in *Sahu Ram Chandra v. Bhup Singh*, L. R. 44 I. A. 126 at p. 133; s. c. I. L. R. 39 All. 437; 21 C. W. N. 688 (1917). The fact that one of the sons of the vendor had attained majority so long before this suit to set aside the sale by his younger brothers that if brought by him, it would have been time-barred, did not affect the undoubted rights of the Plaintiffs to sue within the extended period of limitation to which their minority at the date when the cause of action arose entitled them. **JAWAHIR SINGH v. UDAI PARKASH** 698

Joint family property—Existence of nucleus of joint property necessary to raise presumption of jointness as to property in the hands of any one member—Circumstances varying strength of presumption—Ancestral property in joint possession not sufficient to provide fund for acquiring property—Separate property subsequently acquired by individual member—Suit to recover such property—Presumption of jointness, how far arises as to such separate property—Onus of proof.] It is necessary to establish the existence of a nucleus of joint family property before property in the possession of any one member can be presumed to be joint family property. In order to hold that property purchased in the name of one of two brothers was the joint property of both, it is not enough to find that at the time of the purchase they were living together. It has to be found further that they were joint in mess and estate and that there was sufficient estate out of which it may be presumed that the property was acquired. The onus of proof in a case where the property is said to be the joint property of a joint family must depend upon the circumstances of each particular case. Where the family was joint in mess and estate at the time of the acquisition and there was a nucleus of joint fund, however small it may be, the onus is undoubtedly

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upon a member of the family to prove that the property though purchased in his name was not a joint property. But when the only fact found was that the two brothers lived together, this circumstance alone did not throw any burden of proof on the Plaintiff, who claimed the property as the self-acquisition of one of the brothers, more than is to be borne by him as the Plaintiff in the case to prove that the property was purchased by the brother through whom he claimed. **TRILAKYA-NATH CHAR v. CHINTAMONY DUTT** 588

Agarwalla Jains, law of adoption governing—Power of brothers to give in adoption—Adoption made in fact but not good in law—Conduct affirming fact of adoption, if estops from denying validity of adoption in law—Estoppel, law of, as affecting adoptions—Evidence Act (I of 1872), sec. 115.] The Agarwallas generally adhere to Jainism and repudiate the Brahmanical doctrines relating to obsequial ceremonies, the performance of shraddh, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father. An Agarwalla boy who has lost both his parents cannot, according to the admitted rule of Hindu law, be adopted, for he cannot be given in adoption by anybody but his father, or if he be dead, by his mother—not even under authority delegated to him by the parent. Where the facts were that such a boy was given to J in adoption by his brothers, the parents being both dead, and it was alleged that L, a brother of J and a coparcener with J, brought the boy from his native village to J's place, became a witness to the deed of adoption, allowed him to perform the cremation ceremony of J and at the time of his marriage represented him to be the adopted son of J: Held—That there was no misrepresentation of fact by R, and R's heir was not estopped from denying the validity of the adoption in law. *Gopee Lal v. Mussamat Sree Chundrasee Buhoojee*, L. R. I. A. Sup. Vol. 131; 19 W. R. 12; 11 B. L. R. 391 (1872), followed. Precedents bearing on the question of estoppel in relation to adoption considered and it was pointed out that in those cases the Courts considered in substance that a long course of recognition and acquiescence by the person making the adoption—the person best acquainted with the circumstances—gave rise to the inference that the conditions relating to the adoption were duly fulfilled, whilst in *Rani Dharam Kunwar v. Balwant Singh*, L. R. 39 I. A. 142; s. c. 16 C. W. N. 675 (1913), the estoppel was considered purely personal. *Quare*.—Whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel. Bringing forward exceptions to a

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decree never urged before at the hearing of the appeal upon notice served on the opponent shortly before the hearing decreed. **DHANRAJ JOHARMAL v. SONI BAI** ... 601

— **Mithila School—Debt incurred by heads or branches of joint family—Pious obligation of descendants to pay.** [Where the several heads of the four branches of a joint Hindu family governed by the Mithila School of law jointly incurred a debt, a descendant of one of them is not released from the pious obligation to pay such debt of his ancestor, by reason of the debt having been jointly incurred with others, the authority of the Vivada Chintamani in that behalf applying only to debts incurred jointly with a stranger. **SUBENDRA MOHAN SINHA v. HARI PRASAD SINHA** ... 482

— **Spiritual benefit, the test of inheritance—Daughter's son's son, if heir.** [The power to confer spiritual benefit is the foundation of the theory of inheritance propounded in the Dayabhaga and a daughter's son's son who is unable to confer any spiritual benefit is no heir. **NIPAL-DAS MUKHERJI v. PROBHAS CHANDRA MUKHERJI** ... 357

— **Widow, decree against, if binds reversioners—Conditions necessary—Dispossession of widow—Suit for recovery, limitation for—Limitation Act (IX of 1871), sec. 129—Act XV of 1877, Art. 141.] A Hindu widow has no power to sell or assign the estate she holds as a limited owner except for necessity so as to bind her husband's reversioners after her death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent. When the suit was not collusive, it did not make any difference that in resisting the suit she was actuated by a purely personal and selfish object, if she in fact and in law represented the estate as well as her own interest as a Hindu widow. **Katama Natchier v. The Rajah of Shivagunga**, 9 M. L. A. 539 (1863) and other cases referred to. Where the widow made over the estate to a person whom she had adopted as son to her husband in 1862: **Held**—That although the adoption was in law invalid, there could be no recovery without displacing the apparent adoption by a suit which under Art. 129 of Act IX of 1871 stood barred after the expiry of 12 years from 1862, i.e., in 1874, long before Art. 141 of Act XV of 1877 came into force. **Kandamba Chowdhrao v. Dakshina Mohan**, 1 L. R. 13 I. A. 84; s. c. 1 I. R. 13 Cal. 246 (1906), followed. **VAITHIATHINGA MUDALIAR v. SRIRANGATH ANNI** 313**

— **Hindu widow, debts incurred by—Amount borrowed in excess of necessity**

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— **Effect on the transaction—Onus of proof on person challenging transaction to show excess—Nature and scope of enquiry to be made by Court.** [In cases where it is shown that the money borrowed by a Hindu widow was more than the necessity justified the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity, and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If on the other hand the finding of the Court is in the negative, the transaction should be upheld in its entirety. The onus is on the reversioner who challenges the transaction to show that the sum which the widow borrowed for the necessity which really existed was in excess of the necessity and that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge. It is impossible to draw a line as to the extent to which an excess should be held not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amount lent should not be held to vitiate the transaction. When the excess is disproportionately large that itself being evidence of collusion the Court should not uphold the transaction. In cases where the Court finds that the necessity was inadequate for the entire loan the reversioner should be put to terms. **TARAPROSAD SAU v. MADHU SUDAN GIRI** ... 204

— **Adoption by Hindu widow. See Hindu Law. KONDAPALLI VIJAYARATHNAM v. MANDAPAKA** ... 193

— **Gift to two persons—Interest of donees, whether joint—Survivorship—Joint tenancy or tenancy in common—Death of Defendant during pendency of proceedings—Decree passed without the legal representatives being brought on the record—Effect of such decree.** [In a suit by a member of a Hindu family for recovery of possession of two jamas a compromise was arrived at and it was stipulated in the *sehadama* that the Defendant would possess the properties during her life-time and after her death her two granddaughters would get them. Subsequently rent suits were brought by the landlord against the Defendant in the aforesaid suit and after her death which took place when the suits were pending decrees were passed without bringing her legal representatives on the record. In execution of these decrees the properties were sold and purchased by the stranger who took possession through Court. One of the granddaughters then died and after her death the other granddaughter brought a suit for possession of the entire properties: **Held**—That the rent decrees were

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void and infructuous as having been passed against a dead person but the Plaintiff was entitled to recover possession of eight annas share only of the properties inasmuch as the two sisters took not as joint tenants but as tenants in common. The principle of joint tenancy is unknown to Hindu law except in the case of coparcenary between the members of an undivided Mitakshara family. **GOUR CHANDRA DAS v. SUBASHINI DAS** ... 39

Religious endowment—Family idol, if capable of disposal of property—Legal position of founder and his heirs when no separate Shebait appointed—Founder's heir, whether can determine the location of the Thakur—Power to remove—Division of worship into turns—Contest between co-Shebaita regarding worship—Thakur to be represented by independent next friend appointed by Court—Members of family entitled to worship but not Shebaita should be made parties—Scheme of worship to be framed on hearing all interested parties and guardian of Thakur.] A Hindu idol is a juristic entity and has a juridical status with the power of suing and being sued. The person who has the deity in his charge is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. The person founding a deity and becoming responsible for the duties of the manager of the idol is *de facto* Shebait. This responsibility is maintained either by the personal performance of the religious rites or, as in the case of Sudras, by the employment of a Brahmin priest to do so on his behalf. The founder, at any time before his death, or his successor likewise, may confer the office of Shebait on another. Family idols are not mere moveable chattels and their destruction, degradation or injury are not within the power of the founder or other custodian for the time being. Where the founder of the idol continued till his death to be the *de facto* Shebait, his heir stood vested with the custody of, and management of the trust for, the family idol which belonged to the founder. Where the founder's heir conveyed and dedicated to his family idol certain premises for its location and directed that the idol was on no account to be removed therefrom except upon dedication to it of another Thakurbari of the same or of larger value, and the office of Shebait having devolved by inheritance on several persons, there was a division of the worship into palas or turns, and the question was whether one of them during his turn of worship was entitled to take the Thakur to his own residence for such purpose: **Held—That, if in the course of a proper and unassailable administration of the worship of the idol by the Shebait, it be thought that a family idol should change its location, the will of the idol itself, expressed through its guardian, must be given effect**

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to. A fortiori it is open to an idol acting through its guardian, the Shebait, to conduct its worship in its own way at its own place, always on the assumption that the acts of the Shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it. The question having arisen in a suit between contesting co-Shebaita, the Judicial Committee held that the idol should be represented in the suit by a disinterested next friend appointed by Court, and that the female members of the family who are entitled to participate in the worship without obstruction or inconvenience should also be joined, and a scheme framed for the regulation of the worship of the idol. **PRAMATHA NATH MULLICK v. PRADYUMNA KUMAR MULLICK** ... 25

Shebait's right of worship of family deity, alienation to another member of family, if legal in the absence of custom—"Benefit to idol," if justifies alienation—"Consensus" of persons interested, if justifies alienation—"Benefit," what is,] There is a distinction between a shebait's obligation to perform the spiritual duties of his office and his obligation to manage the temporalities of the idol. A shebait primarily and mainly is a sacred office and because in certain circumstances a shebait may be entitled to alienate the temporalities of the deity, it does not follow that in similar or any circumstances he is entitled to transfer the spiritual duties and privileges which appertain to his office. In the nature of things, there can be no necessity for a voluntary transfer of the spiritual duties of a shebait, and the doctrine that a shebait at his own will and pleasure is at liberty to alter the line of shebaita on the ground that to do so would be for the benefit of the deity offends against the common law of India and is in conflict with the uniform rulings of the Judicial Committee of the Privy Council. **Muncharam v. Premshunker**, I. L. R. 6 Bom. 238 (1882), **Nirad Mohini Dasi v. Shevadas Pal Dewasin**, I. L. R. 36 Cal. 975: s. c. 13 C. W. N. 1064 (1909) and dictum of **Mitra, J.**, in **Rajeswar Mullick v. Gopeshwar Mullick**, I. L. R. 35 Cal. 226: s. c. 12 C. W. N. 323 (1907), dissented from. **Vidyaswami Tirtha Swami v. Vidyandhi Tirtha Swami**, I. L. R. 27 Mad. 435 (1903), referred to. **Quere**.—Whether the consensus of all the persons interested in the worship would justify a transfer of the spiritual rights and duties of the office of a shebait. **Haja Vurma Valia v. Ravi Vurmah Mutha**, I. R. 4 T. A. 54, 73 (1876), **Khetter Chunder Ghose v. Haridas Bandopadhyay**, I. L. R. 17 Cal. 557 (1890), **Promotha Nath v. Pradyumna Kumar**, I. L. R. 52 Cal. 609: s. c. 30 C. W. N. 25 (P. C.) (1925) and **Sethurama Swami v. Meruswamy**, I. L. R. 41 Mad. 206 (1912), referred to. The nature of the "benefit" which would justify alienation

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of the corpus of endowed property by the shebait considered. <i>Prosunno Kumari Debbya v. Golab Chand</i> , L. R. 2 I. A. 145, 150 (1875), <i>Konwar Doorganath Roy v. Ram Chunder Sen</i> , L. R. 4 I. A. 52; s. c. I. L. R. 2 Cal. 341 (1876), <i>abhiram Goswamy v. Shyama Charan Nundy</i> , I. L. R. 36 Cal. 1003; s. c. 14 C. W. N. 1 (P. C.) (1903), <i>Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi</i> , I. L. R. 41 I. A. 147; s. c. I. L. R. 40 Mad. 709; 21 C. W. N. 729 (1917), <i>Nallayappa Pillian's case</i> , I. L. R. 27 Mad. 465, 473 (1903), <i>Bhugwandas Naik v. Mahadeo Prasad</i> , I. L. R. 45 All. 390, 394 (1923), and <i>Shankar Sahai v. Bechu Ram</i> , I. L. R. 47 All. 381 (1925), referred to. NAGENDRA NATH PALIT v. ROBINDRA NARAIN DEB ... 389		from the use of the general words "other sources" in the last item of heads of income, profits and gains, made chargeable to income-tax by sec. 6 of the Income Tax Act. KING-EMPEROR v. INDU BHUSAN SARKAR ... 524		
INAM GRANT RULS , Rule No. V—Condition specified in rules, if may be varied—Decree declaring Plaintiffs' share in property and awarding share, if res judicata in subsequent partition suit, when partition might have been refused in previous suit— <i>Civil Procedure Code (Act V of 1908)</i> , s. 11.] The Inam rules lay down the conditions which are usually to accompany an Inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. Where such a grant, expressly made heritable to male descendants of the grantees to the exclusion of all females, was, in a suit by certain female descendants, against the certificate-holder for a share of the profits, erroneously declared to belong in part to the Plaintiffs and they were given a decree for the share of profits claimed: Held—That as there were grounds on which a decree for partition, if claimed, might have been refused to the Plaintiffs in that suit, and such a claim was not raised or decided, a claim by the same Plaintiffs for a partition of the property in a subsequent suit was not res judicata and should be refused, but the previous decree being binding upon the parties, the certificate-holder was to hold the property subject to the obligation to pay to the Plaintiffs the share of the profits declared by the decree. MIR SUBHAN ALI v. IMAMI BIGUM		INCOME TAX ACT (XI of 1922) , ss. 31, 33, 86—Question of law in review proceeding—Refusal by Commissioner to state case because application was time-barred—Application for review dismissed without stating case—High Court, power of, under s. 66 of Income Tax Act and under sec. 45 of Specific Relief Act to order Commissioner to state case and refer it to High Court—Specific Relief Act (I of 1877), sec. 45.] The High Court cannot under sec. 68 (3) of the Income Tax Act require the Commissioner to state a case where the application to the Commissioner was refused because it was time-barred. The High Court has no power under the section to order the Commissioner to state a case when a question of law arises before the Commissioner in a review proceeding under sec. 33. But (semble) the High Court may possibly pass such an order in a properly constituted application under sec. 45 of the Specific Relief Act. <i>Alcock, Ashdown & Co. v. Chief Revenue Authority of Bombay</i> , L. R. 50 I. A. 227; s. c. I. L. R. 47 Bom. 742; 28 C. W. N. 762 (1923), referred to. KUMAR SARAT KUMAR ROY v. THE COMMISSIONER OF INCOME TAX, BENGAL ... 831		
INCOME-TAX —Fisheries within permanently settled estates—Profits from fisheries assessed at time of settlement, if liable to income-tax—Income Tax Act (XI of 1922), sec. 6—"Other sources" in sec. 6, if includes income from fisheries— <i>Bengal Permanent Settlement Regulation (I of 1793)</i> , Arts. III, IV and VI.] Where income from fisheries lying within an estate was included in the assets upon which land revenue was assessed under the Permanent Settlement Regulation (I of 1793), incomes from such fisheries are not further liable to assessment under the Income Tax Act. An intention to take away the right conferred by the Regulation on persons paying land revenue cannot be gathered		INFANT —Suit commenced by next friend not for the benefit of the infant—Court's jurisdiction to dismiss suit. See <i>Suit. CHANDRA SEKHAR MULLICK v. GONESH CHANDRA DE</i> ... 327		
		INJUNCTION , temporary, grounds on which may be granted— <i>Civil Procedure Code (Act V of 1908)</i> , s. 94, Or. 39, r. 1—Temporary injunction restraining Defendants from interfering with Plaintiffs' possession, if may be granted, on the ground of apprehended interference with collection of rent and breach of the peace—Jurisdiction.] Where it was alleged in the plaint that one of the three Plaintiffs was in possession and in the prayers for relief, the Plaintiffs asked for declaration of title and consequential reliefs and also for an injunction to restrain the Defendants from interfering with the possession of Plaintiff No. 1 till the decision of the suit and an application by the Plaintiffs for a temporary injunction to restrain the Defendants from interfering with the Plaintiff No. 1's possession, upon the allegation that unless the injunction was granted there would be interference with Plaintiffs' collection of rents and there might be an apprehension of a breach of the peace, was granted by the trial Court: Held—That whatever other remedies the Plaintiffs might have in the matter, there was no case for the issue of a temporary injunction either under Or. 39 or		

- INJUNCTION**—*concl.*
under sec. 94 of the Civil Procedure Code and the order was passed without jurisdiction. **SACHINDRA LAL MITTER v. PANCHANON MITTER** ... 214
- INSOLVENCY**—*Insolvent not producing books before the Official Assignee on the ground that they are not in his possession—Refusal by the Registrar in insolvency to pass protection order—When does the Court interfere with such discretion of the Registrar.* Where the books of a joint family business were in possession of a Receiver appointed in a partition suit between the members, one of whom had been adjudicated an insolvent, and the Registrar in insolvency refused to pass protection order in favour of the insolvent on the ground that the insolvent had not yet produced the books before the Official Assignee: *Held*—That in spite of sec. 36 of the Insolvency Act, which may be availed of by the Official Assignee or a creditor for the production of the books, the Court would not interfere with the discretion of the Registrar unless it was convinced that the insolvent had taken all possible steps for the production of the books before the Official Assignee. **IN THE MATTER OF GOPAL DASS AURORA** ... 112
- INSOLVENCY ACT, PRESIDENCY TOWNS** (III of 1909), s. 15—*R. 74 of the Calcutta Insolvency Rules, 1910—Order of adjudication, whether discretionary—Account books of the debtor, if to be deposited with the Official Assignee before the adjudication order—"May" in sec. 15, if mandatory.* When the conditions laid down in the Presidency Towns Insolvency Act, 1909, are satisfied, a debtor upon his own petition is entitled to an order of adjudication as a matter of course. It is not the settled practice to hand over the account books of a debtor to the Official Assignee before the adjudication order is made. Such practice is not sanctioned by the rules. **Ghatratap Singh Dugar v. Kharag Singh Lachmiram**, L. R. 41 I. A. 11; s. c. I. L. R. 41 Cal. 435; 21 C. W. N. 497 (1916), followed. **Sat Narain v. Behari Lal**, L. R. 52 I. A. 22; s. c. 29 C. W. N. 797 (1921), referred to. **Re Bhuramull Banka**, No. 39 of 1919, dated the 16th May 1919: Unreported and **Re Joseph Perry**, No. 32 of 1919, dated the 28th May 1919: Unreported, distinguished. **RE GOPAL DAS AURORA** ... 173
- s. 36 (5), application under—*At whose instance—Insolvency Rules—Non-compliance with the procedure laid down by—Effect of.* An application under sec. 36 (5) of the Presidency Towns Insolvency Act can be entertained by the Court only at the instance of the Official Assignee and of no body else. Therefore where an order was made under that section on the application of a creditor: *Held*—Such an order was made without jurisdiction. It was not a case of mere irregularity which may be cured under sec. 119 of the Act. *Consequent-*
- INSOLVENCY ACT, PRESID. TOWNS—concl.**
ly an order for commitment to jail for non-compliance with such an order must be set aside. **SITARAM KHEMKA v. HARIBUX FATEHPURIA** ... 614
- ss. 36, 55 and Sch. II, r. 12—*Validity of a mortgage by an insolvent within two years of his insolvency—Application under Rule by mortgagee—Creditor, if may oppose—Stay of proceeding under Rule, when Official Assignee has started proceeding under sec. 36—Objection under sec. 55, if may be considered in enquiry under r. 18.* *Quare*—Whether the Official Assignee alone is entitled to oppose a mortgagee's application under r. 18 of Sch. II of the Presidency Towns Insolvency Act, so that a creditor of the insolvent would have no locus standi to contest the application. *Held*—That the proper order in this case, where the Official Assignee had already withdrawn his consent to the holding of an inquiry under the Rule and had started proceedings under sec. 36, was to stay the inquiry under r. 18 so as to give the Official Assignee an opportunity, if so advised, to take proceedings under sec. 55. **HAJEE TAJIB ALI v. PURNA CHANDRA PAL** ... 896
- sec. 39 (2) (j), insolvent, if guilty of fraud under—*Jurisdiction of Court to make an order of conditional discharge.* One B was adjudicated an insolvent under the Presidency Towns Insolvency Act (III of 1909). Prior to his insolvency he transferred certain goods of his to one M. The transfer was set aside on the ground that it was made with a view to use it as a shield against his creditors: *Held*—That the case came within sec. 39, sub-sec. (2), cl. (j) of the Presidency Towns Insolvency Act, 1909, and the insolvent was guilty of fraud within the meaning of the subsection. *Held further*—That the jurisdiction of the Court to discharge the insolvent was limited by sec. 39, so that it could make only one of the orders contemplated by cls. (a), (b), (c) or (d) of sec. 39, sub-sec. (1). **G. C. MOSES v. A. C. OAKE-SHOTT** ... 518
- ss. 7, 27, 36—*Evidence of Insolvent taken under sec. 27, admissibility of, against others—Benami transaction—Onus—Practice under sec. 36.* The evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title. **Madhoram Raghumull v. Official Assignee**, 27 C. W. N. 611 (1923), considered. Proper use of powers under sec. 7 of the Presidency Towns Insolvency Act and of statements of persons examined under sec. 36, cls. (4) and (5), indicated by **Rankin, J. JNANENDRA BALA DEBI v. THE OFFICIAL ASSIGNEE** ... 346
- INSOLVENCY ACT, PROVINCIAL (V of 1920), sec. 31—Ad interim protection order, refusal to grant, pending the hearing of a petition for insolvency—High Court, if may revise**

- INSOLVENCY ACT, PROVINCIAL—conclid.**
 order—Civil Procedure Code (Act V of 1908), sec. 115.] The Provincial Insolvency Act has made no provision for an ad interim protection pending the hearing of a petition for insolvency. *Per Page, J.*—Refusal to grant an ad interim protection in the exercise of the Court's inherent powers, if it has such powers, does not bring the order in question within the ambit of sec. 115, C. P. C. *Per Cuming, J.* (Page, J., reserving his opinion)—The act has specifically laid down that protection cannot be granted in such a case. **JEWRAJ KHARUWALLA v. LALBHAI KALYANBHAI & CO.** 834
- INTEREST, post litem, discretion of Court as to under sec. 34, C. P. C.** **SOURENDRA MOHAN SINHA v. HARI PRASAD SINHA** 482
- JUDGMENT, what is, within cl. 15, Letters Patent—Order setting aside an ex parte decree and attachment thereunder, if appealable.]** In execution of an ex parte decree in a suit under Or. 37, C. P. C., certain properties were attached. Subsequently the decree and attachment were set aside on the ground that the summons had not been duly served. *Held*—That the order was not a "judgment" within the meaning of cl. 15 of the Letters Patent and was not appealable. The Justice of the Peace for Calcutta *v. The Oriental Gas Co.*, 8 B. L. R. 433 (1872), relied on. *Maharaj Kishore v. Kiranichahi*, I. L. R. 49 Cal. 616 (1921), referred to. *Per Sanderson, C. J.*—It was not a judgment because it left the merits of the questions between the parties undecided. The setting aside of the attachment which was merely consequential upon the setting aside of the decree did not make the order appealable. *Per Buckland, J.*—An order to do a "judgment" within cl. 15 must be one affecting the merits of the dispute between the parties deciding some right or liability. An order setting aside an attachment consequential on the setting aside of the decree under which the attachment was made, though it affects some right between the parties, does not make the order appealable. **BALDEODAS LOHEA v. SHUBCHURN DAS GOENKA** ... 104
- LAND ACQUISITION ACT (I of 1894), s. 54, as amended—Valuation, question of, judgment of reversal on—Privy Council, appeal to—Practice—No interference except on question of law or principle.]** Upon a question of valuation, where the opinions of competent Courts in India differ (and a fortiori where they concur), it is not the practice of the Board to interfere as an Appellate tribunal unless there appears to be error in law (including error in appreciating or applying the rules of evidence or the judicial methods of weighing evidence) or miscarriage of justice. Where no error in principle or law was found in the method adopted by the High Court in arriving at its valuation of land which had been compulsorily acquired, the Privy Council refused to go into the question of valuation raised in an appeal preferred to it under
- LAND ACQUISITION ACT—conclid.**
 sec. 54 of Act I of 1894, as amended. **NOORJOI RUSTOMJI v. GOVERNMENT OF BOMBAY** ... 208
- LANDLORD AND TENANT—Ejectment—Rent, payment of, as marfatdar—Marfatwari rent receipts, grant of, if amounts to recognition of tenancy—Title as tenant acquired by prescription—Kabuliyat, construction of—Heritability.]** It is not always a fact that where rent receipts are granted with the word "marfatdar" it is conclusive that there was no recognition by the landlord of the person who pays the rent as a tenant but the Court should determine in each case whether on a consideration of all the facts a legal inference can be drawn that there has been a recognition establishing the relationship of landlord and tenant between the parties. Where a tenant died in 1902 and rent was paid by his heirs who had no heritable interest from that date up till 1915, and rent receipts were given to them as marfatdars. *Held*—That in the circumstances of the case a legal inference could be drawn that the landlord who was entitled to take khas possession on the death of the tenant not having done so but having allowed the heirs to remain in possession and received rent from them, his conduct amounted to recognition of them as tenants. **Prabhabati Dasi v. Talbatunnessa Choudhurani**, 17 C. W. N. 1088 (1913), referred to. That the heirs of the tenant also acquired the right to remain on the land as tenants by prescription. Where in a kabuliyat the other clauses were not incompatible with the construction that a mere grant for life was intended but there was a clause that "we as well as our heirs and representatives shall be bound and liable in the same manner as we are, by all the terms and the conditions of this kabuliyat." *Held*—That the interest conferred on the lessee was heritable. **SADANANDA MANDAL v. KUMAR JYOTISH KANTHA ROY** ... 787
- Tenancy, whether permanent—Land in Municipality let out for dwelling-house, held for generations at unchanged rent, inspite of abnormal rise in value—Inference of permanency, if legal.]** In a suit for ejectment of a tenant after notice to quit, the facts found were that there was no lease creating the tenancy, that it had come down to the Defendant by a series of successions, that the rent had not been changed for at least 65 years, that the land was let out for dwelling purposes and was situated within the Howrah Municipality and that the rent had remained unchanged though the value of the land had increased abnormally. *Held*—That the Court was right in its conclusion that the tenancy was a permanent tenancy. **BIRESWAR MOOKHERJI v. SM. TROILOKHYA DAS** ... 700
- Right of landlord to re-enter on abandonment of holding—Transfer of non-transferable holding**

- LANDLORD AND TENANT**—*concl.*
 and making over possession to transferee—
 [Necessary inference as to abandonment.]
 For a landlord seeking to re-enter it is not
 necessary to prove as a fact that the hold-
 ing has been abandoned but it is a direct
 inference from the fact that the entire
 holding was sold and possession given to
 the purchaser. **PROSONNA KUMAR DE
 v. ANANDA CHANDRA BHATTACHAR-
 JEE** ... 231
- ... Breach of cove-
 nant during subsistence of original lease—
 Waiver of such breach by acceptance of
 rent. See Calcutta Rent Act, **OFFICIAL
 TRUSTEE OF BENGAL v. W. G. BOW-
 DEN** ... 199
- LEGAL PRACTITIONERS ACT (XVIII of
 1879), ss. 12, 13, 14, proceedings under, if
 proper when allegation on which action
 taken amounts to charge of commission of
 a specific criminal offence.] Where the al-
 legation against the persons against whom
 proceedings, under the Legal Practitioners
 Act were taken amounted to a charge of
 aiding and abetting or conspiring to com-
 mit a criminal offence, viz., causing evi-
 dence to disappear for the purpose of
 screening an offender: *Held*—That the
 correct procedure to be followed was that
 proceedings under the Legal Practitioners
 Act should not be taken but that if it was
 thought necessary to take action it should
 be by way of a criminal prosecution. In
 this view the High Court discharged the
 Reference. **IN THE MATTER OF RAJEN-
 DRA KUMAR DUTTA** ... 186**
- LETTERS PATENT, cl. 15**—Order giving leave
 to defend on furnishing security in default
 decree against the Defendant, if a judgment.
 See under Rules of the High Court. **CHA-
 TTU LAI, MISSER v. THE MARWARI
 COMMERCIAL BANK LD.** ... 298
- ... cl. 15—Judgment, what is.
 See Judgment. **BALDEODAS LOHEA v.
 SHUBCHURN DAS GOENKA** ... 104
- ... **BOMBAY, cl. (15)**—Judg-
 ment, meaning of.] The term "judgment"
 in the Letters Patent of the High Court
 means, in civil cases, a decree and not a
 judgment in the ordinary sense. **SEVAK
 JEBANCHOD BHOGILAL v. THE DA-
 KORE TEMPLE COMMITTEE** ... 439
- LIMITATION**—Title by adverse possession for
 over twelve years—Usufructuary mort-
 gage, possession of—Usufructuary mort-
 gages, of can retain possession after pay-
 ment of his mortgage money in full be-
 fore the expiry of the period.] The suit
 land was mortgaged to one Rooke in
 1878, then to Khelaram in 1888 by way
 of usufructuary mortgage to retain pos-
 session till April 1908 and then to Respon-
 dents' father in 1899 who bought it in
 February 1901, paid Khelaram the entire
 mortgage money found due to him up to
 April 1908 and entered into possession
 then. The Appellants dispossessed the
 Respondents in December 1917 and
 alleged title by purchase from the trans-
 ferees of Rooke who had in 1891 bought
- LIMITATION**—*concl.*
 under his own mortgage decree, to which
 Khelaram was no party. At the time of
 Rooke's purchase and thereafter the land
 was in Khelaram's possession. Rooke
 never obtained possession: *Held*—That
 the Respondents acquired title to the dis-
 puted land by adverse possession from Feb-
 ruary 1901 till dispossessed by the Appel-
 lants in December 1917. The usufructuary
 mortgage terminated in 1901 when the
 mortgagee Khelaram was paid off in full.
 Khelaram had no right to retain possession
 since February 1901 when the usufructuary
 mortgage was redeemed upon payment in
 full of the mortgage money; adverse pos-
 session as against Khelaram, Rooke and
 his transferees began in February 1901
 and not from April 1908. **Ram Narain
 Sahoo v. Bandi Prasad, I. L. R. 31 Cal. 737
 (1904), distinguished. Per Mukerji, J.**—A
 paper-book containing translations of the
 Appellants' documents of title relied upon
 by them was not itself secondary evidence
 of their contents, but if a proper case were
 made out for the reception of such evi-
 dence then in conjunction with the re-
 quisite oral evidence it would prove the
 said contents. Correct practice in dealing
 with such evidence, when tendered, indica-
 ted. **RAMANUJ RAI v. DAKSHINES-
 WAR RAI** ... 257
- ... Deed of endowment by a
 Hindu—Dedication of property to deity
 and appointment of trustees to manage—
 Properties, if vested in trustees for a
 specific purpose—Applicability of sec. 10,
 Limitation Act. See under Endowment.
**GANGAPRONAD CHAUDHURY v. KULA-
 DANANDA ROY** ... 415
- LIMITATION ACT (IX of 1908), s. 5**—Appeal
 filed beyond time under wrong legal advice
 —"Sufficient cause." See Bengal Tenancy
 Act. **DEBENDRANATH SINHA v. NA-
 GENDRA NATH SINHA** ... 479
- ... Sch. I, Arts. 142, 144—At-
 tachment of property under sub-s. (4), s.
 143, Criminal Procedure Code (Act V of
 1898), in proceeding under—Possession,
 whose, in law pending attachment—Posses-
 sion with person in whose favour order
 made.] For the purpose of limitation, pos-
 session during the period during which a
 disputed property is kept under attach-
 ment under sub-sec. (4) of sec. 143, Cr.
 P. C., is in law the possession of the party
 whom the Magistrate as a result of the
 proceeding finally declares to be entitled to
 retain possession as the party who was
 in possession at the date of the proceeding.
**ABINASH CH. CHOWDHURY v. TARINI
 CHARAN CHOWDHURY** ... 541
- ... s. 12—Order re-
 fusing to admit appeal as being out of
 time, if a decree—Limitation Act (IX of
 1908), s. 12—Time required for preparing
 copy of decree, if to be deducted when
 stamps and folios supplied sufficient for
 copy of decree only but not for both
 judgment and decree.] An order dismis-
 sing of an appeal in the following terms:—

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"The appeal being time-barred is not admitted" amounts to a dismissal of the appeal and is a decree. Where the judgment of the Munsif was pronounced on the 6th October and the same day the Appellant applied for a copy of the judgment and decree and put in a certain number of folios and stamps by guess, which were sufficient for the copy of the decree only, and on the 8th October the actual number of stamps and folios required was notified and the Court was closed after the 8th October and reopened on the 12th November and the remaining number of stamps and folios were filed on the 14th November and the copy of the decree was ready for delivery on the 16th November, and the appeal was filed before the District Judge on the 19th November: Held—That the Appellant was entitled to deduct the period from the 6th October to the 16th November under sec. 12 of the Limitation Act. That assuming that the actual number of folios for the copy of the judgment was not filed in proper time, that did not debar the Appellant from deducting the period required for the preparation of a copy of the decree for which the requisite number of folios had been filed. When an application for extension of the period of time for presenting an appeal is made under sec. 5 of the Limitation Act, it is desirable that the lower Appellate Court should record its opinion as regards that application, even when it is rejected. ADARPIA CHOU-DHIRANI v. RAMPRATAP AGARWALA 926

—, s. 19—Acknowledgment, when to be made—What it should be—Doctrine of English law—Difference between the Indian and English law.] Per Greaves, J.—Other requirements being complied with, under sec. 19 of the Limitation Act, it is sufficient to take a case out of the statute if there is an acknowledgment of the liability, even if that acknowledgment is not necessarily made to the Plaintiff or to some body through whom he claims. *Mylapore v. Yeo-Kay*, L. R. 14 I. A. 168: s. c. I. L. R. 14 Cal. 801 (1887), considered. *Moniram Seth v. Seth Rup Chand*, I. L. R. 33 Cal. 1047: s. c. 10 C. W. N. 874 (P. C.) (1906), *Sukhamoni v. Ishan Chunder*, 2 C. W. N. 402 (P. C.) (1898), *Majumdar Hiralal Itchhalal v. Dossai Narsilal Chaturbhujdas*, 17 C. W. N. 573 (P. C.) (1913) and *Guru Charan Saha v. Surendra Kristo Roy*, 19 C. W. N. 263 (1913) referred to. Per Bankin, J.—Sec. 19 of the Limitation Act is free from the doctrine of English Law which puts the value of an acknowledgment upon its being the equivalent of a new promise to pay. All that is required under that section is that there must not be any doubt about the identity of the debt. Once it is clear that the Defendant admits that he owes the money and it is clear what debt he has admitted, it is no answer to say that the acknowledgment is not made to the Plaintiff or to any person through whom the

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Plaintiff claims. SHAMSUD ALI v. MIRJAM ELIAS ... 968

—, Art. 11A—Limitation for suit by auction-purchaser under r. 103, Civil Procedure Code. See Under Civil Procedure Code. *AMBICA CHARAN BAKTA v. RAM PROSAD CHATTERJEE* ... 163

—, Art. 47—Suit for recovery of possession by party against whom order has been made under sec. 145, Criminal Procedure Code (Act V of 1898)—Section, how far applicable: where portion of Magistrate's order legal and portion illegal—Art. 120 scope and applicability of—Civil Procedure Code (Act V of 1908), Or. 2, r. 2, scope and applicability of—Exhaustion of reliefs in respect of one cause of action as distinguished from inclusion in the same action of different causes of action—*Res judicata*—*Estoppel*.] In a proceeding under sec. 145, Cr. P. C., in respect of a jalkar the Magistrate found that the first party had the right to fish by large nets only during a certain period of the year and the second party the right to fish by small nets during that period and both by large and small nets for the rest of the year and directed that the parties should be entitled to catch fish in the manner aforesaid. In 1910 the first party to the proceeding under sec. 145 as Plaintiffs brought a suit for a declaration and injunction that the Defendants, the second party to the proceeding under sec. 145, had no right to catch fish with small nets or with any other means during the period the Plaintiffs were entitled to catch fish in the jalkar and further asked for a declaration that the Plaintiffs had the right to catch fish throughout the year. The suit was decreed in a modified form in respect of a portion of the jalkar in which it was held the Defendants had no right to catch fish with small nets or with any other means during the time the Plaintiffs were entitled to catch fish and a permanent injunction was granted accordingly. The Defendants again interfered with the Plaintiffs' rights and in 1917 a suit was brought by the Plaintiffs in respect of the same portion of the jalkar asking for a declaration and permanent injunction that the Defendants had only the right to catch fish with small nets during a particular period: Held—That the suit was not barred by limitation under Art. 47 of the Limitation Act. Per Suhrawardy, J.—That under sec. 145, Cr. P. C., the Magistrate was only entitled to decide the question of possession at the date of the proceeding. His order that the Defendants were in possession of the fishery throughout the year whilst the Plaintiffs were entitled to possession jointly with the Defendants for a portion of the year was without jurisdiction as also the portion of the order laying down the way in which each party should exercise his possession. Art. 47 of the Limitation Act prescribes a period of three years

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for a suit by a party against whom possession has been found under sec. 145, Cr. P. C. That article has no relation to any portion of the order of the Criminal Court which has no reference to the question of possession. The suit of 1910 was brought within three years from the order of the Magistrate so far as it decided the question of possession and was therefore rightly constituted and within time. Moreover as the order of the Magistrate did not dispossess the Plaintiffs or maintain Defendants' possession to the exclusion of the Plaintiffs, Art. 47 did not apply. As regards Art. 120 the Magistrate's order as to the mode of possession or the use of large nets by the Defendants could not give a cause of action for a suit which, if not brought within the statutory period, made that portion of the order binding between the parties. The intention of the law of limitation is that if no suit is brought within the statutory period the remedy is lost and in case of an order of a competent Court it remains binding between the parties. The cause of action was not the Magistrate's order under sec. 145 but the infringement of Plaintiffs' right, and when the Defendants again started doing what they had no right to do, it gave rise to a fresh cause of action. That it was also a case of continuing wrong. That the suit was not barred under Or. 2, r. 2, C. P. C., which is directed to securing the exhaustion of the reliefs in respect of a cause of action and not to the inclusion in one and the same action different causes of action even though they arise out of the same transaction. The order under sec. 145, even if valid, gave rise to two different causes of action: one in respect of the Plaintiffs' period of the possession of the fishery and the other in respect of the Defendants' period. That the decision in the suit of 1910 was *res judicata* as to the size of the nets and, even apart from the question of *res judicata*, the Defendants, having invited the Appellate Court to decide the question although it was not necessary for the purposes of that suit, were estopped from re-agitating the matter. *Per* Graham, J.—That the order under sec. 145 was superseded by the decree in the first suit; and every fresh infringement of the Plaintiffs' right gave rise to a fresh cause of action. That as regards the applicability of Or. 2, r. 2, there was no necessity in the earlier suit to ask for a negative relief in regard to the Defendants' claim, since the declaration prayed for as regards Plaintiffs' right excluded the Defendants' claim, and there was thus no relinquishment of relief within the rule. That the decision in the suit of 1910 was *res judicata* as to the size of the nets. RAHINI NANDAN CHAUDHURY v. JADUNANDAN CHAUDHURY ... 573

to set aside award. KIRKWOOD v. MAUNG SIN ... 539

Art. 97—Purchase money, recovery of, owing to the failure of

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the judgment-debtor's title—Limitation, if runs from the date of the decision declaring that the judgment-debtor had no title at the time of sale or from loss of possession—Rateable distribution.] The judgment-debtor's properties were separately sold in different lots in execution of a money decree and bought by the decree-holder himself (Plaintiff-Respondent). The Defendants' (Appellants') predecessor obtained another decree for money against the same judgment-debtor and a portion of the purchase money in deposit was given to him under Court's order upon his application for rateable distribution. The sale of some lots out of the several lots sold was ultimately set aside and declared to be invalid on 11th December 1916 on the ground that the judgment-debtor possessed no saleable interest therein at the time of sale but that the same belonged to his wife. The Plaintiff-Respondent brought a suit on 4th September 1920 against the Defendants-Appellants for recovery of a proportionate share of the purchase money paid by him for those lots, and which the predecessor of the Defendants had taken out of Court under the above order: Held—That the period of limitation in this case commenced to run from the 11th December 1916, the date on which the auction sale was declared to be invalid on account of the judgment-debtor's want of title, and not from the earlier date on which the Plaintiff lost possession. *Quare*—Whether Art. 97 of Sch. I of the Limitation Act applied to the case. *Amrita Lal Bagchi v. Jogendra Lal Chowdhury*, I. L. R. 40 Cal. 187 (1912), approved. *Juscurn Bold v. Pirthi Chand Pal*, I. R. 46 I. A. 52; s. c. I. L. R. 46 Cal. 670; 23 C. W. N. 721 (1918) and *Gurshidawa v. Ganawa*, I. L. R. 22 Bom 783 (1897), referred to. RAJRAJ BOYED v. RAJA BEJOY SINHA DUDHORIA ... 79

Arts. 134, 144—Sale or mortgage by shebait not supportable for necessity—Possession of alienee, if adverse and from when.1 There is no question that the possession of the alienee of debutter property becomes adverse from the death of the shebait who made the alienation. Where the alienation is in the form of an unauthorized lease, if the lessee's possession is consented to by the succeeding shebait, the consent being referable to a new tenancy created by him, there is no adverse possession until his death. This reasoning, however, is not applicable to the case of a sale. *Vidya Varuthi Tirtha v. Balusami Ayyar*, I. R. 49 I. A. 302; s. c. I. L. R. 44 Mad. 531; 26 C. W. N. 537 (1901), *Subbaiya Pandaram v. Mohammed Mustafa Marakayar*, I. R. 50 I. A. 295; s. c. I. L. R. 46 Mad. 751; 28 C. W. N. 493 (1923), *Nalinallal Marakayar v. Ramanathan Chettiar*, I. L. R. 47 Mad. 337; s. c. 28 C. W. N. 809 (P. C.) (1923) and *Lal Chand Marwari v. Ramrun Gid*, I. L. R. 4 Pat. 312; s. c. 30 C. W. N. 721 (P. C.) (1923), referred to. RAJA MANINDRA NARAYAN ROY v. SARAT CHANDRA BANDOPADHYA ... 740

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Art. 142—Suit to recover diluviated land which has reformed—Onus on Plaintiff to prove possession within 12 years, actual or constructive—Possession, when will be presumed in Plaintiff's favour.] Cases of diluviated land or jungle or waste lands are no exception to the general rule that a Plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of the date of the suit. To do this he may rely on a variety of evidence. For instance, he could show that he was in possession up to the time of diluvion and that the land remained under water or incapable of being possessed up to a point of time within the statutory period, or even though out of possession he might show that he had a subsisting title, in which case possession would be considered to go back to him when the trespasser was evicted by vis major when the lands were washed away. **PANCHANON SARKAR v. RANI BASANTO KUMARI DASI** ... 497

Arts. 142, 144—Alienation by mahant of math—Suit to recover by successor—Starting point of limitation—Indian Evidence Act (I of 1872), sec. 108, presumption of death, nature of, under—Onus of proof as to time of death.] If a person has not been heard of for not less than seven years, there is a presumption of law that he is dead; but at what time during the period of his disappearance he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time during that period lies upon the person who claims a right, to the establishment of which that fact is essential. There is no presumption that the death took place at the close of the first seven years of such disappearance. **Rango Balaji v. Mudiyeppa**, I. L. R. 23 Bom. 296 (1898) and *In re Phene's Trusts*, L. R. 5 Ch 139 (1869), referred to. In the case of an unauthorised alienation by a head of a math: **Quære**—Whether the statute of limitation began to run in favour of the alienee from the date of the wrongful alienation, or from the date of the death of (or final abandonment of office by) the mahant who alienated the property. But the suit in this case which was commenced by his successor more than twelve years after his predecessor's death was barred in any event. **Damodar Das v. Lakhan Das**, I. L. R. 37 I. A. 147; s. c. I. L. R. 37 Cal. 895; 14 C. W. N. 589 (1910) and **Vidya Varuthi Thirtha v. Balusami Ayyar**, L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921), referred to. **LAL CHAND MARWARI v. RAMRUP GIR** ... 721

Art. 182 (5)—Execution of decree—Application for execution returned for amendment—Formal defect—Application amended but not re-filed within time allowed—Application "in accordance with law"—Limitation—Civil Procedure

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Code (Act V of 1908), Or. 21, rr. 11 to 14, 17.] Where an application for execution filed on the 25th August 1923, which was in time, was returned on the ground that there were omissions with regard to the amount of interest and costs to which the decree-holder was entitled, and it was ordered to be re-filed within ten days after the necessary corrections, but it was not re-filed within that time, and on the 28th June 1924 a fresh application for execution was made giving the necessary particulars and the previous application of the 25th August 1923 was also filed along with it, and thereupon the Court ordered the return of the previous application on the ground that it was not necessary as a fresh one had been filed, and objection was taken by the judgment-debtors that the application filed on the 28th June was barred by limitation: **Held**—That the application made on the 25th August 1923 was one "in accordance with law" under Art. 182 (5) of the Limitation Act and the present application for execution was not barred by limitation. The question whether an application for execution or for taking step in aid of execution is one "in accordance with law" is to be determined with reference to the circumstances of each particular case. **Per Suhrawardy, J.**—The words "in accordance with law" in Art. 182 (5) should be taken to mean that the application, though defective in some particulars, was one upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, such an application is not in accordance with law. If upon the application the Court is able to take further steps in execution it cannot generally be said that such an application, if not defective in material and substantial particulars, is an application not in accordance with law. The only defect, in the present case, was the omission of certain sums which the decree-holder was entitled to receive from the judgment-debtors but which he did not mention in the application for execution and so there was no bar to the Court levying execution for the lesser sum claimed by the decree-holder. If an application is presented to the Court and the Court takes judicial action upon it either in registering the application or by returning it for amendment, such an application, though not filed within the time fixed by the Court, should not be considered as not having been made. **Per Page, J.**—Where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits or returns the application or allows such application to be amended. **Gopal Sah v. Janki Koer**, I. L. R. 23 Cal. 217 (1906). **Mathura Prasad v. Mussamat Anurag Koer**, 14 C. W. N. 181 (1916). **Fuzloor Rahman v.**

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sec. 105—Additional rent for additional area,		myra trees: Held—That sec. 12 of the Act	
if recoverable, where the putnidar is in		applies and the landholder has no claim	
possession of land according to the record-		for compensation for trees growing on the	
of-rights and the Plaintiff does not chal-		land which is held by a raiyat though no	
lenge the record-of-rights in the suit.]		mention of trees be made in the lease. Sec.	
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the lands of three villages as recorded in		a person on whose land they do not grow	
the settlement record-of-rights. The land-		and the landholder is entitled to the	
lord sued for additional rent on the allega-		full value of the trees cut. Murugappa v.	
tion that the putni was originally in respect		Ramanathan, 1 L. W. 881 (1914), approved.	
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putnidars were in possession of more lands		by a raiyat but were let as a separate entity	
than they had taken settlement of. The		in his lease. RAJA RAJESWARA SETU-	
landlords did not challenge the correctness		PATI AVARGAL v. RAMID ROWTHEN 841	
of the record-of-rights, nor did they prove			
that the "lot" in the putni potta meant		MAHOMEDAN LAW—Dower—Widow's right to	
only one village: Held—That the word "lot"		retain possession till debt paid, nature of	
in the parlance of putni potta usually		—Right, if like that of mortgagee—Decree,	
meant a group of villages. As the Plaintiffs		directing heirs to recover on payment of	
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		possession to vendee, effect of.] The posses-	
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ration about a person as to unsoundness of		peaceably and lawfully acquired, the right	
mind and incapacity to manage his affairs		of the widow to retain it till her dower-debt	
when justifiable—Different factors to be con-		is paid is conferred upon her by Mahomedan	
sidered by the Court.] Under the present		law. The widow has no estate or interest	
Lunacy Act, what the Courts have got to		in the property as has a mortgagee under a	
decide is whether the person before them		mortgage, ordinary or usufructuary, and	
is of unsound mind and is incapable of		the principles applicable to mortgages can-	
managing himself and his affairs and under		not be safely applied by analogy to such	
the provisions of sec. 65 of the Act, it is open		a case. In a suit by the other heirs of the	
to the Courts to find that a man is of un-		deceased husband to recover immediate pos-	
sound mind so as to be incapable of manag-		session of their shares of the estate on their	
ing his affairs but that he is capable of		paying to the widow such amount as should	
managing himself and is not dangerous to		after proper deductions be found due to her	
himself or to others. It is necessary to find		on account of dower, the decree was that on	
that the person is both of unsound mind		paying the amount found due by a fixed	
and incapable of managing himself and his		date, the Plaintiffs would be put in posses-	
affairs. Where the Appellant was declar-		sion of the shares in question. The pay-	
ed by the District Judge to be of un-		ment was never made and more than 42 years	
sound mind and incapable of managing his		after the date fixed for payment in the	
affairs the High Court on a consideration		decree a fresh suit was instituted for reco-	
of the evidence on the record and exami-		very of possession on the ground that the	
nation of the Appellant himself vacated		dower-debt had been wiped out from the	
		usufruct or if any portion of it was still un-	

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discharged on condition of the Plaintiffs paying the amount that might be found due upon accounts being taken: *Held*—That upon failure of the Plaintiffs in the previous suit to make the payment as directed in the decree, the widow did not become absolute owner of the property, but that the parties were relegated to the position in which they were before the suit; the *res* in the previous suit being different from that of the later suit, the trial of the later suit was not barred by *res judicata*. That the suit was not barred by limitation. That when the widow transferred possession of the properties to certain vendees, she lost her right to retain possession. *Quære*.—Whether the widow could assign the dower-debt and her right to hold possession. *MUSST. MAINA BIBI v. CHAUDHRI VAKIL AHMAD* ... 673

----- Sunni Hanafi School—
Divorce, given by husband to wife under compulsion—Divorce embodied in a compromise with a third person but addressed to wife and not mere acknowledgment of divorce given, if effective.] Under the Hanafi School of Sunni law, a divorce pronounced under compulsion is valid and is none the less so because it is contained in a written document, provided this document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion. *JOMINA AKTAR KHATUN v. HAFIZ- UDDIN KHAN* ... 178

-----, Marz-ul-mout, waki executed in, operation of—Tests of death illness—The subjective test of apprehension of death—Capacity to pursue ordinary avocations and to stand up for prayers—The one year rule—Possession of senses and faculties.] T, a very old man and a Mahomedan, was attacked by paralysis of the lower limbs in February 1895; he at once became a helpless invalid, permanently confined to his bed and could not perform the ordinary offices of nature without assistance and could not even leave his bed for religious exercises. On 20th March 1895, he made a wakf of his properties. He lingered on in the same condition till his death in November 1895 from the same illness: *Held*—That the wakf having been made in death illness, operated only to the extent of a third of his properties. *Per Walmsley, J.*—That the wakf having been made when T was under an immediate apprehension of death, the months of lingering before actual death did not take the case out of the doctrine. *Per Mukerji, J.*—That the crucial test as settled by the authorities was whether there was an apprehension of death in the mind of the donor as distinguished from apprehension caused in the minds of others. The possession of one's senses and mental faculties is no index of this apprehension. There is no hard and fast rule that continuance of the illness without change for one year must necessarily take the case out of the

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- operation of the doctrine. *Quære*.—Whether inability to attend to ordinary avocations is a *sine qua non* to the application of the doctrine. *KARIMANISSA BIBI v. IIA-MEDULLA* ... 129
- MAINTENANCE, right to, if can be attached and sold. See C P. C., sec. 60. *LAL RAJINDRA NARAIN SINGH v. MUST. SUNDAR BIBI* ... 816
- MALICIOUS PROSECUTION, suit for damages for—Giving information to police which leads to prosecution, if prosecution—What Plaintiff has to prove, innocence or termination of criminal proceedings in his favour.] Where, as in India, prosecution is not private, giving information to the police which leads to prosecution amounts to prosecution for the purposes of a suit for damages for malicious prosecution. In an action for malicious prosecution, the Plaintiff has (amongst other things) to prove not that he was innocent of the charge upon which he was tried, but only that the proceedings complained of terminated in favour of the Plaintiff, if from their nature they were capable of so terminating. *Basebe v. Matthews, L. R. 2 C. P. 684, 986 (1867); Weston v. Beaman, 27 L. J. Ex. 57 (1857) and Huntley v. Simson, 27 L. J. Ex. 131 (1857), referred to. BALBHAD-DAR SINGH v. BADRI SAH* ... 866
- MANAGING AGENCY to Limited Company for fixed period—Circumstances justifying dismissal of Managing Agent before termination of stipulated period. See under Contract. *GUS ALEXANDER MACKENZIE v. HIMALAYA ASSURANCE CO.* ... 440
- MARFATWARI rent receipts, grant of, if amounts to recognition of tenancy. See Landlord and Tenant. *SADANANDA MANJAL v. KUMAR JYOTISH KANTHA ROY* ... 787
- MATH—Alienation by Mahant—Suit to recover by successor—Starting point of limitation. See under Limitation. *LAL CHAND MAR-WARI v. RAMRUP GIR* ... 21
- MATWALLI of wakf property, if can grant permanent lease without leave of kazi. See Wakf Property. *BIBI JABEDA KHATUN v. SYED MAHOMED MOZAFAR ALI HOS-SAIN* ... 807
- MERGER, a question of intention—Pre-existing debt on an original hatchitta, whether merges in a subsequent mortgage for the same debt.] Where for money lent on a hatchitta, a subsequent mortgage was executed for the same debt, but in which there was no express covenant to pay: *Held*, construing the mortgage deed—That the original debt had not merged in the mortgage. Merger is a question of intention. Such intention is to be gathered from the deed itself and surrounding circumstances. *Ethel Georgina Kerr v. Clara B. Ruxton, 4 C. L. J. 510 (1906), referred to and approved. RAMLAL MUKLIDHAR v. JOGENDRO KRISHNA RAY* ... 58
- MINOR—Contract for sale by guardian to pay off debts, if specifically enforceable—Contract, if enforceable against adult parties in respect

- MINOR—consolid.**
of their interest.] Although a sale by a guardian of a minor of the latter's property to pay off the debts of his father is binding on the minor, a contract for such a sale stands on a different footing; and a contract by the guardian to sell the minor's property for the payment of his father's debts is not specifically enforceable. *Mir Sarwar Jan v. Fakhruddin Mohamed Choudhury, I. L. R. 39 Cal. 292: s. c. 16 C. W. N. 74 (P. C.) (1911),* referred to. The contract may be enforced with variation in respect of the shares of the adult co-executants, though it fails in respect of the share of the minor. *SRI-NATH BHATTACHARYA v. JATINDRA MOHAN CHATTERJEE* ... 263
- NATIVE STATE,** decrees of Court in, transferred for execution to British India—Objection as to jurisdiction, if maintainable. See *C. P. C.*, sec. 3. *PANCH KARI MAJUMDAR v. GIRIDHARI MAL MOHESRI* 785
- NEXT FRIEND,** suit by, not for benefit of infant—Court's jurisdiction to dismiss suit. See suit. *CHANDRA SEKHAR MULLICK v. GONESH CHANDRA DE* ... 327
- ORIGINAL SIDE,** High Court—Rules for service of summons. See *C. P. C.* *SUGAN CHAND DAGA v. KANAPPA CHETTY* ... 731
- ORIGINAL SIDE RULES,** High Court—Order giving leave to defend, if appealable. See Rules. *MEGHJEE MANSING v. KALORAM LACHMI NARAIN* ... 706
- ODDH ESTATES ACT (I of 1869), s. 13—Amendment Act (III of 1910), sec. 6, if operates retrospectively—**Property included in List V, bequeathed to younger son under unregistered Will, effect of—Suit by Hindu law heir to recover from widow of legatee—Compromise by widow retaining property for life, but acknowledging property to be subject to Oudh Estates Act, how far valid as family settlement—Suit by presumptive reversioner against Hindu widow—Decision, if binds whole body of reversioners—Civil Procedure Code (Act V of 1908), sec. 11, Exp. VI.] Reversioners possess individually what has been called a *spes successionis*, the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving any one of them surviving entitled to take immediate possession after her, unless the husband has left the power to her to adopt a son. But the *spes* is common to them all; so is the danger by the widow's act against the interest of the reversioners. The right to sue to set aside that common danger is given for obvious reasons of policy and convenience to the person who, if the widow died at the moment, would take the estate. But the result, favourable or otherwise, affects the reversioners as a body. Under Exp. VI to sec. 11 of the Civil Procedure Code, in the absence of anything to show that the litigation by the presumptive reversioner was collusive or vitiated by fraud or laches on his part in conducting the suit or in asserting his reversionary right, the decision is res judicata against the reversioners as a
- ODDH ESTATES ACT—consolid.**
body. Sec. 6 of the Oudh Estates Amendment Act (III of 1910) is not retrospective. A taluqdar purported to bequeath a property included in List V prepared under the Oudh Estates Act (X of 1869) to his younger son, but the Will was not registered as required by sec. 13 of the Act. Held—That with the failure of the bequest the property passed out of the Act and became subject to Hindu law and did not once more become subject to that Act on the passing of Act III of 1910. That in a suit by the heir of the taluqdar according to Hindu law to recover the property from the widow of the younger son who had been in possession up to his death, it was prudent and reasonable on the part of the widow to enter into a compromise with the heir under which she was left in possession of the property for life, on her acknowledging that the estate was subject to Act I of 1869, and it should be upheld as a family settlement, specially as the compromise gave effect to the rule of the Hindu law which applied to the case, the acknowledgment of the widow that the property was subject to Act I of 1869 not affecting the rights of the parties on the basis of the law governing the succession. It is not open to Courts in India to question any principle enunciated by the Judicial Committee, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them to question its decision on any particular issue of fact. *MATA PRASAD v. NAGESHAR SAHAI* ... 628
- PARSI ENDOWMENT—**Fire Temple of Rangoon, beneficiaries of, who are—Right of non-Parsi convert to Zoroastrianism to enter and worship. See Endowment. *SUKLAT v. BELLA* ... 289
- PARTIES—**Person added as co-Plaintiffs under alleged assignment of share in subject of suit—Decree, whether can be made jointly in favour of all Plaintiffs without the consent of Defendants or without production of deed of assignment by original Plaintiff—Proper decree in such a case, safeguarding rights of added Plaintiffs.] Persons who assert that they have a derivative interest in the stake of a suit cannot, by getting added as Plaintiffs, be associated in a decree in favour of the person who has the only real title. The Defendants have an interest in this as well as the Plaintiff, and it is at least safe to say that no decree would be granted to the real Plaintiff and the added Plaintiffs jointly unless there had either been a consent signified by the Defendants or a legal conveyance or assignment produced by the real Plaintiff of a share of the subject of the suit. Judgment was given in favour of the real Plaintiff but with the addition that this was to be without prejudice to the added Plaintiffs to recover in respect of any conveyance or assignment made or of any contract to convey or assign such

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PARTIES—concl'd. share of the property recovered under the judgment as might appertain to them in respect of such conveyance, assignment or contract. MUST. LAJWANTI v. SAFA CHAND ...	50	
PARTITION by Civil Court—Grant of permanent lease by co-sharers before partition—Other co-sharer, to whom land allotted, it takes it subject to lease.] A person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers. NIRANJAN MUKHERJEE v. SM. SOUDAMINI DASI ...	511	
PARTNERSHIP BUSINESS—Lunacy of partner, effect of, if dissolution—Contract Act (14 of 1872), ss. 254, 254—Dissolution, how affects rights of persons dealing with firm without notice—Rights of persons who commenced dealing with firm after dissolution.] Lunacy of a partner does not ipso facto dissolve a partnership. It provides a ground for dissolution and if there has been no dissolution in fact by reason of the lunacy of a partner, the partnership must be deemed to continue. Sec. 254 of the Contract Act preserves, as against persons known to have been partners, the rights of persons who have dealt with the firm subsequently to the dissolution of the partnership or change of partners without notice of such dissolution or change. The application of the section is not confined to persons who had dealings with the partnership before the dissolution. JAGAT CHANDRA BHATTACHARYA v. GUNNY HAJEE AHMED ...	11	
PERMANENT LEASE OF PROPERTY , if can be clogged with condition that certain heirs will not succeed—Such stipulation by lessee not operative and opposed to general principles of inheritance—Right of lessor to khas possession when such excluded heir is in possession—"Putra poutradi Krame," if excludes females.] The Plaintiff granted a permanent lease of a certain property and the lessee executed an <i>ekranama</i> to the effect that his daughter and daughter's sons would not be entitled to succeed as heirs. After the death of the lessee and his widow, his daughter (the Defendant) remained in possession of the property and the Plaintiff sued for khas possession by ejecting her: Held —That the clause in the <i>ekranama</i> regarding the exclusion of the daughter and daughter's sons was inoperative and did not give the landlord the right of re-entry in the event of the nearest heir being the daughter or daughter's son. A subject has no right to impose on land or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable to his case. Even assuming that the clause in question was operative the grantor would have no right of re-entry on the		
PERMANENT LEASE OF PROPERTY—concl'd. failure of other heirs, for the right to possession on the failure of heirs does not revert to the grantor but escheats to the Crown. Per B. B. Ghose, J. —Although the words "putra poutradi krame" literally signify descendants of the male sex they ordinarily mean and include female heirs where by law the estate would descend to such heirs and are apt for conferring an estate of inheritance to either male or female heirs. PANCHUBALA DEBI v. JOTINDRA NATH GOSWAMI ...	821	
PERPETUITY , rule against in England and India. See Succession Act. S. SOUNDARA RAJAN v. C. M. NATARAJAN ...	434	
PLAINT presented in wrong Court returned for filing in proper Court—Amendment of Court Fees Act before return of plaint—Court-fee, if to be paid as under new Act—Plaintiff, if to be credited with amount already paid.] A plaint was filed in a Court which was ultimately found not to have jurisdiction in the matter and the plaint was returned to be presented to the proper Court. Before the plaint was returned the Court Fees Act was amended: Held —That when the plaint which has been returned is presented in a Court of competent jurisdiction the suit must be taken to be instituted on the date of such presentation and court-fee was payable under the amended Act. The Plaintiff would be credited with the amount already paid and was to pay the balance. BIMLA PRASAD MUKHERJI v. LAL MONI DEVI ...	90	
PLEADINGS , amendment of—Discretionary power of trial Court—Circumstances justifying interference of the High Court in revision. See Amendment. ELLODS BANK v. SURAJMULL JALAR ...	928	
POSSESSORY TITLE —Onus of proof of superior title—Concurrent findings of fact.] The Plaintiff-Appellant claimed to have purchased two-thirds share in a leasehold property from the heirs of two brothers and brought this suit for recovery of the said share against the Defendant-Respondent who purchased the whole of the leasehold property from the third brother who was in possession thereof: Held —That since the Courts below found that the Plaintiff could not establish, by the evidence adduced, his allegation that the leasehold property had been acquired by the father of the three said brothers and dismissed the suit, the Judicial Committee would not interfere with this concurrent finding of fact. LAKSHAN CHANDRA MANDAL v. TAKIM DIALJI ...	1009	
PRE-EMPTION —Sale by Mahomedan to Hindu—Mahomedan co-owner of vendor, if can exercise right of pre-emption.] Where no local custom exists with regard to pre-emption amongst Hindus the Mahomedan law of pre-emption does not apply when the person claiming the right of pre-emption and the vendor are Mahomedans and the purchaser is a Hindu. Furman Khan v. Shurut Chunder, 4 B. L. R. 134 (F. B.); 13		

- PRE-EMPTION—concl'd.**
W. R. F. B. (21 (1869), followed. Sec. 9 of Reg. VII of 1832 has been repealed by Act VI of 1871, sec. 24 of which has been substituted for it, but the change effected does not make the decision of the Full Bench in Furman Khan v. Bhurut Chunder, 4 B. L. E. 134 (F. B.); 13 W. R. F. B. 21 (1869), inapplicable. AJITFULLA SAHA v. JADAVNATH CHAKRAVERTY ... 272
- PRINCIPAL AND AGENT—Difference between legal agent and so-called agents who are specially favoured or favouring buyers—Agent selling as principal with a view to make undisclosed profit, if may claim indemnity from principal for loss.] The extension which modern business has given to the terms "agent" and "agency" adverted to. In many trades—particularly, for instance, in the motor-car trade—the so-called agent is merely a favoured or favouring buyer, one who under an overriding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders, but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is by a special provision in the overriding contract forbidden to sell too cheaply or required not to spoil the market by asking too much. Held, however, upon the evidence in the case—That the Respondents were Appellants' "agents" in the legal sense of the term and not favoured buyers, loosely called agents. That, as agents, they had no authority to sell as principals, and could not claim indemnity as agents from the Appellants, their principals; neither could they claim as a link in a chain of buyers and sellers for the damages recovered by the ultimate buyer, because there was no contract of sale between the Appellants and themselves. HOPE PRUDHOMME AND COMPANY v. HAMBL AND HORLEY, LIMITED ... 791**
- PRIVY COUNCIL APPEAL—Neglect on the part of Defendants substantially successful in appeal before Privy Council to lodge Order in Council to High Court—Proper remedy for Plaintiffs to get execution—Civil Procedure Code (Act V of 1908), Or. 45, r. 15 (1).] Where the Defendants were substantially successful in an appeal before the Privy Council and in accordance with the ordinary practice the Order in Council was issued to them but they did not lodge it in the High Court and the Plaintiffs who could not therefore get execution applied to the Privy Council to vary the Order in Council: Held (In rejecting the application)—That it was open to the Plaintiffs to apply to the High Court with a certified copy of the order and ask for a summary order on the Defendants to lodge the order which had been entrusted to them so that execution might follow in terms of the judgment of the Board. SOURENDRO MOITAN SINHA v. HARI PRASAD SINHA ... 938**
- PRIVY COUNCIL, practice as to new argument advanced for the first time. SECRETARY OF STATE FOR INDIA v. JYOTI PROSHAD SINGH DEO ... 745**
- Practice—Concurrent findings of fact, review of.] Where the Courts in India concurrently found that the testator was of sound disposing mind when he executed the Will and that it was truly his Will, being fully alive to the suspicious circumstances attending the execution and to the principles of law in accordance with which the question was to be tried, the Judicial Committee found nothing in the nature of the case to bring it within the limited and rare class of exceptional cases which have occasionally induced the Board to review concurrent findings. The fact that the character of the Will appeared to both the Courts below to have been somewhat of an injustice on the part of the testator towards his wife and children was not a circumstance justifying a departure from the rule. BAI MONGHIBAI v. PRAGJI DAYAL HARIANI ... 462**
- Appeal—Concurrent findings that irregularities in sale were waived—Irregularities, if may be made grounds of appeal to Privy Council.] Where the Courts in India concurrently found that the irregularities in relation to a sale in execution of a decree caused by non-publication of the proclamation or otherwise, on which the Appellants before the Privy Council relied in support of their appeal, had been waived: Held—That no question of law arose until these findings were re-opened, which it was not in accordance with the rule of the Board to do. RAJA GANESHI NARAYAN SAHI DEO v. MANIK TAL CHANDER ... 464**
- PUBLIC DEMANDS RECOVERY ACT (III, B. C., of 1913), sec. 37—Questions relating to irregularities in execution of certificate, must be determined by certificate officer—Bar to suit in Civil Court—Maintainability of suit on the ground of fraud—Sec. 36 (b), scope and effect of.] After an auction sale held in execution of a certificate under the Public Demands Recovery Act, the certificate-debtors first made an application to the certificate officer for setting aside the sale and then brought a suit for a declaration that the sale was void as being obtained by fraud and also on the ground of irregularities in relation to the execution proceedings. It was found that the Plaintiffs failed to substantiate the allegation of fraud: Held—That the allegation of fraud being negatived the Plaintiffs' suit failed under the provisions of the Public Demands Recovery Act. It is not open to a certificate-debtor to evade the provisions of secs. 36 and 37 of the Public Demands Recovery Act by making a fictitious allegation of fraud. Under sec. 37 of the Act any objection relating to the confirmation or setting aside of a sale held in execution of a certificate granted under the Act and arising between the certificate holder and the certificate-**

- PUBLIC DEMANDS RECOVERY ACT**—*conclid.* Page
 debtors or their representatives shall be determined not by suit but by order of the certificate officer before whom such question arises or of such other certificate officer as he may determine. The procedure laid down by sec. 37 must be adopted notwithstanding that the purchasers under the auction sale may be impleaded as being interested in the result. *Prosanna Kumar Sanyal v. Kalidas Sanyal*, I. L. R. 19 Cal. 683 (1892), applied. *BASANTA KUMAR PAL v. HARENDRO NATH MUKHOPADHYAY* ... 36
- PUBLIC DOCUMENTS**, entries in, admissibility of—Exception to rule of hearsay evidence—Reasons therefor—Evidence Act (1 of 1872), sec. 74.] For a series of years since 1852 Plaintiff's family had been shown in the Revenue Records as belonging to a caste of Mohals, which, if true, would make the Plaintiff a Rajput and so a member of an agricultural tribe. The Appellate Court in India discounted these entries on the ground that "there was no proof that whoever first caused this entry to be made had any title to the use of the term Mohal." *Held*—That the reason given was not sufficient to disregard entries in public records made in accordance with the requirements of the law, in a pedigree case. Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. The reason for this exception made to the rule of hearsay evidence is that in nearly all cases, after a lapse of years, it would be impossible to give evidence that the statements contained in such documents were in fact true. *GHULAM RASUL KHAN v. SECRETARY OF STATE FOR INDIA* ... 101
- TEMPLE**—Scheme of management, authorising Temple Committee to change rules, with sanction of District Court—Power given to High Court upon application to change rules—Rules sanctioned by District Judge, appeal against, if lies to High Court—Appeal erroneous, entertained by High Court because appeal not objected to—Original application to High Court refused—Appeal to Privy Council, if lay, and on what ground—Letters Patent (Bombay), cls. 15 and 39—"Judgment" meaning of, in civil cases.] A scheme for the management of a public Hindu temple, confirmed by Order in Council on 14th May 1912, provided *inter alia* for the appointment of a Temple Committee with powers to make rules for the guidance of their business and for the management of the temple and for other purposes specified in the scheme, which on being sanctioned by the District Court were to have the same force as if they were part of the scheme. By another clause (cl. 20) of the scheme it was provided that the provisions of the scheme might be altered, modified or added to by an application to
- PUBLIC TEMPLE**—*conclid.*
 the High Court. A body of rules framed by the Temple Committee was after certain alterations sanctioned by the District Court. An appeal preferred against the order of the District Court sanctioning the rules treating the same as an order under sec. 47 of the Civil Procedure Code and an application under cl. (20) to the High Court for notification of the rules came on before a Judge of the High Court, who, in spite of doubts as to whether the appeal lay against the order sanctioning the rules, entertained the appeal because no objection was taken thereto, and having considered the rules in the appeal, dismissed the application under cl. (20) of the scheme: *Held*—That the appeal did not lie and, as jurisdiction cannot be conferred by consent or acquiescence, should have been rejected. But the High Court could alter, modify or add to the rules sanctioned by the District Judge upon the application under cl. (20) of the scheme. That there was no right of appeal to His Majesty in Council from the decision of the High Court except on the sole ground that the judgment of the High Court and the decree drawn up thereon were incompetent. *SEVAK JERANCHOD BHOGILAT, v. THE DAKORE TEMPLE COMMITTEE* ... 453
- PURDANASHIN LADY**, deed by, law governing enforcement of—Want of independent advice, if in itself fatal—Intelligent execution, onus to prove—Discrepancy between draft and conveyance, how affects the consideration of the question—Duty of Court to apply law for protection of persons under disability strictly.] In the case of an illiterate purdanashin lady disposing of a large proportion of her property without professional or independent advice, the authorities show that independent legal advice is not in itself essential to its validity. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. If the lady really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. The onus is on the party who sets up and relies on a deed executed by a purdanashin lady to satisfy the Court that it had been explained to and understood by her either before execution or after it under circumstances which establish adoption of it with full knowledge and comprehension. Mere execution, though unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions or the unfamiliarity of the subject-

- PURDANASHIN LADY**—concl'd
 matter are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding unless her attention has been directly drawn to it. So if a deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person of the executant's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the executant, subsequently made, that she had not understood what she was doing is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. Fraud, duress and actual undue influence are separate matters. It is a matter of obligation on the Judicial Committee to be strict and unwavering in defence of those strict rules which have been laid down for the protection of the defenceless in India. **FARIDUNNISA v. MUKHTAR AHMED** ... 337
- PUTNI**—Contract between Durputnidar and Seputnidar for durputni rent, maintainability—rent to Putnidar out of seputni rent payable to Durputnidar—Suit by Putnidar against Seputnidar for durputni rent, maintainability of. See **Contract. JIBAN KRISHNA MULLICK v. NIKUPAMA GUPTA** ... 812
- PUTNI TENURE**, nature of—Putnidar, if may use land for brick-making—Injunction, if may issue, at the instance of zamindar—Absence of provision in putni lease about brick-making, if can be construed to prohibit it by implication] Where on the suit of the zamindar the lower Court granted an injunction restraining the putnidar and his lessees from making bricks: Held (on the question whether the relation of zamindar and putnidar was such as to debar the former from getting the relief claimed).—That the only matter to be considered was whether the use made of the land affects the landlord's security in the matter of the rent reserved. If the use does not threaten the complete destruction of the property or if it does not threaten such a change as to endanger the rent the zamindar has no cause for complaint. Held further—That
- PUTNI TENURE**—concl'd.
 it could not be held that because the putni instrument did not authorise brick-making it forbade it by implication. Real nature of putni taluks as distinguished from ordinary leasehold interests pointed out. **SURENDRA NARAIN SINHA v. RAJA REJOY SINGH DEODHORIA** ... 233
- "PUTRA POTTRADIKRAME,"** if excludes females. See permanent lease. **PANCHUBALA DEBI v. JOTINDRA NATH GOSWAMI** ... 821
- RAILWAYS ACT, INDIAN (IX of 1890), s. 72**—Risk note, Form B, consignment of goods by—Non-delivery of complete packages—Suit for damages for non-delivery—Onus—Initial onus on Railway to prove loss—"Loss," meaning of—Suit, proper constitution of, as to parties—Defendant described as "Agent, Railway administration," if sufficient—Appearance by Railway Company to contest suit—Misdescription—Amendment.] Where goods were transmitted by Railway at a lower charge than the ordinary tariff rate upon the consignor signing a risk note, Form B, the burden is upon the Plaintiff, consignor, of proving that the case falls within the exception contained in the risk note, viz., that the goods were lost owing to the wilful neglect of its servants, etc. But before the Plaintiff is called upon to prove that the goods were lost by the wilful neglect of, or theft by, the Railway servants, it must be shown that the goods have been lost; and unless the fact of the loss is admitted by the Plaintiff, the onus is, in the first instance, on the Railway administration to prove that the goods have been lost and it will be then for the Plaintiff to show that the loss was due to the wilful neglect of, or theft by, the Railway servants. The loss, as contemplated by sec. 72 of the Indian Railways Act, is loss of the goods by the Railway and not loss to the consignor. **The East Indian Ry. Co. v. Jogpat Singh**, 28 C. W. N. 1001 (1924), approved. **Smith v. G. W. R. Co.**, [1922] 1 App. Cas. 178, distinguished. The suit having been brought against the Defendant, described as "Agent, East Indian Railway," the Railway Company entered appearance, put in written statement and contested the suit considering itself to be the party sued; and though in the written statement it pleaded that the Plaintiff had no cause of action and no right to sue the Defendant, no specific ground was taken that the proper party had not been sued. Held—That it was a case of misdescription which could be rectified by a formal amendment. **The Saraspur Manufacturing Company v. B. B. and C. I. Railway Company**, 1 L. R. 47 Bom. 755 (1923), referred to. **Ram Das Sein v. Mr. Cecil Stephenson**, 10 W. R. 366 (1868), **Nuboon Chunder Paul v. Cecil Stephenson**, Agent of the East Indian Railway Company, 15 W. R. 531 (1871), Agent, Bengal Nagpur Railway v. **Behari Lal Dutt**, 29 C. W. N. 614 (1925) and **East Indian Railway Company v. Ram Laxman Ram**, 1 L. K. 8 Pat. 230 [1921] Pat. 9 (1923), distinguished.

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RAILWAY ACT, INDIAN—consolid.		
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RECORD-OF-RIGHTS—Whether entry in record-of-rights presumptive evidence only in suit between landlord and tenant as such or in all suits. See under B. T. Act. FAZ-LAR RAHMAN v. GOLAM KADER MIA	683	
REGISTRATION ACT (XVI of 1908), s. 17, sub-sec. (2), cl. (vi)—Registration—Solenama in a rent suit creating a permanent and transferable right in a holding, if admissible in evidence in a subsequent suit, though unregistered—Solenama incorporated in substance in the decree, if requires registration.] In a rent suit by a Hindu widow, a solenama was filed by which a permanent and transferable interest was created in a holding and the suit was decreed at an enhanced rent, the decree stating that the suit be decreed in terms of the solenama which had been filed. Subsequently on the sale of the holding by the tenant, the reversionary heir brought a suit for ejectment on the ground that the tenant had no transferable interest and that the solenama purporting to grant a transferable interest to the tenant was inadmissible for want of registration: Held—That the decree in the previous suit in substance incorporated the solenama as part of the decree, as the decree could not have been passed without reference to the solenama. Further, the solenama, having been used only as an admission by the Plaintiff who had filed it on behalf of the widow, was admissible in evidence without registration. JAGADISH CHANDRA MUKERJI v. KASIK MANDAL	307	
REGULATION II OF 1819, sec. 77—Suit for registration of a conveyance—Valuation put by Plaintiff should determine the jurisdiction of the Court and not the real value of the property conveyed.] The Petitioner brought a suit under sec. 77 of the Indian Registration Act in the Munsif's Court for the registration of a conveyance and valued the suit at Rs. 500 which was the value of the property as mentioned in the document. The lower Courts held that as the actual value of the property in question was more than Rs. 1,000 the Munsif had no jurisdiction to try the suit: Held—That the Plaintiff was entitled to put his own valuation of the suit which was not with regard to any land or interest in land but the sole object of which was to get a document registered, and the Munsif had jurisdiction to try the suit. GOLAM RAHAMAN v. SM. SABEKJAN BIBI	951	
REGULATION II OF 1819, sec. 24—Suit to contest order of Board of Revenue declaring land claimed as part of permanently settled estate liable to assessment of revenue, if barred by one year's rule of limitation—Act IX of 1847, sec. 6.] A suit to contest an order of the Board of Revenue under sec. 6 of Act IX of 1847 declaring the liability of lands claimed as part of a permanently settled estate, to as-		
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assessment of revenue, is not barred by the one year's rule of limitation laid down in sec. 24 of Reg. II of 1819. SECRETARY OF STATE FOR INDIA v. RAI RADHA KANTO AICH BAHADUR	774	
RENT, suit for, if may be brought by joint co-sharer alone. See suit for rent. RADHABINODE MONDAL v. NABA KISHORE MONDAL	413	
RES JUDICATA, See Mahomedan law. MUSST. MAINA BIBI v. CHAUDHRI VAKIL AHMAD	673	
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essence of the doctrine of—		
Applicability of the doctrine in suit for rent or other recurring liability—Decision of question not raised in the issue but necessary to be decided, effect of, as res judicata—Suit for rent of putni—Previous rent suit for a different period against Defendant's estate dismissed but liability for rent for all times not discussed nor decided—Previous decision, if res judicata.] The Plaintiff sued for the rent of a putni tenure, eight annas interest in which belonged to one N, the same according to the Plaintiff having been purchased by the estate of N's mother-in-law which descended to N. In a previous suit for rent of the same putni against the executor of the estate of N's mother-in-law the said estate had been absolved from liability to pay. The facts relating to the purchase appeared to be that the owner of the eight annas interest owed a certain amount to N's mother-in-law on a note of hand on which a decree was obtained and in execution of that decree the share of the putni was purchased: Held—That the decision in the previous suit did not operate as res judicata. The essence of the doctrine of res judicata is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit. In the case of suits for rent or other recurring liability the causes of action for suits for successive periods are different. In the case of such suits for the doctrine to apply it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided, the decision would be res judicata in respect of any suit for a subsequent period. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substan-		

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tially but collaterally or incidentally. In a suit for rent no issues need be framed, but where issues are framed the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue. The principle that the decision of a question in an earlier suit which was not raised in the issues but which it was necessary to decide therein operates as *res judicata* in respect of the same question when it is raised in a subsequent suit had no application to the present case as it was not at all clear that the question of liability of the estate for the rent of the putni for all times was either raised or decided; while, on the other hand, the matters on the record pointed to a contrary conclusion, namely, that the estate was absolved from liability in respect of the particular decree and the question of the liability of the estate for all times was undetermined. GNANADA GORINDA CHAUDHURI v. NOLINI BALA DEBI ... 592

----- Decision in previous rent suit on rate of interest, if *res judicata* in subsequent rent suit when law altered by judicial decisions after passing of previous decision—Stipulation in *kabuliya* about interest at 75 per cent., if penal.] The Plaintiffs sued for rent on a *kabuliya* in which interest for arrears of rent was stipulated at 75 per cent. per annum. It appeared that in a previous suit for rent between the same parties it was held that the stipulation as to interest was of a penal nature and interest was allowed at 12 per cent. per annum: Held—That the mere fact that 75 per cent. is the rate stipulated in a *kabuliya* does not show that the rate was a penal one. *Asutosh Dhar v. Joylal Sardar*, 17 C. L. J. 50 (1912), referred to. That the law on the subject having been altered by judicial decisions since the judgment in the previous suit it could not operate as *res judicata*. Cases must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit and if the said law has been altered in the meantime and the effect of the law has been differently interpreted by judicial decisions or altered by statute, the decision on the question of interest in an earlier suit for rent would not operate as *res judicata* with regard to the same question in a suit for rent for subsequent years. *Alimunnissa Chaudhuran v. Shama Charan Roy*, J. L. R. 32 Cal. 749 (1905), followed. *NABIN CHANDRA SAHA PODDAR v. DUDU MIA* ... 83

REVENUE SALE ACT (XI of 1859)—Non-service of proper notice under s. 6, effect of, under s. 33—Combined notice under s. 5 and s. 6, if valid notice under the latter—Object of the respective notices, under ss. 5 and 6—Sale, when to be set aside—Necessity of showing substantial injury—Cess,

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if to be included in arrears of revenue—Revenue money order—Collector, if can appropriate remittance to kist other than that mentioned by remitter—Contract Act (I of 1872), s. 59.] The notice under sec. 5 is to be issued for the purpose of giving warning to the people concerned of the liability of the mahal being sold in the event of the payment not being made within the time fixed therein. It must therefore issue before the mahal has become liable to sale; whereas the notification under sec. 6 has to be issued after the property has become liable to sale—a date for sale having been fixed. Therefore a combined notification under secs. 5 and 6 cannot be legally issued and when such a notification is issued the effect is non-service of a proper notification under sec. 6. Under sec. 33 of the Act what is meant by irregularity is the fact of the sale having been held contrary to the provisions of the Act. There is no distinction made between illegality and irregularity. The authorities show that when the Collector has jurisdiction to hold the sale, non-compliance with any of the provisions of the Act will render the sale liable to be set aside only on the ground that a party has sustained substantial injury by reason of the illegality or irregularity complained of. The finding of fact that the low price fetched at the sale was not due to the failure of the Collector to issue a proper notification under sec. 6 of the Act is a finding of fact which must be accepted, and whether the non-compliance with the provisions of sec. 6 amounts to illegality or irregularity, the Plaintiffs are not entitled to succeed in view of the finding of the Court below that the inadequacy of price was not due to the breach of any provisions of the Act. Cesses should not be included in the amount recoverable under the Revenue Sale Act, but if there be arrears of revenue due and unpaid, the fact that the amount of arrears claimed was different from what is found really due did not take away the jurisdiction of the Collector. Where an amount is sent to the Collector by postal money order it must be appropriated by the Collector to the kist mentioned by the remitter under sec. 59 of the Contract Act. *Per Graham J.*—Act XI of 1859 is a stringent enactment for the realisation of arrears of revenue and that being so, there is an obligation to comply exactly with its requirements. A notification under sec. 6 ought to be issued in all cases and it cannot be dispensed with on the ground that a notification has already been issued under sec. 5. *LAL BEHARY MAITY v. RAJENDRA NATH MAITY* ... 618

ss. 10, 11—Residuary share, sale of—Specification in notices, when sufficient—Largest co-sharer deliberately defaulting and buying up estate—Other co-sharers' equity to get reconveyance.] The specification in the notices of the property sold should contain sufficient de-

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tails to enable the purchaser to know what he was buying. Where the largest co-sharer in a revenue-paying estate deliberately defaulted with the intention of getting rid of his co-sharers and purchasing the estate himself, the Court would in equity be justified in ordering him to re-convey to the other co-sharers their shares of the estate which he purchased at the sale on such co-sharers paying to him the amount of arrears due from them together with their shares of the costs incurred. <i>SM. KUSUM KAMINI DEBI v. HARA SUNDAR MAJUMDAR</i> ...	1004	
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RULES OF THE HIGH COURT, Original Side—Chap. XIII A—"Swearing positively to the facts of the case," what is—Order giving leave to defend, if appealable.] An appeal does not lie from an order giving leave to defend under Chap. XIII A of the Rules of the High Court (Original Side). <i>Karamall Ramballav v. Mangilal Dalimchand</i> , 23 C. W. N. 1017 (1919), considered. It is not sufficient compliance with the rules providing for verification of the cause of action to refer in the affidavit to the plaintiff and say that the statements contained in it are true; but in deciding an application under Chap. XIII A, the whole affidavit ought to be looked to to see whether there has been a proper verification. <i>MEGHJEE MANSING v. KALOORAM LACHMI NARAIN</i> ...	706	
Original Side, Chap. XIII A, r. 3—Defendant first appearing in person, then through an attorney—Summons in time, if made within 10 days from the date of the last appearance—Order giving leave to defend on furnishing security, in default decree against the Defendant, a "judgment" within the meaning of cl. 15 of the Letters Patent.] A suit on certain promissory notes was instituted on the 18th of June 1924. On the 11th of July 1924, the Defendant entered appearance in person; on the 21st of July, he again entered appearance through an attorney and on the same day the written statement was filed. On the 22nd of July 1924, a summons was taken on behalf of the Plaintiffs under Chap. XIII A of the Rules of the High Court and it was ordered that the Defendant furnishing security (within a time specified in the order) would have leave to defend, in default a decree should be drawn up against the Defendant for the claim under the promissory notes. Held—That the order involving an adjudication on the claim was a judgment		
RULES OF THE HIGH COURT— <i>concl.</i> , within the meaning of cl. 15 of the Letters Patent and as such an appeal lay from the order. <i>Sukhlal Chundermull v. Eastern Bank, Ltd.</i> , 1 L. R. 42 Cal. 735 (1915), distinguished. Held further—That though the summons was out of time, if the 11th July was taken as the date from which the 10 days ran, the Defendant's attorney by again entering appearance on behalf of the Defendant on the 21st July 1924, gave the Plaintiffs another opportunity and as such the summons was in time as defined by r. 3, Chap. XIII A of the Rules. <i>CHATTU LAL MISSEER v. THE MARWARI COMMERCIAL BANK</i> ...		296
SEA CUSTOMS ACT, INDIAN (VIII of 1878), sec. 20, proviso to—Great Indian Peninsula Ry. Co., if agents or co-proprietors of the Secretary of State for India in Council—Stores purchased and imported by Company, if liable to duty.] The railway and works and all engines, stock, etc., pertaining thereto formerly belonging to the Great Indian Peninsula Railway Company vested by statutes 63 and 64 Vic. c. 38 in the Secretary of State for India in Council as from 30th June 1900: Held, upon a construction of the agreement made between the Secretary of State in Council and the Company—That the Company was thereunder constituted the agent for the maintenance and management and working of the railway and no more than the agent of the Secretary of State in Council. The receipt under the agreement of an one-twentieth share of the profits by the Company did not make it a partner with the Secretary of State in Council in the undertaking, the same being remuneration for services rendered as such agent. Consequently stores purchased by the Company with money supplied by the Secretary of State for India in Council and imported by them into India for the use of the undertaking were, at the time of the importation, goods belonging to Government and exempt from duty under the proviso to sec. 20 of the Sea Customs Act. <i>SECRETARY OF STATE FOR INDIA v. THE GREAT INDIAN PENINSULAR RY. CO.</i> ...		76
SERVICE TENURES—Lands held by digwar or ghatwal—Relation with zamindari within ambit of which lands situated—Onus of proof—Ancient document, when to be construed with reference to usage—Thanadari lands, whether resumed or not—Minerals, whether belong to Government or landowners—Privy Council practice—New ground of argument.] While it may well be that the digwars or ghatwals are subordinate to the zamindar, it is always a question of fact whether they are or are not subordinate. The burden of proving that the lands of the digwar or ghatwal though within the geographical limits of the zamindari are a part thereof is on the zamindar. <i>Forbes v. Meer Mahmud Tuques</i> , 13 M. J. A. 438; 14 W. R. 28 (1870), relied on. Should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage.		

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Duke of Beaufort v. The Mayor, Aldermen and Burgesses of Swansea, 3 Exch. 113 (1894), **Van Diemens Land Co. v. Table Cape Marine Board**, [1906] A. C. 92 and **Watcham v. Attorney-General of East Africa Protectorate**, [1913] A. C. 533, referred to. The question whether mines and minerals belong to landowners or to the Government not considered. **Quara**—Whether the statement in the High Court's judgment that thanadari lands though made resumable were not always resumed is consistent with the observations of the Judicial Committee in **Lelaund Sing Bahadoor v. Bengal Government**, 6 M. L. A. 101, 114-115 (1885), **Joykishen Mookerjee v. Collector of East Burdwan**, 10 M. L. A. 34, 44 (1884) and **Ranjit Singh v. Kalidasi Debi**, J. R. 44 I. A. 117, 122; s. c. I. L. R. 41 Cal. 841; 21 C. W. N. 609 (1917). The Privy Council would be very chary of entertaining an argument never raised before or considered by the Courts below in a case from India. **SECRETARY OF STATE FOR INDIA v. JYOTI PROSHAD SINGH DEO** ... 745

SHEBAIT, sale or mortgage by, not supportable for necessity—Possession of, alienable, if adverse and from when. **RAJA MANINDRA NARAYAN ROY v. SARAT CHANDRA BANDOPADHYA** ... 740

SONTHAL PARGANAS REGULATION III of 1872, as amended by Regulations V of 1893 and III of 1898, secs. 5, 6—Civil Court at Bhagalpur, if competent to entertain suit to enforce mortgage of properties partly in Sonthal Parganas and partly in Bhagalpur—Interest awardable—Post litem interest, award of, discretionary—Civil Procedure Code (Act V of 1908), sec. 34—Sec. 11, Expl. IV, object of—Omission to claim relief in previous suit, claim barred—Preliminary decree refusing to award interest post litem—Final decree, if may award same.] The joint family property of certain Hindus who were governed by the Mithila School of Hindu law, the greater portion of which was situated in the Sonthal Parganas and the remainder in the District of Bhagalpur was mortgaged in 1896. A suit to enforce the mortgage by sale of the property brought in 1904 in the Court of the Subordinate Judge of Bhagalpur was dismissed as incompetent by the Privy Council in 1914 in view of sec. 5 of Reg. III of 1872 as amended by Reg. V of 1893; a personal decree, to the passing of which sec. 5 of Reg. III of 1872 would be no bar and which was prayed for in the plaint, was not passed in that suit owing to Plaintiff's omission to press for it. The statute was amended by Reg. III of 1908 which only excluded from the jurisdiction of the Civil Courts suits to be instituted between the date of a notification in the Gazette that a settlement shall be made of the whole or any part of the Sonthal Parganas and the date on which the settlement shall, by similar notification, be declared to have been completed. In 1915, the mortgagees instituted the present suit in the Court of

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SONTHAL PARGANAS REGULATION—concl'd.

the Subordinate Judge at Bhagalpur upon the mortgage bond praying for the same reliefs. Held—That in view of the change in the law, in the absence of proof that at any time the mortgaged property was notified for settlement and not notified as settled, the Court had jurisdiction to entertain the suit within the meaning of sec. 6 of Reg. III of 1872 as amended by Reg. V of 1893. That in dealing with the suit the Court would be bound to give full force and effect to the provisions of sec. 6 of the Regulation in regard to interest. **Ram Chandra Marwari v. Rani Keshobati Kumari**, 1 C. L. J. 182 (1903), approved. Where the preliminary decree refused to award post litem interest upon the amount decreed on foot of a mortgage, the Court had no power to award such interest by the final decree. The allowance of interest post litem is, by sec. 34 of the Civil Procedure Code, within the discretion of the Court and the High Court having in the exercise of such discretion refused such interest, the Privy Council declined to interfere with that decision. That the prayer for a personal decree could not be granted in this suit in view of Expl. IV to sec. 11 of the Civil Procedure Code, the Plaintiff having omitted to claim this relief in the previous suit. **SURENDRA MOHAN SINHA v. HARI PRASAD SINHA** ... 482

STERLING DRAFTS ON LONDON, contract to buy from Bank—Custom of the Exchange Banks in Calcutta. See under Contract. **S. MAHBOOB JILAHIE AND CO. v. MESSRS. COX AND CO.** ... 775

SUCCESSION ACT (X of 1865), secs. 101, 102, 126—Will—Construction—Absolute gift accompanied by void settlement, or estate for life—Gift to daughters for life, remainder to children on attaining 21 years—Gift to class—Perpetuity, rule against, in England and India—Act VIII of 1921.] The testator, a Hindu who died in 1904, bequeathed his estate to trustees with directions to apportion the residuary trust funds into as many equal shares as he might have daughters living at the time of his death or who having predeceased him should have left issue surviving the testator and to pay the income of each of such shares to his said daughters respectively during their respective lives, and from and after the decease of each of the said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years. All his three daughters having survived him: Held—That there was no disposition in favour of the daughters of an absolute estate in the respective shares followed by a provision for settlement which became inoperative within the meaning of sec. 126 of the Succession Act the principle of which is not substantially different from that laid down in **Lassance v. Tierney**, 1 Mac. & G. 531 (1849). That the ultimate dispositions in favour of the daughters' children on their attaining the age of 21

- SUCCESSION ACT—concl'd.**
 years failed altogether as being obnoxious to the provisions of sec. 101 and sec. 102 of the Succession Act, the children of the daughters being intended to take as classes, within the meaning of sec. 102. The difference between the rule obtaining in England and that laid down in sec. 101 of the Succession Act pointed out. Whether Madras Act I of 1914 was ultra vires or not, Act VIII of 1921 of the Indian Legislature made secs. 101 and 102 applicable to the Will. The provisions of the Majority Act extending the period of minority in cases mentioned therein to 21 years did not validate the disposition, as at the testator's death one could not be certain whether all or any of the members of the classes in whose favour the disposition was made would ever have guardians appointed as contemplated by the Act. **S. SOUNDARA RAJAN v. C. M. NATARAJAN** ... 434
- SUCCESSION OF PROPERTY PROTECTION ACT (XIX of 1841)—Shebait of idol, if competent to make application under the Act—Act not limited in application to intestate succession—Sec. 14—Application made within six months of the death of widow who intervened as holder of life interest, if within time.] One P by his Will gave a life interest in his properties to his wife and also authorised her to adopt a son, failing which event the properties were to vest in two idols. After P's death his widow was in possession for a long time and on her death one B took possession of the properties alleging that the widow had adopted his son. On the application of the mother of P representing herself as a shebait of the idols the District Judge made an order directing that the curator appointed under the Act should make over the properties to the applicant before him: Held—That it is competent for a shebait to present an application under the Act. The expression "succession" in the Act is not confined to intestate succession and applies also to testamentary succession. It is not necessary to bring the operation of the Act into play that the succession should be claimed from the last deceased proprietor and the application having been made within six months of the death of the widow of the testator was properly made within the meaning of sec. 14 of the Act. **BENODE BEHARY SAHA v. RAT SUNDARI DASSYA** ... 500**
- SUIT under Chap. XIII A of the Rules of the Original Side—Unconditional leave to defend—Practices—Denial of main portion of the Plaintiff's claim—Sale of securities, if without jurisdiction.] Where there is a general denial of the main portion of the Plaintiff's claim, unconditional leave to defend should be given and it is a wrong practice under Chap XIII A of the Rules of the Original Side (new rules) to make an order for furnishing security merely because the Judge thinks that the Plaintiff has a better prospect of success than the**
- SUIT—concl'd.**
 Defendant. The Court has no jurisdiction under Chap. XIII A to make an order for sale of securities. **RADHA KISSEN GOENKA v. THAKURSIDAS KHEMKA** ... 228
 — for rent—Joint co-sharer, if alone may sue for his share of the rent.] The Plaintiff and his brother were joint owners of one-third of an estate. He sued the Defendant for his one-sixth share of the rent: Held—That the Plaintiff and his brother, being joint proprietors with regard to the one-third share of the rent payable to them the Plaintiff was not entitled to enforce his claim to the one-sixth share of the rent as against the tenants without their consent. The Plaintiff might sue for the enforcement of the entire contract between him and his brother by making his brother a party Defendant but he was not entitled to enforce a part of the contract between himself and his brother on the one hand and the tenants on the other. **RADHA-BINODE MONDAL v. NABA KISHORE MONDAL** ... 413
 — commenced by the next friend of an infant, not for his benefit—Court's jurisdiction to dismiss the suit on an application.] Where it appears clearly upon affidavit that a suit has been commenced by the next friend to promote his own views and not for the benefit of the infant, the Court has jurisdiction to make an order summarily dismissing the suit, without an enquiry into its propriety. **Sale v. Sale**, 11 *Leav.* 556 (1839), followed. **CHANDRA SEKHAR MULLICK v. GONESH CHANDRA DE** ... 327
 — for recovery of possession by party against whom order has been made under sec. 145—Portion of Magistrate's order legal and portion illegal—Limitation. See under Limitation. **RAJINI NANDAN CHAUDHURI v. JADUNANDAN CHAUDHURI** 873
- SUMMONS, service of—Original Side, High Court—Rules. See Civil Procedure Code.**
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JOYMAN BEWA v. EASIN SARKAR ... 600
- SURETY for judgment-debtor—Consent decree without the knowledge of the surety, if discharges the surety—Payment of decretal amount by instalments.] Where a consent decree is made without the knowledge and consent of the surety, the surety is discharged. *Tatum v. Evans*, 54 *L. T.* 336 (1885), followed **NATIONAL COAL CO. v. KSHITISH BOSE** ... 540**
- TARIFF ACT, INDIAN (VII of 1894), s. 10 (b) —Sale—Buyer's right to deduct decrease in custom duty from price—Tariff valuation and taxation distinguished from levy of duty.] Tariff values and their taxation are totally different from the duties and their levying. A change of duty means a change in the rate of duty, which follows Government and administrative action. The contention that a change of tariff**

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TARIFF ACT, INDIAN—concl'd. values of sugar is constructively a change in the sugar duty within the meaning of sec. 10 of the Indian Tariff Act VII of 1894 is untenable. PROBHUDAS v. GANIDADA ...	73	VENDOR AND PURCHASER—concl'd. terms—Notice by vendor to purchaser to engross conveyance for signature and pay money within four days, if unreasonable, specially when purchaser gave assurance that he had money.] Though time was originally of the essence of a contract of sale of land, the parties having allowed the negotiations to continue far beyond the time appointed, the condition as to time being of the essence of contract was, by conduct of the parties, obliterated therefrom. When subsequently the negotiations were concluded and all the terms were settled and only two things remained to be done to complete the transaction, viz., the engrossment of the conveyance for signature and the payment of the money, and the vendor then pressed for early completion of the purchase at the same time expressing doubts as to whether the purchaser had money and received an assurance that he had: Held—That in the circumstances the vendor did not act unreasonably in thereupon demanding that the contract should be completed within four days. That the purchaser was estopped from urging that the assurance he gave that he had money was unfounded. That irrespective of the estoppel created by the assurance, the vendor was in the circumstances justified, in a time of financial strain, in demanding the completion of the little that remained to be done within four days. MOTILAL ITCHIALAL GANDHI v. HAJI MOUSA HAJI MAHOMED ...	411
TRANSFER OF PROPERTY ACT (IV of 1882), ss. 56 and 81, principles of, if applicable where some of several mortgaged properties are subject to a mining lease, the lessee having taken the lease with notice of the indebtedness of the mortgagor—Lessee, if entitled to have the charge satisfied out of the other mortgaged properties first, where the mortgagor has still a valuable interest in the property, e.g., the superior right to receive rent and royalty.] Where two out of several mortgaged properties were subsequently leased out for mining, the lessees having notice of the mortgagor's indebtedness, and the properties, the subjects of the lease, were ordered to be sold first in execution of the decree had on the mortgage upon the application of the mortgagors: Held—That the lessees were not entitled to have the mortgage debt satisfied by the sale first of properties other than those subject to the lease, and the principle of sec. 56 of the Transfer of Property Act did not apply as the mortgagors still had a valuable interest in the property, i.e., the right to receive rent and royalty from the lessees, which superior interest might be sold in satisfaction of the mortgage debt. The principle of marshalling of securities as contained in sec. 81 of the Transfer of Property Act also did not apply in such a case as the lessees having taken the lease subject to the encumbrance with full notice of the indebtedness of the mortgagor had no equities in their favour. That in the circumstances of the case, the order directing the sale of the leased properties first was properly made. MESSRS. H. V. LOW & CO. v. HAZARIMULL BABU ...	183	WAKF PROPERTY—Matwali, if can grant permanent lease without leave of kazi—Suit for khas possession and enhancement of rent of lands comprised in tenure created long ago of which rent has remained unchanged for seventy years—Duty of Court to presume lawful origin of grant—Recognition of matwali for the time being limited to new tanancy created by him—Representation in Court sale by matwali that tenure permanent not such as to create estoppel—Onus on tenant to prove lease creating right to hold in perpetuity at fixed rent—Istimrari mukarrari, meaning of.] The Plaintiffs sued for khas possession on declaration that the Defendants had no right to enjoy the jote in suit purchased by them at a rent execution sale as a permanent and heritable tenure with rent fixed in perpetuity on the ground that it appertained to the wakf estate of which he was the matwali and any permanent settlement thereof by any matwali on which the Defendants based their title was illegal. The Plaintiff also asked for enhancement of rent in the alternative. It appeared that the tenure had existed since the year 1843, that the rent had remained unchanged during three matwaliships for a period of about seventy years and that applications for enhancement of rent had failed: Held—That unless authorised by a kazi no matwali can create a leasehold interest to endure beyond his life, that the lessee acquires no title by adverse possession against the succeeding matwali and that if the succeed-	
... s. 59—Mortgage—Execution by purdanashin lady—Persons who did not see her sign—Signing as attesting witnesses on execution being reported to them—Admission of execution by executant, if dispenses with proof of proper attestation—Evidence Act (I of 1872), s. 70.] Where the evidence showed that when the executant, a purdanashin lady, signed the mortgage bond, not one of the persons who signed as attesting witnesses was present or saw her sign, and it appeared that her son took the document behind the purdah and came out and told those outside, the witnesses amongst others, that she had signed the deed and they then signed as witnesses: Held—That the mortgage was not legally attested and it could not be enforced against the executant merely because she admitted that she signed it. The words of sec. 70 of the Evidence Act applies to a document duly attested. HIRA BIBI v. RAMHARI LAL ...	364	VENDOR AND PURCHASER—Time made essence of contract—Waiver—Settlement of	

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ing matwali recognise, the interest, the consent is only referable to a new tenancy created by him and there is no adverse possession until his death or until a new matwali takes his place. That it was not within the scope of the matwali's agency to make a representation on behalf of the Deity at Court sales that the tenure sold at his instance was a permanent tenure, so as to give rise to estoppel if the lease was in fact granted without the authority of the kazi. That the Defendants by admitting their tenancy admitted that the lands were part of the permanently settled estate and as such liable to rent which they acknowledged they were liable to pay and it was therefore for them to show that they held a lease of their lands which entitled them to hold in perpetuity at a fixed rent. That in the circumstances of the case the Court should presume that the grant was in its origin lawful. The cases lay down that the meaning of the term <i>istimrari mukarrari</i> is not necessarily permanent and heritable but that the nature of the grant is to be determined from the circumstances which in the present case justified the Court to infer that the grant was permanent and heritable. BIBI JABEDA KHATUM v. SYED MAHOMED MOZAFAR ALI HUS-SAIN ... 807		land In the case of an artificial watercourse, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. There is, however, a well-established principle of law that a watercourse originally artificial may have been made in such circumstances and have been used in such a way that an owner of land situated on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. A raised road or bund run transversely across the depressed ground through which flowed an ancient fresh-water channel and was properly provided with a gap for the flow and a bridge over the channel. The bund thus provided with an eye and a bridge to permit the inflow and outflow of water was interfered with by the Defendant who filled up the eye and the channel course thereat and converted an innocuous bund into a dam, which dammed back the water on to the Plaintiff's land. Held—That the Defendant was responsible for damage thus caused to the Plaintiff's property. The principles of law as laid down in English decisions applied. MAUNG BYE v. MAUNG KYI NYO ... 219	
WATERCOURSE—Rights of riparian owners —Artificial and natural watercourse, if differ —Damming up of channel—Resulting loss to neighbouring owner—Liability—English law, applied.] The widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse does not convert it into a canal. In the case of a natural watercourse, the riparian owners are each entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land, as a natural incident of the ownership of his		WILL (Hindu)—Revocation—Locus standi to apply—Probate obtained by widow upon withdrawal of objection by brother—Nephew, if may apply for revocation.] Where an application for the probate of a Will propounded by the widow of the alleged executant, a Hindu, was at first opposed by his brother, but shortly afterwards the latter filed a petition withdrawing his objections and admitting the genuineness of the Will, and thereupon probate was granted. Held—That a brother's son of the deceased, who had not been served with citation in the case, had locus standi to prosecute proceedings for revocation of the Will. SHAMA CHARAN DE v. SM. REEBALA DASSI ... 567	

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CRIMINAL PROCEDURE CODE (Act V of 1898), s. 108—Security for good behaviour for disseminating matter, publication of which punishable under s. 153A, I. P. C.—Scope of the section—Intention to promote feelings of enmity between classes must be present—More tendency of matter disseminated to promote class hatred not sufficient—Facts not sufficient to prove guilt under sec. 153A, I. P. C., do not justify proceedings for security under sec. 108, Cr. P. C.—Penal Code (Act XLV of 1860), sec. 153A—Internal evidence and meaning of words used, not the only test of intention—Admissibility of other evidence for the purpose—Publication of news having tendency to promote class hatred without such intention not sufficient to bring publisher within the mischief of the section—Scope of restriction put by legislature on liberty of the press.] The Appellant who was the editor of a newspaper called the "Forward" published therein an article headed "Yellow Urdu Lashet; Attempts at Incitement; Will Mahomedan Leaders Intervene?" in which he animadverted on a pamphlet in Urdu circulated for the benefit of the Mahomedans. In the body of the article an English translation of the pamphlet was printed as also a transliteration in English letters of the original Urdu and it was observed that the pamphlet was being circulated and it was not difficult to trace the source from which it emanated. The Appellant added:—"Let us wait and see what steps the guardians of law and order take in the matter." For this the Appellant was proceeded against under sec. 108, Cr. P. C., and ordered to enter into his own recognizance in the sum of Rs. 500 to be of good behaviour. Held:—That the utmost that is warranted on any view of sec. 106 of the Code of Criminal Procedure is that a person comes within its scope if he disseminates matter which reveals an intention to promote feelings of enmity between classes. Where there is no such intention, the mere publication of news which is of such a character that it is possible to suppose that some people reading it may momentarily or foolishly be induced to entertain unreasonable feelings towards a class of other people is not enough to bring it within the mischief either of sec. 153A, I. P. C., or of sec. 108, Cr. P. C. It is not for the Criminal Courts to abandon "intention," the ancient and statutory test and to put in peril of their process persons of innocent intention. If the legislature meant to say that a Magistrate could proceed under sec. 108, Cr. P. C., against any person who was found to have disseminated matter which in the opinion of the Magistrate had a tendency to promote class hatred, it would have said this very plainly in terms very different from those

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which it has employed. If the person proceeded against under sec. 108 of the Code of Criminal Procedure is innocent under sec. 153A, I. P. C., he does not come under the former section as a person disseminating matter, the publication of which is punishable under sec. 153A, I. P. C. Sec. 108, Cr. P. C., seems to assume that one has only to look at the matter to tell whether its publication is punishable or not. This is broadly true no doubt but it is not the truth and it ill consists with sec. 153A, I. P. C., under which no matter is set aside or classified except with reference to the intention of the particular person accused. Sec. 153A, I. P. C., does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be for the purpose or part of the purpose of the accused to promote such feelings and if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient. The internal evidence of the words used and the meaning of the words used will very generally be decisive of the question whether or not the Court is confronted with a successful or unsuccessful attempt to promote feelings of enmity. They will be decisive in all cases where the intention is expressly declared; also if the words used naturally, clearly and indubitably have such a tendency, then it must be presumed that the publisher intended that which is the natural result of the words used. But the words used and their true meaning are never more than evidence of intention and it is the real intention of the accused that is the test. Whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves, but other evidence can also be looked at. The explanation to the section shows quite conclusively that in any matter on which other evidence could assist it may be taken. An explanation is not the same as a proviso. The explanation to sec. 153A, I. P. C., cannot be used to enlarge the provisions of the substantive section any more than a proviso can be used to enlarge the provision to which it is a proviso, such things are put in constantly to enable certain classes of people to feel safe that the section will not penalise them if they are acting in a certain manner. Held—That in publishing the article in question the newspaper has given its readers in the ordinary way a perfectly legitimate and sensible piece of news without any intention to utilise that piece of news for the purpose of promoting or furthering class hatred and even assuming the article to have in some

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sense a tendency to promote ill-feeling in the minds of certain persons, it is quite plain that the editor or the publisher was not attempting to do anything of the sort and the reasonable explanation of the publication of the matter in question was the ordinary desire of the editor to publish a fairly important piece of news likely to be of some genuine interest to reasonable readers. That apart from the fact that the article does not come within the first part of sec. 153A, I. P. C., it is also within the terms of the explanation to that section which *prima facie* covers it, malice not being imputable without definite and solid reason. *Quære*.—What is the effect of the amendment of sec. 108, Cr. P. C., by the introduction of the word "intentionally"? P. K. CHAKRA-VAETI v. KING-EMPEROR

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having been transferred to another Court and dismissed under sec. 203, Cr. P. C., the Magistrate before whom the petition of complaint was filed took proceedings under sec. 211, I. P. C., by making a complaint under sec. 476, Cr. P. C., and transferred the same for action to another Magistrate. **TARAKESWAR MUKHOPADHYAY v. KING-EMPEROR** ... 504

... ss. 236, 237—Trial on charge of abetment of forgery—Conviction for using a forged document, if legal.] In a trial on a charge of abetment of forgery under sec. 467 read with sec. 109, I. P. C., the accused cannot be convicted of using a forged document under sec. 471, I. P. C. Secs. 236 and 237, Cr. P. C., do not warrant such a conviction. The offence of abetment of forgery is complete when the document is written and signed but the user is a distinct and different offence for which the accused is entitled to be separately charged. **HARUN RASHID v. KING-EMPEROR** ... 100

... ss. 236, 237—Charge of murder—Conviction for removal of dead body, if legal—Assessors, opinion taken in writing and not orally, not shown to cause miscarriage of justice, if ground for consideration by Privy Council.] Under sec. 237 read with sec. 236 of the Criminal Procedure Code, a man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Where several persons were charged under sec. 302 of the Penal Code with murdering the deceased, and the evidence went to show that several persons had set upon the deceased in a field, and after he had been killed, his corpse was wrapped up in a cloth, placed on a horse and in that way removed, and as regards some of the accused, the Judge was of opinion that the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder, but on the other hand, he convicted each of them of having removed the body and convicted them of that offence. Held—That they were properly convicted under sec. 237 of the Criminal Procedure Code of that offence though they were not formally charged with it. Unless an alleged aberration from the precise directions of the Code of Criminal Procedure is shown to have led to a miscarriage of justice, the point is not one for reconsideration by the Judicial Committee. **BEGU v. KING-EMPEROR** ... 581

... s. 360—Reading over of the depositions of witnesses examined on one day at the close of the day, if a sufficient compliance with the section.] Where the deposition of each witness was not read over and explained to him after it was recorded but the depositions of all the witnesses examined were read over and explained at the close of the day: Held—That this was not a sufficient compliance

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with the provisions of sec. 360. ABDUL MALLIK V. KING-EMPEROR ... 641

... s. 360—Deposition of witness read over to accused's pleader—Legality.] Reading over the deposition of a witness in the presence of the pleader of the accused and not in his own presence although he is in attendance in Court is not a sufficient compliance with sec. 360. KASIM ALI V. SARADA KRIPA LAHA ... 336

... s. 370—Conviction by a Presidency Magistrate—Omission to record all the particulars required by section, whether an illegality or irregularity when such omission is not of real importance—Reference in recording reasons on re-trial to those recorded on the first occasion, propriety of.] A Presidency Magistrate has not to write a judgment in accordance with the provisions of sec. 367, Cr. P. C. All that he is required to do is to record certain particulars laid down in sec. 370 and in case of conviction and sentence of imprisonment or fine exceeding two hundred rupees, a brief statement of the reasons for the conviction. Where the Magistrate did not strictly comply with sec. 370 and did not record the various particulars required to be recorded in the usual way on the printed form provided for the purpose, but the omissions were of no real importance: Held—That the omission to comply with the provisions of sec. 370 was no more than an irregularity and was not an illegality which vitiated the trial. Where the Magistrate in recording reasons under sec. 370 in a re-trial held under orders of the High Court referred to those recorded by him when the case had been tried in the first instance: Held—That since the Magistrate is only required to record brief reasons for the conviction there was no serious objection to his referring to a document on the record instead of taking the trouble to re-write those portions of it which should have been included in his final order. BISHNUPADA DEB V. KING-EMPEROR ... 981

... s. 374—Reference to High Court for confirmation of death sentence—Duty of High Court, to be satisfied on evidence as to the correctness of the finding of the jury—Identification test, held during trial, propriety of.] In a reference under sec. 374 of the Code of Criminal Procedure for confirmation of a sentence of death passed by a Sessions Judge, the High Court must be satisfied that the finding of fact arrived at by the jury is justified on the evidence on the record. The High Court came to a contrary view on the examination of the evidence and acquitted the accused. Propriety of identification test held during trial commented on by Mukerji, J. ARSHED ALI V. KING-EMPEROR ... 166

... s. 403—Previous acquittal on a charge under sec. 193,

CRIMINAL PROCEDURE CODE—contd.

Indian Penal Code (Act XLV of 1860)—Subsequent trial on charges under secs. 465, 471, 120B—Facts exactly the same—Subsequent proceedings quashed.] The Petitioners had previously been tried under sec. 193, I. P. C. and, upon a careful and exhaustive consideration of the whole evidence, acquitted. He was again put on his trial under secs. 465, 471 and 120B: Held—That inasmuch as the facts on which the complainant founded the present case were inseparable from those upon which the previous case was proceeded with, the proceedings should be quashed. CHERA-GALI DEPART V. SATISH CHANDRA GHOSH ... 364

... s. 403—Bengal Food Adulteration Act (VI, B. C., of 1919), sec. 21, failure of prosecution under, for want of sanction—Subsequent prosecution after sanction properly obtained, if less—Autre fois acquit, principle of, when applies.] Prosecution of the accused for an offence under sec. 21 of the Bengal Food Adulteration Act having fallen through for want of a valid sanction and the accused acquitted under sec. 245, Cr. P. C., the Municipal Commissioners later at a meeting passed a resolution sanctioning the prosecution of the accused under the said Act and he was again prosecuted and tried for the same offence: Held—That the previous acquittal of the accused did not operate as a bar to his subsequent trial. There having been no order or consent in writing of the Municipal Commissioners sanctioning the prosecution of the accused for any offence under the Bengal Food Adulteration Act, the prosecution was incompetent and no cognizance could have been taken by any Court of any offence, and as such there could have been no trial of the accused within the meaning of sec. 403, Cr. P. C. A verdict of acquittal is no doubt immune from challenge; but it is only when an accused has been tried and acquitted of an offence that the immunity arises. P BANNERJI V. BEPIN BEHARY GHOSH ... 369

... s. 436—Further enquiry, nature of, which can be ordered—Complaint dismissed under sec. 203 after enquiry under sec. 202—Further enquiry after summoning accused, if can be ordered.] Where on receipt of a complaint, a Magistrate holds an enquiry under sec. 202, Cr. P. C., and dismisses the complaint under sec. 203, Cr. P. C., the Sessions Judge under sec. 436, Cr. P. C., can only direct a full and proper enquiry of the same nature as the Magistrate has already held, and cannot direct a further enquiry after summoning the accused. The practice of allowing accused to be represented in an enquiry under sec. 202, Cr. P. C., has been condemned. BECHU MIA V. ANWAR NABI ... 819

CRIMINAL PROCEDURE CODE—contd.

s. 438—Form in which reference has to be made. *JITENDRA NATH SEN v. KUTISWAR MONDAL* 646

s. 438—Admission made by party before Sessions Judge at the time of hearing of application for reference to High Court—High Court, if should accept such admission.] If in a proceeding before the Sessions Judge for a Reference to the High Court under sec. 438, Cr. P. C., admissions of fact are made by either party, then those admissions of fact ought to be accepted by the High Court for the purposes of the Reference. *SHEIKH GARIB NAJI v. MUCHIRAM SHAHA* 359

s. 476—Chief Presidency Magistrate making complaint against a witness before himself—Transfer of case to Third Presidency Magistrate—Enquiry and commitment to High Court Sessions by latter—Objection to trial overruled—Letters Patent, cl. 26, review under Advocate-General's fiat—Validity of proceedings before Magistrate and of commitment, how may be questioned—"Complaint," "taking cognizance," meaning of—Proper tribunal for questioning legality of commitment—"High Court," meaning of, in sec. 215—Secs. 4 (h), 18 (4), 190, 195, 215, 487 (2), 529, 537—Sec. 537, if applicable under cl. 26, Letters Patent.] Where the Chief Presidency Magistrate made a complaint to himself under sec. 476 (1) of the Criminal Procedure Code and then transferred the case to the Third Presidency Magistrate for disposal, and the latter after having enquired into the case committed the accused to the High Court Sessions for trial: *Held per Curiam* (Rankin and Chakravarti, JJ., dissentiente)—That the procedure followed was substantially correct. *Per Walsley, J.*—The Chief Presidency Magistrate in taking cognizance of a complaint made by himself and sending it to the Third Presidency Magistrate made a mistake, but a technical one only, not going to the root of the case. *Per Cuming and B. B. Ghose, JJ.*—There was nothing in the Code to prevent the Chief Presidency Magistrate from taking cognizance of his own complaint. Taking cognizance of a complaint is not a judicial act. *Semble, per Walsley, Cuming and B. B. Ghose, JJ.*—The legality of the commitment was not open to question before the Court of Sessions. The remedy of the accused was to move the High Court in its Revisional Jurisdiction. *Per Rankin and Chakravarti, JJ.*—In making a complaint to himself the Chief Presidency Magistrate adopted a course unknown to the law. Further, he either took cognizance of the complaint under sec. 190 contrary to the prohibitions of sec. 195 and 476, Cr. P. C., or laid a complaint before a Magistrate who not being a first class Magistrate had no power to take cognizance of it under sec.

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476. The proceedings having been commenced and continued in defiance of the express provisions of the Code and of fundamental principles of law, there was not merely an irregularity but a breach of the public order. Sec. 537 of the Code is applicable under cl. 26 of the Letters Patent, but there was no question of error, omission or irregularity in the complaint in the present case, for the proceedings were illegal from beginning to end. *EMPEROR v. COLIN MACKENZIE MACKAY* ... 276

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s. 526—Transfer of case—Conviction of accused by a Magistrate at previous trial, if ground under sec. 526 for transfer of case pending for re-trial by the same Magistrate—"Expedient for the ends of justice," as used in sec. 526, interpretation of—Re-trial, order of, by High Court, without stating, if re-trial to be held by the same Magistrate or some other Magistrate—Effect of such order.] The question as to whether a trial before a particular Magistrate is expedient for the ends of justice or not has got to be considered from the point of view of the accused person as well, and unless it is impossible to get a Magistrate other than the one who has already convicted the accused person on the same charge at a previous trial, or unless there be circumstances which would necessitate the trial of the same case before the same Magistrate over again, it is desirable that the re-trial should not be held before the same Magistrate. If an order for re-trial is made by the High Court and it is not stated in the order whether the re-trial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of the Court to direct that the re-trial should be held by the same Magistrate. The matter is left entirely in the discretion of the Magistrate who has got to appoint the Court by which the case is to be tried. *BALI RAM KALWAR v. SITARAM KALWAR* ... 1002

CRIMINAL TRIAL—Witness for prosecution acting as interpreter—Impropriety of proceedings vitiating trial.] In a trial on a charge of murder one of the witnesses for the prosecution acted as interpreter and he interpreted the evidence of the witnesses including his own evidence to the accused: *Held*—That it was a procedure which was absurd from the very outset and opposed to elementary ideas of justice. That a witness who had taken an active part during investigation, who had given evidence in the Committing Magistrate's Court on behalf of the prosecution and who was found to be ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man who was charged with very serious offences under secs. 302, 304, I. P. C., should have been chosen to act as interpreter in the case was a procedure

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CRIMINAL TRIAL—concl'd.		EVIDENCE—concl'd.	
which called forth severe condemnation and was highly irregular, the irregularity being of such a nature as to border on illegality. <i>ALI SOI v. KING-EMPEROR</i>	696	ground that they were inadmissible in evidence: Held—That the statements in question which were at variance with those made before the Magistrate were admissible in evidence and as they were important from the point of view of the defence and the Magistrate had not taken them into consideration in convicting the accused, the conviction and sentence should be set aside. Held—That such a delay as took place in the case was inexcusable having regard to the simple nature of the case and it might easily amount to a denial of justice. Having regard to the circumstances of the case and especially to the fact that the trial extended over more than a year, the High Court did not direct a re-trial. <i>Per Pearson, J.</i> —The evidence was admissible under sec. 155, sub-sec. (3) of the Evidence Act subject only to this that the provisions of sec. 115 of the Evidence Act had been complied with in the matter of putting the specific parts of it which were to be relied upon to the witness in cross-examination. The delay which occurred in the case was only inviting evidence which could not be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses gave evidence the greater the probability of confusion and of the truth being obscured, particularly in a case where the accused happened to be a police officer and the alleged offence arose out of his conduct during the course of his duties. <i>THOMAS J. H. ARNUP v. KEDARNATH GHOSH</i>	835
DELAY in the disposal of case, mischievous effect of. See under Evidence. <i>THOMAS J. H. ARNUP v. KEDARNATH GHOSH</i>	835	EXCISE ACT (V, B. C., of 1909), rule under—	
EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II, E. B. & A., of 1907), sec. 2—Proceedings under Act not governed by Code of Criminal Procedure must be decided according to ordinary rules of fairness and propriety—Findings necessary to be arrived at to justify order of discontinuance under sec. 3—House must be used as described in sec. 2, cls. (a), (b), (c) to attract the operation of sec. 3—Joint enquiry about several houses—Necessity of individual finding as to annoyance to local inhabitants.] Proceedings under the Eastern Bengal and Assam Disorderly Houses Act are not governed by the provisions of the Code of Criminal Procedure and it is not necessary for the Magistrate to act only on legal evidence and he need not administer oaths but before passing an order under sec. 3 he must satisfy himself not only that the houses are used as brothels or for the purposes of habitual prostitution or as disorderly houses but he must further find an additional fact to bring it within the provisions of cls. (a), (b) or (c) of sec. 2 of the Act. The Magistrate may come to his decision in any way that does not violate the ordinary rules of fairness and propriety. While considering the cases of several houses together the Magistrate should apply his mind to the case of each house separately on the question whether annoyance was caused to the inhabitants of the vicinity. <i>RAM PADA CHATTERJEE v. BASANTA BAISHNAH</i>	91	possessing more than one tola of guli (opium mixture for smoking)—Opium diluted in water, if smoking mixture.] Under the rules under the Excise Act a person cannot be convicted of having an excess of a mixture of opium for smoking when the quantity of smoking mixture found in his possession is not beyond that allowed by the rules but over and above that quantity he has a quantity of opium diluted in water. Such solution cannot be held to be an admixture for the purpose of smoking. <i>DWARIKA NATH MISRA v. KING-EMPEROR</i>	964
EVIDENCE—Statements of accused and a servant of the accused obtained while in custody of excise authorities, if admissible in evidence. See under Excise Act. <i>BATASI MONI DASSI v. KING-EMPEROR</i>	854	s. 46—Illegal possession and sale of cocaine—Statements of accused and a servant of the accused obtained while in custody of excise authorities, if admissible in evidence—Opinion of excise officer as to reputation of accused as a dealer in cocaine, if admissible—Conviction on residue of evidence—Exemplary sentence passed by Magistrate relying on extraneous matters not supported by evidence—Impropriety of such sentence—Prosecution, how to be conducted without prejudice to accused.] The Petitioner was convicted under sec. 46 of the Bengal Excise Act for illegal possession and sale of cocaine and sentenced to one year's rigorous imprisonment on each charge. The trying Magistrate in determining the sentence remarked that the accused was carrying on cocaine dealing in a	
Statement made by complainant to Deputy Commissioner of Police, if admissible in evidence at the trial—Magistrate's refusal to consider such statement, effect of—Conviction set aside on ground of admissible evidence not having been considered by Magistrate—Usual course of re-trial—Special circulars not warranting order for re-trial—Delay in the disposal of case, mischievous effect of, amounting to denial of justice—Evidence Act (I of 1872), secs. 155 (3), 145—Penal Code (Act XLV of 1860), sec. 323.] The Petitioner, a sergeant of the Calcutta Police, was convicted by an Honorary Presidency Magistrate under sec. 323, I. P. C., for causing hurt to the complainant, the driver of a taxi-cab, and sentenced to pay a fine of Rs. 50. It appeared that the Magistrate refused to consider certain statement by the complainant to the Deputy Commissioner of Police on the			

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very large way, that her reputation for years had been that of one of the most notorious of cocaine dealers and that she possessed some of the finest equipages in Calcutta and three motor-cars and an exemplary sentence was necessary. It appeared that in the course of the trial various complaints were made by the accused as regards the manner in which the search was conducted and in which she herself was treated, that certain statements obtained from the accused and one of her servants while in custody in the excise barracks were received in evidence and that the opinion of the excise officer as to the reputation of the accused as a dealer in cocaine on a large scale elicited from him by the Magistrate was also admitted in evidence. **Held**—That the statements in question which could not be considered as voluntary statements should not have been received in evidence. That the Magistrate should not have allowed the excise officer's opinion as to the reputation of the accused to be admitted in evidence. That excluding the inadmissible evidence the residue was enough to justify a conviction, but there being no evidence as to the matters relied on by the Magistrate in passing an exemplary sentence, in fixing which he was influenced by extraneous matters the sentence inflicted was extraordinarily severe and quite uncalled for. That there might be exaggerations in the complaint made by the accused about the manner in which her premises were searched and the way she was treated, but indications were not wanting on the record to show that the search was conducted and the accused detained in an inconsiderate manner. Prosecutions ought to be conducted fairly and squarely and nothing should be done so as to give ground for complaint on the part of the accused. **BATASI MONI DASSI v. KING-EMPEROR** ... 854

EXEMPLARY sentence passed by Magistrate relying on extraneous matters not supported by evidence—Impropriety of such sentence. See under Excise Act. **BATASI MONI DASSI v. KING-EMPEROR** ... 854

GOONDAS ACT (I. B. C., of 1923), sec. 4— Arrest under warrant issued by Local Government with provision for bail—Principles on which amount of bail should be fixed and on which bail should be granted and sureties accepted—Improper rejection of bail and refusal to accept surety, effect of—Insufficiency of the amount of bond required and of the sureties to control him, if lawful consideration under such warrant—Proceedings of Commissioner of Police, if judicial proceedings—High Court, when can interfere with arrest under such warrant—Criminal Procedure Code (Act V of 1908), sec. 431—Writ of habeas corpus, when illegal detention in custody is proved.] The Petitioner was arrested under a warrant issued by the Local Government under sec. 4 of the Goondas Act. The warrant directed

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the Deputy Commissioner of Police, Calcutta, to arrest the Petitioner and it was provided in the warrant that if the Petitioner should give bail himself in the sum of ten thousand rupees with two sureties each in the sum of five thousand rupees to attend before the Commissioner of Police, Calcutta, and to continue to attend, he may be released. It was alleged that bail was refused on the ground that the Petitioner was not in the opinion of the Deputy Commissioner good for ten thousand rupees and the sureties instead of being examined as to their sufficiency were rejected on the ground that they were not likely to keep the Petitioner under control: **Held**—That refusal of bail on either of the aforesaid grounds alleged would be an illegal abuse of law not merely on general principles as regards the liberty of the subject but on the face of the Goondas Act itself and on the face of the warrant which is notified for use under the Goondas Act which is in terms of sec. 76 of the Code of Criminal Procedure. On such a warrant the business of the officer who fixes the sum of money is to see that he fixes a reasonable sum of money having regard to all the circumstances and that it is not an excessive one and it is sufficient so far as the person under arrest is concerned that he is willing to execute a bond in that sum. As regards the surety offered, when the object is to secure the attendance of person arrested, embarking on a consideration of control over the person arrested (waiving aside the mere question of sufficiency) is an illegal abuse of power on the face of the Goondas Act and the warrant. The Commissioner of Police acting under such a warrant is not acting under the Code of Criminal Procedure. The proceedings are of the executive armed with certain special powers and the High Court can interfere under sec. 491 of the Code of Criminal Procedure by issuing a writ of habeas corpus only when those powers have been exceeded and the person arrested is illegally or improperly detained in public custody. That in the circumstances of the case no illegal detention was made out which could justify the interference of the High Court. **BISSESWAR ROY GARIA v. KING-EMPEROR** 791

JURISDICTION—Improper trial—Conviction by Magistrate of offence triable by him when facts proved showed commission of offence triable exclusively by Court of Session—Conviction set aside by High Court and Magistrate directed to commit accused to Court of Session—Indian Penal Code (Act XLV of 1860), secs. 196, 471.] Where the Petitioner was convicted by the Magistrate under sec. 196, I. P. C., but it appeared on the findings arrived at by him that there was a *prima facie* case against him under sec. 471 which was exclusively triable by the Court of Session, the High Court in revision set aside the conviction and sentence, and directed the Magistrate to commit the

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Petitioner to the Court of Session. HARA
MOHAN DAS v. KING-EMPEROR ... 840

JURY, trial by--Charge to jury--Necessity of direction as to the applicability of exception in sec. 300, I. P. C., even if no case of provocation made by accused.] The mere fact that the accused persons do not admit their presence at the occurrence and raise a case of provocation or of that of passion or something of that sort does not render it unnecessary to give the jury a proper direction as to the exception in sec. 300, I. P. C. The question is whether on any reasonable view of the facts certain of the exceptions can matter. If they can matter and if a proper direction is not given to the jury, then it is not open to the Court to guess and gamble as to whether or not the jury's verdict would have been different. JAIJUR SHEIKH v. KING-EMPEROR ... 912

-, trial by--Disagreement between Judge and jury--Unanimous verdict of guilty--Reference to High Court for acquittal--Accused given benefit of doubt and acquitted.] The Appellants were tried by a jury on charges under secs. 147, 325 read with sec. 149, I. P. C., and unanimously found guilty. The Sessions Judge made a reference under sec. 307, Cr. P. C., recommending the setting aside of the unanimous verdict: Held (on a consideration of the entire circumstances)--That the whole case was suspicious and the real facts in connection with the occurrence and circumstances under which it took place had not been disclosed by the prosecution, nor was the case for the defence entirely true and to convict the accused under such circumstances was likely to cause miscarriage of justice and the accused should be given the benefit of the doubt and the verdict of the jury set aside. EMPEROR v. YAKUFI ... 858

trial--Duty of Judge when verdict confused and unintelligible--Duty of Judge to explain law to jury clearly--Impropriety of placing before the jury Codes and legal treatises--Heads of charges must convey sufficient information as to explanation of law and important questions of fact.] Where the verdict of the jury is confused and unintelligible it is the duty of the Judge to obtain from them a proper and correct verdict before accepting the verdict given. Under the law of procedure it is the duty of the Judge to explain to the jury the law applicable to the case and it is the duty of the jury to accept the law as laid down by the Judge without any extraneous aid. If the jury is unable to understand the law fully and clearly it is the duty of the Judge to explain it to them afresh, but in doing so he cannot place before them the Code or any legal treatise for the purpose of finding out the law. Under sec. 307 the Judge is not to write a judgment but to record the heads of the charges to the jury; but as an appeal lies to

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the High Court in jury trials it is necessary that the charge recorded should be such as to convey sufficient information to the Court as to the explanation of the law by the Judge and about important questions of fact. SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS v. G. C. WILSON ... 693

misdirection to--Witnesses for prosecution absent--Application for adjournment refused and trial proceeded with and jury directed to return a verdict of not guilty for want of evidence--Misdirection--Acquittal set aside on appeal by Local Government.] On the date fixed for hearing in the Sessions Court the witnesses for the prosecution were not present and the trial was adjourned to the next day when to the witnesses not being present, the public prosecutor made an application for further adjournment which was refused and the Judge then empanelled a jury and called upon the public prosecutor to open his case and upon the accused to plead, whereupon the public prosecutor opened the case under protest and informed the Court that he had no witnesses present to support the case for the prosecution and the Judge directed the jury to return a verdict of not guilty as there was no evidence: Held--That in the circumstances of the case it was a misdirection for the Judge to tell the jury that there was no evidence and that they should return a verdict of "not guilty." That the Judge had exercised his discretion unwisely in not giving the public prosecutor an opportunity to produce his witnesses, since it appeared that there were witnesses whose attendance had not been procured on the date fixed through blunder. The High Court set aside the order of acquittal and directed a re-trial. SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS v. SADER SAIK ... 190

MAPS in criminal cases how to be prepared. See Criminal Procedure Code, sec. 163. BHAGIRATHI CHOWDHURI v. KING-EMPEROR ... 142

MURDER, case of--Proper sentence. See under Circumstantial Evidence ARAJALI v. KING-EMPEROR ... 376

OPIMUM ACT (I of 1878), s. 11--Confiscation of conveyance used in the illegal removal of opium--Opportunity to owner to show cause, when should be given.] Sec. 11 of the Opium Act in enacting that the conveyance in which opium liable to confiscation shall be found shall be liable to confiscation leaves it to the discretion of the tribunal which is trying the case to decide whether having regard to the facts of the particular case the conveyance used in carrying the opium should be confiscated and in cases where there is no improper conduct imputed to the owner and where during the course of the case

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nothing is proved to show improper conduct on the part of the owner it would be advisable for the Magistrate who is trying the case to give the owner an opportunity of being heard before he comes to the conclusion that the conveyance should be confiscated. **MOHAMED KESHAB v. KING-EMPEROR** ... 240

PENAL CODE (Act XLV of 1860), s. 197, interpretation of—Criminal Procedure Code (Act V of 1898), s. 253—Government Savings Banks Act (V of 1873) and the rules relating thereto. The certificate given under the rule, viz., that in the case of female depositors withdrawing money from Post Office Savings Bank by their authorised agents under r. 18, the agent must sign a certificate on the application for withdrawal to the effect "Certified that the depositor is on this day alive and sane," is not a certificate prescribed by the Government Savings Banks Act (Act V of 1873) or statutory rules made thereunder and this certificate is not a certificate within the meaning of sec. 197, I. P. C. **Per Suhrawardy, J.**—The word "certificate" occurring in sec. 197, I. P. C., contemplates a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. **BIRENDRA NATH CHATTERJEE v. UMANANDA MUKHERJEE** ... 120

... s. 304—Causing death by rash and negligent act—Criminal rashness, criminal negligence, what is—Road closed to traffic for repairs—Coolies sleeping on closed road at night—Driving a motor car into the closed road and running over coolies, if rash and negligent act.] Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge arises, was the imperative duty of the accused person to have adopted. A person driving at night a motor car along a portion of a road which was closed to traffic for repairs cannot be reasonably expected to take precautions against the chance of coolies sleeping on that portion. Two coolies who were so sleeping with their bodies covered except for their faces having been run over and killed by the accused driving over them in a motor car in the above circumstances, the latter could not be held

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to have caused their death by a rash and negligent act. **H. W. SMITH v. KING-EMPEROR** ... 68

... s. 339—Exception, accused in revisional stage, if can claim benefit of, when he did not raise the defence under the Exception in the lower Courts—Dispute of civil nature, propriety of trial by Criminal Court.] A person accused of an offence under sec. 341, I. P. C., for obstruction of a way by raising a wall, did not raise the defence that he was entitled to the Exception to sec. 339, I. P. C., and denied having raised the wall. But at the same time he contended that the wall which had been raised was on his own land: Held—That the dispute between the parties was evidently one which could be better determined in the Civil than in the Criminal Court. In the present case the obstruction put up by the accused having been put up in good faith in the belief that he had a lawful right to obstruct the complainant from going along the path, he was entitled to the benefit of the Exception to sec. 339, I. P. C., though he did not clearly raise that defence in the lower Courts. **KALIDAS RAHA v. DEODHARI MISTRI** ... 192

... s. 362—Kidnapping—Elements necessary to constitute the offence.] In order to support a conviction for kidnapping from lawful guardianship the following are the points requiring proof—(1) That the person kidnapped was then a minor under sixteen years of age if a female. (2) That such person was in the keeping of a lawful guardian. (3) That the accused took or enticed such person out of such keeping. (4) That he did so without the consent of the lawful guardian. The mere fact that the minor leaves the protection of her guardian does not put her out of the guardian's keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping: Held, on a consideration of the circumstances of the case—That the offence of kidnapping was not made out. **R. W. VALLIANT v. MRS. ELEAZAR** ... 215

... s. 379—Theft, charge of, not maintainable when object of theft admittedly in possession of accused.] Where it appeared that certain trees which were the subject of the charge of theft stood on the holding in the possession of the accused: Held—That the charge of theft could not stand because the offence under sec. 379, I. P. C., is an offence against possession. **SHEIKH GARIB HAJI v. MUCHIRAM SHAHA** ... 359

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to—Recusal of Governor-General to transfer case to another Province—Violation of natural justice.] The rule in Dillet's case that the King in Council is not a Court of Criminal Appeal and will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done—was re-affirmed. A question whether the trial Judge had properly explained sec. 111 of the Penal Code is one for a Court of Criminal Appeal and not one for consideration by the Judicial Committee. The refusal by the Governor-General of India to transfer the case for trial to another Province on the alleged ground that there had been such copious and prejudicial newspaper comment on the crime committed that a fair trial by a local jury was impossible cannot be challenged before the Judicial Committee as a violation of the principles of natural justice. SHAFI AHMED NABI AHMAD v. KING-EMPEROR ... 557		—Magistrate's power in this respect—Evidence Act (I of 1872), sec. 45, iii. (c)—Opinion of expert on comparison of thumb impression.] The Respondent was prosecuted under sec. 82 of the Registration Act for having falsely personated another woman at the time of the registration of a document purporting to have been executed by the latter. Under orders of the trying Magistrate the Respondent's thumb impression was taken by an expert and compared with that on the document in question and relying on the evidence of the expert that the two tallied and were totally different from the thumb impression of the woman whom the Respondent had personated, the Magistrate convicted the accused but the Sessions Judge on appeal set aside the conviction and the local Government appealed: Held—That sec. 5 of Act XXXIII of 1920 authorised the Magistrate to direct the thumb impression to be taken in the manner in which it was done and illustration (c) to sec. 45 of the Evidence Act makes it abundantly clear that in a case like the present the opinion of the expert formed by comparison of the various thumb impressions referred to is admissible in evidence. The procedure adopted by the Magistrate was therefore in strict accordance with law. The High Court in setting aside the acquittal directed, upon a consideration of the circumstances of the case, that the Respondent should be released under sec. 562 of the Criminal Procedure Code on her entering into a bond with surety to appear and receive sentence when called upon within one year. SUPER-INTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS v. KIRAN BALA DASSI ... 373	
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THE CALCUTTA WEEKLY NOTES.

REPORTS.

PRIVY COUNCIL,
[APPEAL FROM BENGAL.]

LORD DUNEDIN.

LORD ATKINSON.

MR. ANNEER ALI.

LORD SALVESBEN.

1924,

Heard, 3, 4 and
6, November.

Judgment,

11, December.

Bengal Tenancy Act (VIII of 1885), secs. 160, 161—Permanent tenure, nature of tenant's interest—Tenant's duty to protect himself from illegal encroachment—Trespasser acquiring title to lands of tenancy by adverse possession against tenant—Tenant, if may claim abatement of rent against landlord—Stipulation by tenant not to claim abatement of rent, if binds purchaser at rent-sale—Failure of landlord to give tenant possession of all land leased, when ground for suspension of rent—Tenancy at lump rental and at a rate per bigha, difference between.

The tenant under a permanent and transferable lease held at a fixed rent virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lessor and the succeeding landlords have no interest in the lands except in so far as they form a security for the payment of rent. The purchaser of the tenure at a rent sale acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants, not being a protected interest within secs. 160, 161 of the Bengal Tenancy Act.

The duty of a tenant under such a perpetual tenure is to protect himself against illegal encroachment by others on the lands of which he has exclusive possession. If he fails to do so, he cannot prejudice the landlord's claim for rent.

WOMESH CHUNDER GOOPTO v. RAJ NARAIN ROY (1) referred to.

Where a purchaser of such a tenure at a rent sale suffered a person who at the date of the purchase was in adverse possession of some lands of the tenure to remain in such possession for the statutory period:

Held—That the purchaser could not claim an abatement of rent against the landlord in respect of the land the possession whereof he lost by his own neglect.

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

The Judicial Committee accepted the soundness of the long and consistent body of judicial decisions referred to in the judgment under appeal [UDOY KUMAR v. KATYANI (2)] denying the validity of the argument that a trespasser, being liable to ejectment by the lessor, acquires title by limitation against the lessor as well as the tenant and that when this happens the tenant is entitled to an abatement of rent.

Quere.—Whether a compromise by a former landlord and the tenant under which the latter stipulated not to apply for abatement on any ground whatever in respect of the area then found on measurement to be in their occupation would necessarily bind a purchaser of the tenure at a rent sale.

(1) 10 W. R. 15 (1868).

(2) 1 L. R. 49 Cal. 948 (1932).

SRIMATI KATYAYANI DEBI v. UDOY KUMAR DAS.

These were consolidated appeals (Nos. 134 and 135 of 1923) from two decrees of the High Court of Bengal, dated the 27th February 1922, which varied two decrees of the Court of the Subordinate Judge of Khulna, dated the 24th July 1919.

The suits were instituted by the Respondent as landlord against the Appellant his tenant to recover arrears of rent.

The Defendant contended that she was never put in possession of the whole of the demised premises and claimed an abatement of rent.

The facts so far as material to this appeal were as follows :—

In 1878, S. N. Tagore, the predecessor-in-interest of the Respondent granted a reclamation lease on a *mourasi mukurari* tenure of 3,800 bighas of land to Banerjee and Sarkar the predecessors-in-interest of the Appellant. The lands comprised several mouzas including Daskati, with the exception of 61 acres. This latter estate was purchased on behalf of the Appellant's husband H. C. Chaudhuri at a revenue sale in 1875.

Ten years later Chaudhuri purchased an under-tenure in Daskati, and in 1888 he dispossessed the original grantees from the whole of that mouza.

The interest of Banerjee and Sarkar was purchased by Nilkantha Singh at an execution sale in 1889 and when Nilkantha Singh in his turn failed to pay his rent a further execution sale took place in 1894 at which the present Appellant became the purchaser of his tenure.

From 1894 until the institution of the present suits in 1917 the Appellant had paid to the landlord the entire rent fixed.

The area in respect of which rent was now claimed was 5,161 bighas. The Defendant contended that she was entitled to a suspension of rent on the ground that

she had been dispossessed by the Plaintiff of certain land included in the tenancy, and that she was entitled to an abatement of rent for portions of the land which did not form part of the tenancy, and of which her husband had been in possession.

The Subordinate Judge allowed the abatement claimed and on appeal the High Court (Woodroffe and Cuming, JJ.) delivered separate judgments differing from each other. The former held that the Defendant was entitled to the abatement of rent, the latter that she was not so entitled.

The decree of the Subordinate Judge was accordingly confirmed under sec. 98 (2) of the Code of Civil Procedure, 1908.

The Plaintiff appealed under cl. 15 of the Letters Patent and the Court (Mookerjee, Newbould and Pearson, JJ.) decided in his favour.

For the judgments in appeal *vide Uday Kumar v. Katyani* (2).

Messrs. L. DeGruyther, K. C. and A. Majid for the Appellant.—The claim is for arrears of rent but there can be no arrears of rent unless the area of the property leased is specific. The original lease provided for an assumed number of bighas within defined boundaries. The Appellant has not had title in those boundaries, and an area of 61 bighas therein was the property of her husband. She was entitled to be put in possession of the whole lands contained in the original lease free from all incumbrances.

It was not the duty of the Appellant but of her landlord to eject the trespasser.

Messrs. Dunne, K. C. and Dubé for the Respondent.—The rent has been paid by the Appellant until 1913 and any rights acquired by her husband were not in violation of the lessor's title, moreover the Appel-

SRIMATI KATYAYANI DEBI v. UDOY KUMAR DAS.

lant had power to annul any incumbrance on the holding.

Bengal Tenancy Act, VIII of 1885, secs. 159, 161 and 167.

A statutory title by 12 years' possession is an incumbrance within the meaning of the Act, and it was the duty of the Appellant to protect herself against any encroachment by a trespasser.

They referred to *Goluck Monee Dosee v. Huro Chunder Ghose* (3), *Womesh Chunder Goopto v. Raj Narain Roy* (1), *Khantomoni Dasi v. Bijoy Chand Mahatab* (4), *Karmi Khan v. Brojo Nath Das* (5), *Nuffer Chand Pal Chowdhury v. Rajendra Lal Goswami* (6) and *Bipradas Pal Chowdhury v. Kamini Kumar Lahiri* (7).

Mr. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SALVESEN.—This is an appeal from the High Court of Judicature in Bengal in two actions for arrears of rent brought by the Respondent against the Appellant. The Respondent is the successor in title to a certain Tagore, who, on the 27th November 1878, granted a reclamation lease of certain lands which were then lying waste and in a state of *jungle*, at a rate which fell to be calculated at 13 annas per bigha of the area embraced in the lease. Since the date of the lease the greater part of the area has been brought under cultivation and has been in the possession of several successive tenants. The Appellant acquired the tenant's rights in the lands as a purchaser at a sale in execu-

tion of a decree for arrears of rent due by the prior tenant.

For the purposes of this appeal, in which a single question of importance has been raised, it is only necessary to consider the state of matters at the time of the Appellant's purchase, which took place in 1894. The Appellant then obtained possession of the whole lands within the boundaries mentioned in the lease with two exceptions—(1) a small area of 61 acres or thereby to which her husband had established a paramount title dating from 1875 against the original lessor, and (2) a much larger area of which her husband had taken possession without any title some six years previously and of which he had continued to hold possession, notwithstanding certain efforts by the previous tenant to eject him.

From 1894 until the first of the two suits now under consideration was raised in 1917 the Appellant paid without objection the rent of Rs. 4,300 which had been fixed as between the prior lessee and the then landlord, to be the rent due under the lease in question. In her defence to this suit the Appellant contended that she was entitled to an abatement of rent in respect of such portions of the area embraced within the boundaries of the lease of which she was not actually in possession. It was conceded that she is entitled to an abatement of rent applicable to the 61 acres above referred to, and this has been allowed by the judgment under appeal. The controversy that still remains to be determined is whether she is entitled to a corresponding abatement in respect of the much larger area which her husband continued to possess and which is now possessed by his representatives.

The lease which is evidenced by the *kabuliyat* of 27th November 1878, is of a kind which is familiar in the province of

(1) 10 W. R. 15 (1868).

(2) 8 W. R. 62 (1867).

(4) I. L. R. 19 Cal. 787 (1893).

(5) I. L. R. 22 Cal. 241, 251 (1894).

(6) I. L. R. 25 Cal. 167 (1897).

(7) L. R. 45 I. A. 499; s. c. I. L. R. 40 Cal. 27, 28 C. W. N. 465 (1921).

SRIMATI KATYAYANI DEBI F. UDOY KUMAR DAS.

Bengal. As it expressly bears, it is permanent and transferable, and at a fixed rent. The tenant under such a lease virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lessor and succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrear the landlord's only remedy is to bring the tenure to sale by public auction on the execution of a decree for payment of rent. The purchaser of the tenure, as has now been settled by a long series of authorities in the Indian Courts, which are enumerated in the learned and exhaustive judgment of Mr. Justice Mookerjee, acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants. An incumbrance is defined by sec. 161 of the Bengal Tenancy Act, 1885, as any "right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest." There is no question in this case of any protected interest but only of such right as the Appellant's late husband may have acquired in respect of his possession of a portion of the lands embraced in the lease for a period exceeding 12 years.

At the date when the Appellant acquired the lease by purchase only six years of adverse possession by her husband had run against the former tenant. It is admitted that she could immediately have put an end to this tortious possession by her husband on her purchasing the tenure. She did not do so, but allowed him to continue in possession, so that it may be assumed that he and his heirs have acquired by limitation an absolute right as against the present tenant to continue in possession.

The case for the Appellant is that this

right which her husband has acquired against her is also good against the respondent as in right of the landlord's interest under the lease. It was argued that the lessor had a title to eject the trespasser and that, if he did not do so, the trespasser obtained a title by limitation against him as well as against the tenant and that, as the latter is now deprived of the possession of the lands, she is entitled, in a question with the landlord, to an abatement of rent. There is a long and consistent body of authority to the opposite effect in India, and although the matter has not been made the subject of direct decision by this Board their Lordships see no ground for doubting the soundness of the decisions referred to in the judgment of the High Court.

The duty of a tenant under a perpetual tenure such as the one in question is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so he cannot prejudice the landlord's claim for rent. The considerations which appear to their Lordships to be conclusive are those stated by Peacock, C. J., in *Womesh Chunder Goopto v. Raj Narain Roy* (1) and connected appeal, and which are quoted in the judgment of the High Court. It has also been pointed out in other judgments that the landlord cannot in the ordinary case know whether the possession of a particular area of land is adverse to the tenant or has taken place with his consent. He could not therefore safely sue an action at his own hand for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant, who can deal with the lands as he pleases.

On the assumption that the High Court

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has correctly stated the law applicable, the Appellant nevertheless maintained that, under the terms of the particular *kabuliyat*, she was entitled to succeed. The clause quoted is in the following terms:—

"Should any dispute about the boundaries given below arise with any *malik* we will report it to you and you will investigate it. If through neglect we lose hold of any land, we will be answerable and will compensate you for the same."

The latter part of the clause, which in their Lordships' judgment is directly applicable to the present case, is adverse to the Appellant's contention. It was entirely through her own neglect that she lost possession of the lands now occupied for more than 12 years of her own tenancy by her husband. So far as these lands were concerned he was a mere trespasser, and it is of no consequence whether a trespasser is a *malik* or holds some inferior position. With regard to the earlier part of the clause it may be held to cover the dispute with regard to the 61 acres of land that have been duly investigated and in respect of which an abatement of rent corresponding to the area has been made. The further contention (which was but faintly maintained) that as this plot of land was originally embraced within the boundaries of the tenure and that the Appellant has not been put in possession of same, she is entitled to suspend payment of the rent of the remaining area, was decided adversely to the Appellant in all the lower Courts, and their Lordships see no reason for differing from their judgments. The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump sum for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

So far their Lordships are in entire

agreement with the judgment of the High Court, and this is sufficient for the disposal of the case.

An alternative ground of judgment is based upon a settlement which took place between the former landlord and tenants of the lands in question, under which a compromise was arrived at to the effect that the tenants should not be entitled to apply for abatement of rent on any ground whatever in respect of the area of 4,300 bighas then found to be the measurement in their occupation. Their Lordships are not, at present, satisfied that such an agreement between the lessor and the former tenants would necessarily be binding on a purchaser of the tenure at an auction sale, but, as the point is unnecessary to the decision of the case, they refrain from expressing any opinion upon it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors: *Messrs. Watkins and Hunter* for the Appellant.

Solicitors: *Messrs. W. W. Box & Co.* for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD ATKINSON.

MR. AMEER ALI.

LORD SALVESB.

1924,

Heard, 31, Octo-

ber and 3, Nov-

ember.

Judgment,

5, December.

SETH MOTILAL HIRABHAI
and ors., Appellants,

v.

BAI MANI,
Respondent.

*Civil Procedure Code (Act V of 1908), sec. 47—
Decree for redemption—Whether certain new shares
were issues of pledged shares within the meaning of
the decree, a question for the executing Court—*

SETH MOTILAL HIRABHAI v. BAI MANI.

Contract A : (IX of 1872), sec 163—Accession to bailed goods

H obtained a decree for redemption of certain pledged shares "together with all the issues thereof," and applied for execution thereof by transfer to H of certain newly allotted shares which H claimed to be accessions to the pledged shares:

Held—That the question to be determined depended upon considerations which necessarily were connected with the original case and was therefore a matter which the executing Court was fully competent to go into under sec. 47 of the Civil Procedure Code.

That having regard to sec. 163 of the Contract Act the newly allotted shares were "issues" of the pledged shares and recoverable as such.

This was an appeal (No. 139 of 1923) from a decree, dated the 6th September 1921, of the High Court at Bombay, affirming an order of the Subordinate Court at Ahmedabad, dated the 28th September 1918, made in execution proceedings of a redemption decree passed in favour of the Plaintiff-Respondent.

In 1883, 48 shares of Rs. 1,000 each and 48 shares of Rs. 500 each in the Ahmedabad Ginning and Manufacturing Company stood in the name of Girdharlal, the father of the present Plaintiff Bai Mani. In 1883 there were disputes between Achratlal and Girdharlal as to the ownership of the shares, the former alleging that the latter was his *benamidar*. The disputes were settled by arbitration and each party was entered as the owner of 24 shares of Rs. 1,000 and of 24 shares of Rs. 500 subject to certain conditions.

Shortly afterwards Girdharlal pledged 5 shares of Rs. 1,000 and 5 shares of Rs. 500 with Achratlal for Rs. 7,500. Achratlal died in 1886 and the Appellants are his trustees and representatives.

In 1886 the Company issued "B" shares one of Rs. 1,000 to every holder of a Rs. 1,000 share and one of Rs. 500 to every holder of a Rs. 500 share.

Achratlal's trustees remained in possession of the shares pledged by Girdharlal and received also the "B" shares issued in respect of them.

In 1913 a suit was instituted by Girdharlal's heir against Achratlal's trustees for redemption of the pledged shares and the "B" shares issued in respect of them.

The Subordinate Judge passed a decree for redemption of the mortgaged shares and their "issues" on payment of a sum amounting to about Rs. 12,000 and that decree was confirmed on appeal in 1917.

On the 20th February 1918 the present Respondent applied for execution of the decree and tendered the decretal amount.

The trustees admitted her right to the "A" shares in the Company and their "issues" but denied her right to the "B" shares submitting that they were not the subject either of the mortgage or of the redemption suit.

Both Courts in India decided in favour of the Plaintiff.

The trustees appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellants.—The question as to the right to the "B" shares cannot be raised in an application such as the present application under sec. 47 of the Code of Civil Procedure, 1908.

The only thing that can be recovered in execution is something which was the subject-matter of the decree. The "B" shares were not mentioned in the plaint nor in the issues and were not taken into consideration in the decree.

The shares did not in law belong to Girdharlal and he cannot therefore claim any accretion of sub-shares.

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In re Piercey (1).

There are admittedly others who may have a claim to the shares and there is not sufficient material to decide their various rights on an application of this kind.

Sir George Lowndes, K. C. and Mr. Parikh for the Respondent.—The suit is by the mortgagor and no question arises as to the ownership of the shares or the rights of 3rd parties and no such decision is desired in this application.

The contention that the "B" shares are not included in the relief desired is incorrect. The "B" shares bear the same numbers as the "A" shares and the Appellants themselves refer to the "B" shares as "Bachan" or issues of the "A" shares.

The decrees and pleadings are at least ambiguous and the question can be raised under sec. 47 (2) of the Code of Civil Procedure, 1908.

Any accession to the mortgaged property goes to the mortgagor.

Sec. 163, Contract Act, 1872.

Sec. 63, Transfer of Property Act, 1882.

The decision whether a dividend or bonus shares are to be regarded as capital or income rests with the Company, and the resolutions of the Company show that their intention in the present case was to increase their capital.

In re Evans (2), *In re Hatton* (3) and *Commissioners of Inland Revenue v. Blot* (4).

Mr. E. B. Raikes replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMBER ALI.—This appeal arises

out of proceedings in execution of a decree made by the Subordinate Judge of Ahmedabad on the 28th September 1915, which was affirmed by the High Court of Bombay on the 26th June 1917.

The circumstances that gave rise to this litigation are simple. It appears that one Achratlal had purchased 48 shares of Rs. 1,000 each and 48 sub-shares at Rs. 500 each issued by a Company which carried on business in Ahmedabad under the name of the Ahmedabad Ginning and Manufacturing Company. The purchase was made in the name of a person named Girdharlal Daltat Ram. This Girdharlal was the nephew of a woman called Bai Gulab, who is said to have been under the protection of Achratlal. In the year 1883 a controversy arose between Achratlal and Girdharlal as to the real ownership of the 48 Rs. 1,000 shares and the 48 Rs. 500 sub-shares. Achratlal alleged that Girdharlal was only his *benamidar* and that in fact he was the real beneficial owner of the said shares. The contest was settled between Achratlal and Girdharlal on the 18th July 1883. On that date an agreement was entered into by which it was agreed that 24 shares of Rs. 1,000 each and 24 sub-shares of Rs. 500 each were to be transferred to Achratlal under certain conditions. The remaining 24 shares of Rs. 1,000 and the 24 sub-shares of Rs. 500 were allowed to remain in the name of Girdharlal, subject to the following among other conditions :—

"That during the lifetime of Achratlal and Gulab, Girdharlal should not sell or mortgage the same without their consent, (2) that out of the amount to be received by Girdharlal as the dividend in respect thereof (excluding such shares as might have been sold with their consent) he was to retain for himself Rs. 1,100 and hand over the balance, if any, to Achratlal and Gulab or the survivor of them, and (3) that after the death of both of those persons the shares were to belong to Girdharlal absolutely."

(1) [1907] 1 Ch. 289, 294.

(2) [1913] 1 Ch. 23, 32.

(3) [1917] 1 Ch. 357.

(4) [1921] 2 A. C. 171, 180.

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Shortly after the settlement Girdharlal appears to have got into financial difficulties and in September 1883, Achratlal advanced him Rs. 7,500 without interest on the pledge by Girdharlal of five shares out of the 24 shares that had been allotted to him in his own right, consisting of Nos. 260-270 each of Rs. 1,000 and five sub-shares of Rs. 500 each corresponding thereto. These shares, which were pledged to Achratlal, were transferred to his name as mortgagee or pledgee thereof. Achratlal died two years after. Before his death, on the 12th February 1885, Achratlal appointed by his Will certain trustees, five in number, to carry out the directions of his Will; one of these trustees was Bai Gulab.

In 1886 the Company passed certain special resolutions to the effect that its capital should be increased by the issue of 350 shares of Rs. 1,000 and 350 sub-shares of Rs. 500, to be called "B" shares. And it was provided that those of the present share-holders who had a whole share of Rs. 1,000 should be given one whole share of Rs. 1,000 of the "B" capital, and similarly with regard to the half-share. The second resolution provided:—

"That if in respect of these shares, a call be required to be made, the same be made in this manner that a call of half of the amount of the call which would be made in respect of a whole share, is made in the case of a half-share of Rs. 500."

The third resolution was as follows:—

"That until all the calls in respect of the 'B' capital are completed (? paid up), the dividend which is distributed every six months out of the earnings (? profits) be distributed on this understanding that a sum is to be deducted for depreciation in accordance with the provisions of the deed and a portion representing two annas (in the rupee), out of the actual (? net) earnings, is to be set apart for the Reserve (fund) and the remaining amount is to be distributed among the present shareholders as dividend."

The fourth resolution is in these terms:—

"That at the time of the declaration of the dividend as stated in the above clause, there should be an understanding that interest (? dividend) at the rate of (i.e., amounting to) 6 per cent. is to be paid to the shareholders in cash and that the remainder is to be entered and acknowledged in the share certificate (as paid) on account of call."

Girdharlal appears to have been unable to carry out his obligation under the agreement of 1883, and had not paid to Bai Gulab the dividends he had undertaken to pay her out of the income of the shares he had pledged to Achratlal, and accordingly an arrangement was entered into between him and the trustees of Achratlal under which they advanced him a sum of Rs. 4,439, out of which they paid the dividends to Bai Gulab and debited Girdharlal with the amount thereof. The trustees have remained in possession of the shares pledged with Achratlal collecting the dividends and paid the value to Bai Gulab as provided in the old arrangement. They appear also to have received the "B" shares which were issued under the resolutions adopted in September 1886, by the directors of the Company.

It is unnecessary to refer to certain other arrangements which were entered into between Girdharlal and Bai Gulab and the trustees as they do not bear directly on the present controversy.

Girdharlal died in 1892. The Plaintiff in the suit before the High Court, who is the present Respondent, is his daughter and heiress. She brought a suit in 1913 in the Court of the First Class Subordinate Judge of Ahmedabad against the five trustees of Achratlal's Will, including Bai Gulab, for the redemption of the pledged shares "together with all the issues thereof that there may be at present."

The trustees (the Defendants) in their

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defence to the Plaintiff's action raised various questions which were decided by the High Court in the decision arrived at in 1917. No reference was made by the trustees in their defence to the "B" shares which they had obtained from the Company and which they held at the time, nor was any specific reference made to these "B" shares in the judgments of the Subordinate Judge and the High Court.

On the 20th February 1918, the Respondent, Girdharlal's daughter, applied to the Subordinate Judge of Ahmedabad for the execution of the decree passed in her favour on the 28th September 1915, and which as already stated was affirmed by the High Court in June 1917. Her application was to the effect that the trustees might be ordered to transfer to her the said five shares mentioned in the decree bearing Nos. 266-270, "together with all sorts of 'Bachan' (issues) appertaining to the same," and she brought to the Court the amount she was directed to pay for the redemption of the mortgaged shares.

The trustees admitted that she was entitled to redeem the "A" shares bearing Nos. 266-270 and their "Bachan" existing at the time of the mortgage, but denied her right to the "B" shares.

Bai Gulab died during the course of these proceedings, and one Harilal, who styled himself the trustee of Bai Gulab, was placed on the record on the 18th July 1918. His case is that he was by virtue of Bai Gulab's right entitled to the "B" shares as representing dividends to which she was entitled in her life-time.

On this state of facts two questions arose for determination in the Courts in India. First, whether the Plaintiff was entitled to proceed under sec. 47 of the Code of Civil Procedure, or whether she was

bound to bring a separate action for the relief she was seeking. Secondly, whether the "B" shares which were held by the trustees were in fact the "Bachan" of the original shares called "A" shares. Both the Subordinate Judge and the High Court have held that the Plaintiff was entitled to proceed under sec. 47 and that in fact the "B" shares were included in her original claim as "accretions" to the "A" shares, the word "issue" being wide enough to cover the claim.

On appeal before His Majesty in Council the contentions advanced by the trustees have been repeated with some force. In their Lordships' opinion the sec. 47 of the Code of Civil Procedure referred to above covers fully the present controversy. The section runs thus:—

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

Every matter relating to the "execution, discharge or satisfaction" of the decree has thus to be dealt with in the execution proceedings. The new sub-section, which runs thus:—

"The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees,"

gives to the Court the power of converting an application into a suit or a suit into an application. It is not necessary, however, to lay stress on this particular provision, as the first section abundantly covers the question in debate.

The question is whether or not by the word "Bachan" the "B" shares are included in the claim. The object of the proceeding is to have this question determined upon considerations which necessarily are connected with the original case.

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In that view the application appears to their Lordships to be fully competent under sec. 47. The main question, however, remains, *viz.*, whether the Plaintiff is entitled to redeem the "B" shares. It has been objected that in the present proceedings the rights of Bai Gulab cannot be properly adjudicated. In their Lordships' opinion any declaration made in these proceedings cannot affect the right (if any) of Bai Gulab to the shares in dispute. It is quite competent for her personal representative, she having died, to bring an action for the ascertainment of her rights. But it is equally clear that the mortgagees have no right to withhold the "B" shares from the Plaintiff. The Ginning and Manufacturing Company compulsorily capitalised the excess profits after payment of dividends of 6 per cent. The Company was perfectly competent to make such capitalisation and there is nothing to show that it was invalid in any way. These shares were received by the trustees, as arising out of and appertaining to the original "A" shares, and it is impossible to contend that the right to these shares could be differentiated from the right to the "A" shares. It has been objected that the word "accretion" applied by the Subordinate Judge and the High Court in respect of the "B" shares does not apply to moveable property. It may be that the word "accretion" is not quite appropriate to moveable property. But sec. 163 of the Indian Contract Act (Act (IX of 1872) is clear on the point. It declares :—

"In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed."

These shares are clearly accessions to the shares expressly pledged or hypothe-

cated, and the pledgor or his representative, the present Plaintiff, is entitled to recover the same.

Mr. Justice Shah, one of the Judges in the Appellate Court, in a well balanced judgment has held as follows :—

"It is clear that the old shares carried with them the right to the allotment of the new shares. For instance, it is difficult to hold that if the shares had not been mortgaged and transferred to Achratlal and had continued in the name of Girdharlal, the new shares could have been or should have been issued to Achratlal as part of the profits of the old shares, and it is not suggested on behalf of the Defendants that in respect of the remaining 19 shares or such of them as continued in the name of Girdharlal, the trustees of Achratlal have or could have claimed the shares of the new capital 'B' issued to Girdharlal as part of the dividends which were claimable by them under the settlement. The right to be allotted the new shares went with the old shares; and I find nothing on the record to support the view that the new shares formed part of the dividends in respect of the old shares. The evidence as to how the calls were received is not clear; but it seems to me to be a fair inference under the circumstances that the profits of the Company were capitalised and that the new shares were allotted to the holders of the old shares as part of the capital and did not represent the dividends on the old shares. At any rate the trustees have produced no evidence to show that that is not the correct inference. On the contrary their own statement of the profits received shows that the new shares were not treated as part of the dividends received on the old shares."

Their Lordships concur generally with the conclusions arrived at by the High Court, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor : *Mr. E. Delgado* for the Appellant.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 173 OF 1924.

SANDERSON, C. J.

BUCKLAND, J.

1924,

Heard, 16, 17 and

20, July.

Judgment,

27, July.]

JAGAT CHANDRA

BHATTACHARYYA

and ors.

v.

GUNNY HAJEE AHMED.

Civil Procedure Code (Act V of 1908), Or. 21, r. 50, sub-rr. (2) and (4)—Decree against partnership firm—Application to execute personally against person alleged to be partner, but not served with summons in the suit, if maintainable—Procedure for determining individual liability of such person—Lunacy of partner, effect of, if dissolution—Contract Act (IX of 1872), secs 254, 264—Dissolution, how affects rights of persons dealing with firm without notice—Rights of persons who commenced dealing with firm after dissolution.

Or. 21, r. 50, sub-rr. (2) and (4) of the Civil Procedure Code are intended to give persons other than those referred to in cls. (b) and (c) to sub-r. (1) an opportunity in the execution proceedings to dispute their individual liability as partners in respect of the decree made against the firm. A person who has been served with the writ of summons in the suit is not one of those contemplated by sub-r. (2).

Per BUCKLAND, J.—Sub-r. (4) of Or. 21, r. 50 is intended to apply to persons against whose property execution is sought under sub-r. (2).

Per CURIAM.—Lunacy of a partner does not ipso facto dissolve a partnership. It provides a ground for dissolution and if there has been no dissolution in fact by reason of the lunacy of a partner, the partnership must be deemed to continue.

Sec. 264 of the Contract Act preserves, as against persons known to have been partners, the rights of persons who have dealt with the firm subsequently to the dissolution of the partnership or change of

partners without notice of such dissolution or change. The application of the section is not confined to persons who had dealings with the partnership before the dissolution.

This was an appeal against the judgment of Mr. Justice C. C. Ghose, dated the 24th August 1924, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case will appear in the judgment.

Sir B. C. Mitter, Messrs. S. N. Banerjee and N. C. Chatterjee for the Appellants.

Messrs. B. K. Ghose and P. C. Ghose for the added Respondent.

Sir B. C. Mitter for the Appellants.—The decree was against a firm. Kush Chandra Bhattacharyya was not served with the writ of summons nor did he enter appearance in his own name, nor was there any adjudication in the suit as to whether he was a partner. Such a decree can be executed only against the property of the partnership and not against any personal property in the hands of Kush Chandra Bhattacharyya, or his sons and legal representatives.

Or. 21, r. 50 (4) specifies what properties are available in execution of a decree against a firm and that is only partnership property, unless a summons to appear and answer was served upon a partner. No summons to appear and answer was served upon Kush Chandra Bhattacharyya. Therefore the decree cannot be executed against premises No. 90, Raja Nobo Kissen Street.

[SANDERSON, C. J.—If a decree against the firm cannot be executed against the personal property of a partner, then the object of a trial of issue under Or. 21, r. 50 (2) is rendered nugatory.]

Sir B. C. Mitter.—Circumstances may happen in which property may be in

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the hands of a person who was connected with a firm, but denies partnership. In such a case a trial of issue under Or. 21, r. 50 (2) is necessary and on such a person being adjudicated a partner, that property would be available in execution as partnership property.

No leave was taken under Or. 21, r. 50 (2). Even if it was applied for, it ought not to have been granted as the liability of Kush Chandra is disputed in this case. In any case the Appellants ought to have been served with summons and given an opportunity to meet an application for leave under r. 50 (2).

"Summons to appear and answer" in Or. 21, r. 50 (4) means the writ of summons and in the absence of such a writ being served upon Kush Chandra, the present application for execution should have been dismissed. Sub-r. (4) controls the rest of Or. 21, r. 50.

[SANDERSON, C. J.—How are you prejudiced? What additional advantage could you have derived in case of being served with a writ of summons in this suit?]

Sir B. C. Mitter.—If I had been served with a writ of summons in this suit, I could have contested the Plaintiff's claim, and could have urged that the suit was bad, e.g., on the ground of limitation or insufficient stamp on the promissory note. I cannot do that at a trial of issue under Or. 21, r. 50 (2). Cites *Davis v. Hyman* (2).

The suit was bad *ab initio*. Under Or. 30, r. 1, a firm can be sued, if it was subsisting at the time of the accruing of the cause of action. In this case the cause of action arose at the earliest in March 1921. The partnership was dissolved on Kush Chandra becoming a lunatic in 1914, or, at the latest, in March 1919 when Kush

Chandra's wife dissolved the partnership by notice to the other partner. A decree has been passed on the 19th June 1924 in a suit for dissolution of the partnership on the basis of the aforesaid notice of March 1919.

Lunacy of Kush Chandra in 1914 *ipso facto* dissolved the partnership. The law is different in India. Contract by a lunatic is voidable under the English law, but is void under the Indian law. Cited *Mohori Bibee v. Dharmodas Ghose* (3) and sec. 11, Contract Act. The implied agency of a partner is revoked on the lunacy of the co-partner (sec. 251 and sec. 201 of the Contract Act). In any event the lunatic's personal estate should not be liable for the debts of the partnership on the analogy of an infant (see sec. 247, Contract Act).

Mr. B. K. Ghose for the added Respondent Mahomed Fateh Mahomed, the assignee of the decree-holder Gunny, Hajee Ahmed, argued that Or. 21, r. 50, is in its genesis, a crude and careless adaptation of Or. 48, r. 8. R. S. C. Taking the rule as it stands, however, it has to be construed, if possible, so as to give a reasonable meaning to it. The construction suggested by the learned Counsel for the Appellants would make the rule utterly meaningless. It would moreover serve to defeat the beneficial provisions in regard to suits by or against firms in the name of the firm. It would be absurd to suggest that the Plaintiff in such a case must, at the initial stage of the suit, finally make up his mind as to how he would proceed in executing the decree in the suit if and when he succeeds in getting it. Or. 21, r. 50 (2) clearly contemplates a case where the decree-holder wants to proceed against a

(3) I. L. R. 30 Cal. 439; a. c. 7 C. W. N. 411 (P. C.) (1903).

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person, other than a partner who has been individually served with the summons and against property other than the partnership assets. *Davis v. Hyman* (2) does not help the Appellants' case. The word summons in Or. 21, r. 50 (4) can be interpreted only as referring to a summons or notice to appear and answer the application under Or. 21, r. 50 (2). It cannot refer to the writ of summons at the time of instituting the suit. The practice with regard to applications under Or. 21, r. 50 (2) is not quite settled. I must admit that in the present case there has been an irregularity. The application ought properly to have been made on summons to the Respondents under Or. 21, r. 50 (4) to appear and answer the application for execution against the personal property of Kush Chandra Bhattacharyya, as being a partner of the Defendant firm. However, a notice was in fact served on them although as under Or. 21, r. 22 (1) (a) (b), which specified all the particulars.

There has not been the slightest prejudice to the Appellants. In point of fact they appeared and contested the issue whether Kush Chandra Bhattacharyya was liable as a partner of the firm. They never took any objection as to any irregularity in the notice. [Referred to sec. 99 of the Civil Procedure Code.]

Lunacy *ipso facto* does not dissolve a partnership whether in this country or in England. It can only afford a ground for dissolution. [Cited sec. 254, Indian Contract Act; sec. 35, English Partnership Act; *Jones v. Noy* (4).] Whether a lunatic's contract in this country is void or voidable is immaterial for the purposes of this case. The analogy of an infant however does not seem to be quite applicable in the case of a lunatic. The ques-

tion is one as to the liability of a principal who subsequently becomes a lunatic, as regards third persons contracting through the agent of such principal without having any knowledge of the lunacy. The law of partnership is in its essence only an application of the law of agency. [Cited *Drew v. Nunn* (5); secs. 201, 208, Indian Contract Act.] The minutes show that Counsel has admitted before the trial Court that the Plaintiff knew that Kush Chandra Bhattacharyya was a partner of the firm before lunacy. Assuming even that there has been a dissolution whether in 1914 or in 1919, there is no suggestion that any public notice has been given or that the Plaintiff had in fact any knowledge of such dissolution. The matter is quite concluded by sec. 264 of the Indian Contract Act and the Plaintiff cannot be affected by such dissolution at all. Therefore there is no question remaining which requires to be tried on evidence.

Mr. S. N. Banerjee.—I shall rely on *Giovani Gorio v. Vallabhdas Kalianji* (6). The Plaintiff does not come within the sec. 264 of the Contract Act as there is nothing to show that he used to deal with the firm prior to its dissolution.

Mr. B. K. Ghose (continuing).—The observations of Beaman, J., in *Gorio v. Vallabhdas* (6) are merely *obiter dicta*, which moreover are entirely unwarranted by the language of the sections. Notice is required even in the case of a new customer, that is, one dealing with the firm for the first time after the dissolution. In the case of an old customer, however, mere public notice is not sufficient and an express notice will be necessary. [Cited *Chundee Churn Dutt v. Eduljee Cowasjee* (1).]

Sec. 36 (English Partnership Act).

(2) [1903] 1 K. B. 855.

(4) [1883] 3 Mylne. & Keon's Rep. 125.

(1) 1 L. R. 8 Cal. 678 (1882)

(5) 4 Q. B. D. 661 (1870).

(6) 17 Bom. L. R. 762 (1915).

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Lindley on Partnership, 9th Ed. (1924), pp. 281, 291.

Mr. S. N. Banerjee in reply.—Sec. 264 refers to a person dealing habitually with a firm prior to dissolution. Observations to the contrary in *Chundee Churn Dutt's* case (1) are *obiter dicta*.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Jagat Chandra Bhattacharyya, Jogesh Chandra Bhattacharyya and Jyotish Chandra Bhattacharyya, who were sued as representatives of Kush Chandra Bhattacharyya : and, the appeal is against an order of my learned brother Mr. Justice C. C. Ghose, which was delivered on the 24th of August 1924.

The suit was based on a Hundi for Rs. 2,009 drawn by the firm of Kush Chandra Bhattacharyya, carrying on business in Calcutta, in favour of the Plaintiff and dated the 24th of February 1921.

The facts which it is necessary for me to state for the purpose of my judgment are as follows :—

Kush Chandra Bhattacharyya started a firm of Kush Chandra Bhattacharyya & Co. in 1907—the other partners were Sukul Chandra Bhattacharyya, Atul Krishna Bhattacharyya and one Raj Krishna Sinha : and the firm carried on business in Calcutta.

In 1914, Kush Chandra Bhattacharyya became a lunatic, and the business, as far as I know, was managed by the other partners.

It was alleged that the wife of Kush Chandra sometime in March 1919 caused a letter to be sent to the partners, referring to the lunacy of her husband and claiming a dissolution. That letter, however, was not produced at the hearing of this case.

(1) 1 L. R. 3 Cal. 678 (1882)

The suit was brought on the 16th of July 1921. Kush Chandra Bhattacharyya was not personally served, but the writ of summons was served upon the firm in the way provided by the Code of Civil Procedure.

The decree was made on the 8th of August 1921 for the amount of the Hundi and interest, and was *ex parte*. After the decree was made it was assigned to Hajee Gunny Ahmed, who was joined as a party to this appeal.

In September 1921, the partners of the firm other than Kush Chandra Bhattacharyya petitioned the Court and, on their petition the firm was adjudicated insolvent. Kush Chandra Bhattacharyya died on the 27th of August 1923.

On the 7th of April 1924, the Plaintiff made an application *ex parte* to the learned Judge for an order that he should be at liberty to execute the decree against the three Appellants describing them as the sons, heirs and legal representatives of Kush Chandra Bhattacharyya, deceased, who was a partner of the Defendant firm, by attachment of the house and premises No. 90, Raja Nobo Krishna Street in Calcutta. This house was not partnership property, but was the private property of Kush Chandra Bhattacharyya.

The learned Judge upon this application made the order as prayed, *ex parte*.

On the 8th of April 1924, the Plaintiff caused a notice to be served upon the three Appellants describing them as the sons, heirs and legal representatives of Kush Chandra Bhattacharyya, a partner of the Defendant firm. This notice purported to be given in the suit, *Gunny Hajee Ahmed v. Messrs. Kush Chandra Bhattacharyya & Co.*, and to be under r. 22 (1) (a) (b) of Or. 21 of the Civil Procedure Code and called upon them to appear on the day mentioned, to show cause why the decree

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passed against them on the 8th of August 1921 in the said suit should not be executed against them: and, on the same day the Plaintiff filed a tabular statement setting out the Plaintiff's claim against the Defendant firm and praying that the decree might be realized by the attachment and sale of the premises in question, which belonged to Kush Chandra Bhattacharyya, a partner of the Defendant firm, which, since his death, passed into the hands of his sons and legal representatives, the Appellants. The tabular statement concluded as follows: "Leave was granted on the 7th day of April 1924 to execute the decree against the legal representatives of Kush Chandra Bhattacharyya, who was one of the partners of the Defendant firm."

The matter came before the learned Judge on the 21st of May 1924 and on the 29th of May 1924 when the issue between the parties was tried. I do not find that the issue was specifically stated, but I assume for the purpose of my judgment that the issue raised was whether Kush Chandra Bhattacharyya was a partner in the firm at the time the Hundi was executed by the firm, namely, the 24th of February 1921.

The learned Judge after hearing the parties made an order granting the Plaintiff leave to execute the decree by attachment and sale of the house and premises No. 90, Raja Nobo Krishna Street.

The matter was determined upon statements contained in the affidavits which were filed and upon certain admissions which were made at the hearing on the 21st and on the 29th of May 1924.

It appears that Mr. Bannerjee, who appeared for the Appellants, examined a witness on the 21st May and then Mr. Sircar, who appeared for the Plaintiff, stated that it was not necessary to cross-examine the

witness, as for the purposes of the case he was willing to proceed on the footing that Kush Chandra Bhattacharyya was a lunatic. Then Mr. Bannerjee, apparently, having regard to what Mr. Sircar said, withdrew the witness.

On the 29th of May, there was a further admission made, as appears from the minutes. Mr. Bannerjee, who appeared for the Appellants, admitted that Mr. Sircar's client knew that Kush Chandra Bhattacharyya was a partner of the firm prior to the lunacy, and Mr. Sircar said that he was willing to proceed on the footing that Kush Chandra Bhattacharyya was a lunatic from 1914 onwards and Mr. Bannerjee said that he was willing to proceed on that footing.

There is one other fact which I ought to mention and that is that on the 11th of July 1921 the wife of Kush Chandra Bhattacharyya instituted a suit on the Original Side of this Court for dissolution of the partnership. That was before Kush's death, who, as I have said, died in August 1923.

After Kush's death, the Appellants were substituted as Defendants in the partnership suit: and, on the 19th July 1924, a decree dissolving the partnership was made: and, it was directed that the dissolution should take effect as from the 19th of March 1919.

The application upon which the learned Judge's decision was given was alleged to have been made in pursuance of the provisions of Or. 21, r. 50 (2). It was based upon the fact that the Plaintiff's decree was against the firm, and upon the allegation that the Plaintiff was entitled to execute the decree against Kush Chandra Bhattacharyya, as being a partner in the firm, and inasmuch as Kush Chandra Bhattacharyya was dead, against the Appellants as his representatives:

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There is no doubt that the procedure adopted by the Plaintiff was irregular.

The application to execute the decree against the Appellants should not have been made *ex parte*, and the order of the 7th of April giving the Plaintiff leave to attach the premises should not have been made *ex parte*, as it was in this case.

That order was made upon the assumption that Kush Chandra Bhattacharyya was a partner in the firm—but the question whether he was a partner had not been decided, either at the trial of the suit or at any other time.

It was admitted by the learned Advocate for the Respondent that a summons should have been issued under the provisions of Or. 21, r. 50 (4) reciting the decree against the firm, and calling upon the Appellants to appear and answer the allegation made by the Plaintiff that Kush Chandra Bhattacharyya was a partner in the firm and to meet the claim that execution should issue against the Appellants as Kush Chandra Bhattacharyya's representatives.

This irregularity, however, in my opinion should not be allowed to vitiate the proceedings, and it is not by itself sufficient to justify a reversal of the learned Judge's order because notice was subsequently given to the Appellants. They appeared before the learned Judge and contested the question whether Kush Chandra Bhattacharyya was a partner in the firm and whether the Plaintiff was entitled to execute the decree against the Appellants and the property in question, and the irregularity in my opinion did not in any way affect the merits of the case.

The first point raised by the learned Advocate for the Appellants was that the Plaintiff was not entitled to execute the decree against Kush Chandra Bhattacharyya or his representatives or their

private property, because Kush Chandra Bhattacharyya had not been served with the writ of summons by which the suit was instituted.

He based his argument on Or. 21, r. 50 (4), which provides as follows: "Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer." His argument was to the effect that unless a person who was a partner in a firm, against which a decree had been obtained, had been served with the writ of summons by which the suit was instituted, he or his private property could not be made liable under the decree, and the Plaintiff's right to execute the decree was limited to proceedings against the property of the partnership.

I am not able to accept that argument.

If it were held that in no event could a decree, obtained against a firm, be executed against a partner personally or his personal property unless he had been served with the writ of summons in the suit, the object of Or. 21, r. 50 (2) would be rendered nugatory.

The result would be that in any case when a Plaintiff sued a firm, he would have to determine at the outset and before he issued the writ of summons who were the persons against whom he would execute the decree when it was obtained.

In many cases it might be difficult and in some cases impossible for a Plaintiff, who had been dealing with a firm and who has been obliged to sue the firm, to ascertain before he brought his suit against the firm, who were the partners against whom he must eventually execute the decree.

The Code enables the Plaintiff to bring the suit against the firm, and if after the decree has been obtained against the firm

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the decree-holder claims to execute it against any person other than those mentioned in Or. 21, r. 50, sub-r. (1), cls. (b) and (c) as being a partner, he is enabled by sub-r. (2) to apply for leave : and that rule provides what procedure is then to be adopted.

In my judgment the intention of the rule is that when an application under the rule is made it should be on notice to the person, who is alleged to be liable as a partner; he is to be served with a summons and called upon to answer the application. Then if the Court finds that the liability is not disputed, the Court may grant leave to execute the decree against the person who does not dispute the liability.

If the person who is sought to be made liable as a partner having been served with the summons and having appeared to answer, disputes his liability, then the issue is to be tried in any manner in which any issue in a suit may be tried and determined.

There is a further reason which militates against the argument of the learned Advocate for the Appellants. If it were adopted, it seems to me that it would render the provisions of sub-r. (2) meaningless.

Sub-r. (2) applies to the case of persons, against whom the decree-holder seeks to execute the decree, other than the persons mentioned in sub-r. (1), cls. (b) and (c).

Cls. (b) and (c) refer to persons who have appeared or who have been individually served as partners and who have failed to appear.

A person therefore who has been served with the writ of summons is not one of those contemplated by sub-r. (2) : and, if the learned Advocate's argument be accepted and the decree-holder's remedy under his decree against a firm is limited to part-

nership property, unless the person sought to be made liable as a partner has been served with the writ of summons in the suit, sub-r. (2) would be unnecessary, for the decree against the firm can be executed against partnership property under the provisions of Or. 21, r. 50, sub-r. 1 (a).

In my judgment the meaning of Or. 21, r. 50, sub-rr. (2) and (4), is that a decree, obtained against the firm, cannot be enforced, except as to partnership property, against a person alleged to be a partner, and against whom an application has been made under sub-r. (2) unless he has been served with a summons to appear and answer the application specified in sub-r. (2) and he has had an opportunity of disputing his liability as a partner, if he desires so to do.

It was argued by the learned Advocate for the Appellants that this could not be the meaning, for it might be that the person sought to be made liable as a partner might desire to contest the validity of the decree, and if he had not been served with the writ of summons he would not have had any opportunity of so doing.

In my opinion, there is no substance in that argument. If on the trial of the issue contemplated by Or. 21, r. 50 (2) it is decided that the person, alleged by the decree-holder to be a partner, was a partner in the Defendant firm, then it seems to me he has no cause for complaint.

Or. 30, r. 3 provides for the service of the summons in a case where persons are sued as partners in the name of the firm. Assuming that the summons has been served in one of the ways specified in Or. 30, r. 3 and that the person, sought to be made liable as a partner, was found in fact to be a partner, he would have had an opportunity to defend the suit either by himself or through his other partners who were his agents.

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In my judgment therefore the first point, on which the learned Advocate for the Appellants relied, must fail.

The second point upon which the learned Advocate for the Appellants relied was, that the lunacy of Kush Chandra Bhattacharyya, which occurred in 1914, dissolved the partnership between him and the other members of the firm as from that time. He based his argument on the allegation that in India a lunatic cannot have a contractual relationship with any one. There is however no doubt that Kush Chandra Bhattacharyya was of sound mind when he entered into the partnership in 1907; and it remains to be considered whether the partnership came to an end as far as he was concerned by reason of his becoming a lunatic.

The learned Counsel argued that it was a partnership at will, and that as soon as Kush Chandra Bhattacharyya became lunatic, he became incapable of exercising his will and making a contract and consequently the contract of partnership came to an end.

I find some difficulty in following this argument.

Kush Chandra Bhattacharyya was a partner from 1907; if he became incapable of exercising his will-power when he became a lunatic in 1914, as alleged, it seems to me that it would follow that he was incapable of expressing his will and determination to put an end to the contract of partnership and that in the absence of an order of the Court dissolving the partnership or any action by a person duly appointed to represent the interests of the lunatic, the partnership would continue. A man, who has been of sound mind, and who becomes of unsound mind, may recover his sanity; and, in my judgment the lunacy of a partner does not of itself dissolve a partnership, but confirmed lunacy

is a ground for dissolution if the other partners apply to the Court for a decree of dissolution on that ground.

Sec. 254 of the Contract Act provides that "at the suit of a partner the Court may dissolve the partnership in the following cases:—

"(I) When a partner becomes of unsound mind"

This contemplates that an order of the Court is necessary to dissolve a partnership on the ground of the unsoundness of mind of one of the partners—such an order would not be necessary if the unsoundness of mind by itself dissolved the partnership.

It was then argued that by the decree of the Court, dated the 19th of June 1924, the partnership was in fact dissolved as from the 19th of March 1919.

It was alleged on behalf of the Respondent that the suit, in which this decree was made, was a collusive suit: having regard to the parties to it and the date when the suit was instituted, *viz.*, the 11th of July 1921, and the date of the decree, *viz.*, the 19th of June 1924 and the date when the suit on the Hundi against the firm was instituted, *viz.*, the 16th of July 1921, there seems some ground for that allegation.

The decree of the Court for dissolution however was made and still remains, and I assume, therefore, for the purpose of my judgment, that the partnership as between Kush Chandra Bhattacharyya and the other partners was dissolved as from 19th March 1919.

The question still remains whether that fact is sufficient to relieve Kush Chandra Bhattacharyya and his estate from liability to the Plaintiff in this suit.

Sec. 264 of the Contract Act provides as follows:—

"Persons dealing with a firm will not be affected by a dissolution of which no

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public notice has been given, unless they themselves had notice of such dissolution."

The learned Advocate for the Appellants argued that this section applies only to persons who dealt with the firm before the dissolution and therefore the Plaintiff, who, he alleged, had not dealt with the firm before the dissolution, was not entitled to notice, and he could only make liable those who were in fact partners, at the time the Hundis were executed.

There is no express decision by the learned Judge on the question whether the Plaintiff had dealings with the firm before the dissolution, although the learned Judge held that the Plaintiff had many dealings with the Defendant firm before the execution of the Hundis. If the Appellants' contention on the above-mentioned point were correct, I should be of opinion that it would be necessary to remand the case for a further hearing in order to have a decision on the question whether the Plaintiff had dealings with the firm before the dissolution in March 1919.

I am of opinion however that no remand is necessary for I do not think the Appellants' contention in this respect is correct.

In the first place the section says: "persons dealing with a firm." It does not say "persons dealing with a firm before its dissolution;" and I see no reason why the words "before its dissolution" should be interpolated in the section.

In the second place the Appellants' contention is in my opinion, contrary to the decision in *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* (1), which is a decision of a Bench of this Court, consisting of Garth, C. J. and White, J.

In that case the learned Chief Justice said that he felt a difficulty as to the meaning of sec. 264 of the Contract Act especial-

ly as regards old customers who like the Plaintiff in that case had dealt with the firm before its change or dissolution.

He proceeded as follows (p. 683):—"I suppose the section means, that all persons dealing with a firm, whether old customers or new, will be affected by any dissolution of the firm or any change of its members if they have actual notice of the fact. This would be quite in conformity with the law of England. But supposing they have no actual knowledge of the fact, is it intended that all persons dealing with the firm, whether old or new customers, are to be bound by public notice of such dissolution or change, whatever the words 'public notice' may mean?" Again at p. 684 the learned Chief Justice is reported to have said: "The law which regulates the liability of partners for the acts of their co-partners is a branch of the law of agency; and in the absence of any specific rule upon the subject under the head of partnership, we must look to the law of agency for the solution of our present question. Each partner is the agent of his co-partners for the purpose of conducting debts and obligations in the usual course of partnership (see secs. 249 and 251 of the Contract Act, Lindley on Partnership, 3rd Edition, p. 248). And when this agency has once been established, it does not cease as regards third persons, until its termination has become known to them (see sec. 208 of the Contract Act)."

[Sec. 208 of the Contract Act provides—"The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them."]

In the case, therefore, of a dissolution of the partnership or of the retirement of one of its members, the agency as between the partners themselves would

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cease from the time of such dissolution or retirement; but as regards third persons the agency would continue until it had been duly notified. And the mode of notification which the law requires is different in the case of old and new customers of the firm from what it is in the case of other persons."

In my judgment it is clear that the above-mentioned case is an authority for the proposition that the section applies not only to persons who dealt with the firm before the dissolution but also to persons dealing with the firm after the dissolution or change of partners.

This, as already stated, is the natural construction of the section giving the ordinary meaning to the words used in the section.

In this case it was admitted that the Plaintiff knew that Kush Chandra Bhattacharyya was a partner of the firm prior to the lunacy: and it has not been suggested that any public notice of the dissolution or change of partners was given, or that the Plaintiff himself had notice of the dissolution.

In my judgment, therefore, the Plaintiff dealing with the Defendant firm, of which he knew Kush Chandra Bhattacharyya was a partner, and having had no notice of the alleged dissolution was not affected by the dissolution.

For these reasons, I am of opinion that the appeal should be dismissed with costs.

BUCKLAND, J.—On the 8th of August 1921 Gunny Hajee Ahmed obtained a decree against the firm of Kush Chandra Bhattacharyya & Co., for Rs. 2,009 and costs upon a Hundi, dated the 24th February 1921, and executed on behalf of the Defendant firm. Subsequently an application was made under Or. 21, r. 50 (2) for an order for leave to execute the decree against the present Appellants as the sons

and legal representatives of their deceased father Kush Chandra Bhattacharyya by attachment of the house and premises No. 90, Raja Nobo Krishna Street which is a part of the personal estate of their deceased father.

The applicant has since assigned his decree, but that does not affect the points which now arise for decision.

On the 8th of April notice was issued to the Appellants under r. 22 (1) (a) (b) of Or. 21 of the Code of Civil Procedure to show cause why the decree in question should not be executed against them. To that notice I shall have to refer later in more detail.

The Appellants, as observed, are the sons of Kush Chandra Bhattacharyya who is admitted to have been a member of the firm of Kush Chandra Bhattacharyya & Co., from the year 1907 onwards. It is also admitted that in the year 1914 he became of unsound mind.

In the year 1923 he died. It is also alleged and not denied that in March 1919 the wife of the deceased wrote through her Solicitors on behalf of her husband to his partners giving notice of dissolution of the firm carried on under the name of Kush Chandra Bhattacharyya & Co.

The applicant Gunny Hajee Ahmed alleged that he dealt with the firm knowing Kush Chandra Bhattacharyya was partner and that no notice of dissolution was given to him or by public advertisement.

The learned Judge made an order granting leave to the Plaintiff to execute the decree in the manner desired. There is no finding as to dissolution, though the learned Judge appears to have dealt with the matter upon the basis of a dissolution in March 1919.

The first point argued is that under Or. 21, r. 50 of the Code of Civil Procedure no

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execution can issue against property other than the partnership property unless the alleged partner has been served with the writ of summons in the suit. This is based on Or. 21, r. 50 (4) which is said to extend to the whole rule.

Under Or. 30, r. 3 the summons in a suit against partners in the name of their firm may be served either upon any one or more of the partners, or at the principal place at which the business is carried on upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct. Or. 30, r. 6 provides: "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm;" and r. 7 provides: "Where a summons is served in the manner provided by r. 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued."

Execution in a suit decreed against a firm is provided for by Or. 21, r. 50. As regards the partnership property no difficulty arises. Execution may issue in every case. As regards private property of individual partners rr. 50 (1) (b) (c) limit it to cases of persons who have appeared under Or. 30, rr. 6 or 7 or who have admitted that they are or have been adjudged to be partners or who have been individually served as partners and failed to appear. The persons so classified comprise all who prior to execution against their private estate for one reason or another may be held to be aware of their personal liability to satisfy the decree against the firm.

Sub-r. (2) deals with cases of persons said to be partners who are not within the

foregoing categories and who therefore may be held not to be aware of their personal liability. Hence the need for sub-r. (4).

The principle underlying this rule is that as regards the firm and the partnership property there has been a complete adjudication prior to decree. Service in the manner prescribed by Or. 30 ensures that due notice shall be given to the firm as such. Then, as regards the liability of individual partners, the object of the rule is to ensure that no partner shall be held personally liable unless he shall have had individual notice or may be held to be aware of his liability.

It has been argued that sub-r. (4) is generally applicable and that its effect is to limit execution against individual partners to execution against those who have been served with a writ of summons under Or. 30. Such a construction cannot be reconciled with sub-r. (1). It would involve both repetition and inconsistency and be so meaningless as to be inconceivable. If "summons to appear and answer" means the writ of summons, as argued, this leads to the anomalous conclusion, that service on partners is twice ensured, by sub-r. (1) (c) and by sub-r. (4), while sub-r. (2) is ineffective and cannot be utilised.

The only sensible interpretation is that sub-r. (4) is intended to apply to persons against whose property execution is sought under sub-r. (2).

This rule is adapted from the English Or. 48A, r. 8, reference to which makes it clear that the provision as regards service in sub-r. (4) was intended to be applicable to persons against whom execution was asked for other than those against whom the decree-holder was entitled to execution by reason of sub-r. (1). The sub-division of the English rule into Or.

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21, rr. 50 (2) and (4) has led to the elaborate argument which we have heard. The two would more appropriately have been combined in one sub-rule which would have made the intention clear.

The English rule of course is in no way binding as an authoritative guide to interpretation, but I am fully satisfied both as to the genesis and the meaning of the rule which we have to construe.

The form of summons is challenged and it is argued that by reason of the form there has been no proper service. Reference has been made to the words in sub-r. (4) "summons to appear and answer" and it is rightly contended that in relation to sub-r. (2) they mean that proper notice of what is intended shall be given. The summons should recite the decree, that it is against the firm, and that the decree-holder claims to be entitled to execute it against the individual to be charged on the ground of his liability as a partner in such firm.

In this particular case the summons was issued by the master under Or. 21, r. 22 (1) of which sub-rr. (a) and (b) are both applicable. Where necessary the summons should issue under both rules of Or. 21 and the requirements of each should be complied with.

Applications for execution are ordinarily made *ex parte* on a tabular statement. In cases to which Or. 21, r. 22 applies it appears to be the practice, to file the tabular statement and at the same time to take out a summons under that rule. This practice appears to be convenient, and it might well be followed where Or. 21, r. 50 (2) applies, whether in conjunction with Or. 21, r. 22 or not, but the summons should be served before any order is made against the persons to be held liable.

To conclude these observations on the practice under Or. 21, r. 50 (2) which does

not seem to be well settled it also appears to me that the effect of the language of the sub-rule as to granting leave or trying the liability of the person to be charged, where disputed, is that upon the parties being before the Court or properly served, as the case may be, if liability is not disputed, the Court may grant leave forthwith, but if liability is disputed, leave may only be given after such liability has been tried and determined in favour of the decree-holder.

In this particular case, the summons does not conform strictly to what in my opinion is required by the Code. But I am not prepared to say that on that ground the appeal must succeed.

Though no reference is made in the summons to Or. 21, r. 50 (2) nevertheless it contains the title to the suit indicating that the firm was the Defendant against whom the decree referred to later was made. It is addressed to the Appellants as legal representatives of Kush Chandra Bhattacharyya, "a partner of the Defendant firm above-named," and calls upon them to show cause why the decree should not be executed against them, which must mean in the capacity in which they are summoned. They appeared and they took no objection. They met the case made against them on its merits, though it was not open to them at that stage to challenge the decree, for the liability of the firm and of its partners, whoever they might be, had been thereby established. How can they now complain? In my opinion, there is no substance in this objection. Sec. 99 of the Code of Civil Procedure has been referred to and it provides: "No decree shall be reversed or substantially varied . . . on account of any . . . error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction

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of the Court." If necessary I should be prepared to say that this section applied.

The next point argued is that Kush Chandra Bhattacharyya's lunacy in 1914 *ipso facto* dissolved the partnership. This argument is based upon an alleged analogy to infancy which, however, in my opinion, does not exist. An infant is under a continuing contractual disability which is finally removed when he attains majority. The disability of a person of unsound mind may begin and end at any time; it may be continuous or it may be intermittent. Sec. 12 of the Indian Contract Act is consistent with this for the second paragraph provides that, "a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind" and the third paragraph of the section provides for the converse case. Sec. 254 provides that "at the suit of a partner the Court may dissolve the partnership when a partner becomes of unsound mind." This provision of the law is wholly inconsistent with the proposition that the lunacy of a partner *ipso facto* dissolves the partnership. It shows that lunacy provides a ground for dissolution and whether or not it affords a ground for dissolution and whether or not it is open to another partner to dissolve a partnership without an order of the Court, in the circumstances it is not necessary to consider. It may be necessary, therefore, in cases where a partner has become of unsound mind, to consider whether there has been a dissolution in fact, otherwise the partnership must be deemed as continuing. In these circumstances, I find that the partnership continued after 1914.

In this case no dissolution in 1919 as is alleged to have taken place was actually proved before the learned Judge, nor is there any finding by him to that effect, for the judgment of the Court declaring

the partnership to have been dissolved at that date was delivered between the time when the learned Judge heard the application and the date when he made the order which has been appealed against. He assumed, however, that there had been a dissolution in 1919 and seems to have dealt with this matter upon that basis.

I may digress at this point to draw attention to the fact that under Or. 21, r. 50 (2) the question of liability should be tried and determined like an issue in a suit. That means on evidence which may be oral or documentary. This ordinarily should be the course pursued. A form of issue which would probably be appropriate to most cases was considered and approved in *Davis v. Hyman* (2).

In this particular instance the admission by learned Counsel on the one hand of the lunacy in 1914 of Kush Chandra Bhattacharyya, of partnership and of the Plaintiff's knowledge of the partnership before that date on the other, made this unnecessary. Assuming, therefore, that there was no dissolution in 1919, the Appellants are clearly liable.

The only remaining question is whether upon the materials before the learned Judge he was able to decide the case having regard to the state of the law, seeing that the transaction upon which the decree was founded did not occur till 1921.

It is not alleged that any notice of dissolution was given to Gunny Hajee Ahmed or that the alleged dissolution was publicly advertised. It may, therefore, reasonably be assumed that neither of these things was done.

It is put on issue upon the affidavits whether Gunny Hajee Ahmed ever dealt with Kush Chandra Bhattacharyya & Co., prior to 1921 when the Hundi on which the decree was made was executed. I

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will, therefor, assume that Gunny Hajee Ahmed was a new customer of the firm in the sense that he had not dealt with the firm before 1921.

The position, therefore, may be summarised as follows:—That prior and up to 1914 Kush Chandra Bhattacharyya was a member of Kush Chandra Bhattacharyya & Co., that he then became a lunatic, that his widow on his behalf gave notice of dissolution to his co-partners in March 1919, that no further notice of dissolution was given nor notice to Gunny Hajee Ahmed, that Gunny Hajee Ahmed knew prior to 1914 of the constitution of the firm and was a new customer in August 1921. On these facts is the estate of Kush Chandra Bhattacharyya liable to satisfy the decree against the firm?

The matter appears to be governed in part by sec. 264 of the Contract Act, Gunny Hajee Ahmed was a person dealing with a firm. *Prima facie*, he was not affected by the alleged dissolution.

It has been argued that as a new customer he is not within that section. The law of partnership depends on the law of agency. Sec. 201 of the Contract Act provides that an agency is terminated by the principal becoming of unsound mind, but sec. 208 provides, that the "termination of the authority of an agent does not take effect . . . so far as regards third persons, before it becomes known to them." Apart from authority secs. 201, 208 and 264 appear to conclude the matter. But we have the authority of this Court in *Chundee Churn Dutt v. Eduljee Cowasjee Bijnee* (1) in which the effect of sec. 264 was fully considered by Garth, C. J., who was clearly of the opinion that as regards persons who had not dealt with the firm the implied agency of partners would

continue until its termination had been publicly notified.

It has been submitted that inasmuch as the question in that case was one of liability to an old customer the learned Chief Justice's observations were but *obiter*. With this I cannot agree. It does not seem to me that an interpretation of a statute directly necessitated in order to apply its provisions to the facts of a case should be described as *obiter dictum* because it involves reference to facts other than those before the Court.

I had some doubt at one time whether it would not be necessary to remand the case for trial upon the points last discussed, but in view of the admissions and the law as I conceive it to be, that course now seems to me to be unnecessary.

The directions contained in Or. 21, r. 50 (2) as to the trial of an issue should however not be overlooked, and it is very desirable that the issue to be tried should be framed and recorded. The same applies to any admissions which may be held to render oral evidence unnecessary either in whole or in part.

I have no doubt that the learned Judge who tried this case was fully cognizant of the position, but the absence of any full and accurate record of what occurred before him, resulting in the prescribed procedure not being strictly followed has added considerably to the difficulties in dealing with this matter on appeal.

I agree that this appeal should be dismissed with costs.

Messrs. H. N. Dutt & Co., Solicitors for the Appellants.

Messrs. Leslie & Hinds, Solicitors for the Respondents.

P. D.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SHAW.

LORD B. ANESBURGH.

SIR JOHN EDGE

PRAMATHA NATH

MR. AMER ALI.

MULLICK, Appellant,

1925,

v.

Heard, 30, January

P. ADYUMNA KUMAR

and 2, 3, 5, Feb-

MULLICK and anr.,

ruary.

Respondents.

Judgment,

28, April.

Hindu law—Religious endowment—Family idol, if capable of disposal of property—Legal position of founder and his heirs when no separate Shebait appointed—Founder's heir, whether can determine the location of the Thakur—Power to remove—Division of worship into turns—Contest between co-Shebaites regarding worship—Thakur to be represented by independent next friend appointed by Court—Members of family entitled to worship but not Shebaites should be made parties—Scheme of worship to be framed on hearing all interested parties and guardian of Thakur.

A Hindu idol is a juristic entity and has a juridical status with the power of suing and being sued. The person who has the deity in his charge is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir.

The person founding a deity and becoming responsible for the duties of the manager of the idol is de facto Shebait. This responsibility is maintained either by the personal performance of the religious rites or, as in the case of Sudras, by the employment of a Brahmin priest to do so on his behalf. The founder, at any time before his death, or his successor likewise may confer the office of Shebait on another.

Family idols are not mere moveable chattels and their destruction, degradation or injury are not within the power of the founder or other custodian for the time being.

Where the founder of the idol continued till his death to be the de facto Shebait, his heir stood vested with the custody of, and management of the trust for, the family idol which belonged to the founder.

Where the founder's heir conveyed and dedicated to his family idol certain premises for its location and directed that the idol was on no account to be removed therefrom except upon dedication to it of another Thakurbari of the same or of larger value, and the office of Shebait having devolved by inheritance on several persons, there was a division of the worship into palas or turns, and the question was whether one of them during his turn of worship was entitled to take the Thakur to his own residence for such purpose:

Held—That, if in the course of a proper and unassailable administration of the worship of the idol by the Shebait, it be thought that a family idol should change its location, the will of the idol itself, expressed through its guardian must be given effect to. A fortiori it is open to an idol acting through its guardian, the Shebait, to conduct its worship in its own way at its own place, always on the assumption that the acts of the Shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

The question having arisen in a suit between contesting co-Shebaites, the Judicial Committee held that the idol should be represented in the suit by a disinterested next friend appointed by Court, and that the female members of the family who are entitled to participate in the worship without obstruction or inconvenience should also be joined, and a scheme framed for the regulation of the worship of the idol.

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This was an appeal (No. 59 of 1924) from a decree, dated the 10th April 1923, of the High Court at Bengal, which reversed a decree of the same Court, dated the 1st June 1922, in its Original Jurisdiction.

The Appellant and Respondents are descendants of a wealthy Hindu named Mutty Lal Mullick who died in 1846.

During his life-time Mutty Lal Mullick established and consecrated three family deities which were located in his family dwelling-house in Pathuriaghatta Street, Calcutta, and by his Will he provided for the maintenance of the worship of the deities. He was succeeded by his adopted son Jadulal Mullick who pulled down and re-built the family house in Pathuriaghatta Street and erected a Thakurbari on an adjoining plot of land at No. 1, Prosonno Kumar Tagore Street. In 1888 Jadulal executed a deed of trust whereby he dedicated the Thakurbari to one of the three family deities and provided that the Thakur should not be removed therefrom unless another suitable Thakurbari of equal value were provided.

On the death of Jadulal disputes arose among his three sons (represented by the Appellant and Respondents) and a partition was effected and provision made for carrying on the worship.

Further quarrels took place and a scheme was framed and agreed to under which each of the contesting parties was to take it in turns to conduct the Sheba and worship of the deities for a year.

When the Appellant's turn came to conduct the worship he desired to remove the deities to his private residence, a course which was opposed by the Respondents.

The Appellant thereupon filed a suit praying for a declaration of his right to

remove the deities and for an injunction to restrain the Respondents from interfering. The trial Judge (Greaves, J.) made the declaration as prayed for on the ground that Jadulal was not the founder of the worship, and was not entitled to place restrictions on the location of the Thakur which would bind Shebaites who came after him.

An appeal from this decision was heard by Sanderson, C. J., and Richardson, J., who allowed the appeal and set aside the decree of the trial Judge. (See 27 C. W. N. 684).

Mr. Justice Richardson regarded the question of Jadulal's right to impose the restriction while making the gift to the Thakur in the deed of trust as being the only question of substance in the case, and he held that the restriction was for the benefit of the Thakur. He stated in his judgment as follows:—"I cannot therefore accede to the contention that the terms of Mutty Lal's Will conferred on Jadulal an unlimited discretion to deal with the deities according to his pleasure. I will assume on the principle stated in *Girijanand v. Sailajanand** that Jadulal could not bind his successors by any act which was not for the benefit of the deities. No one suggests that the dedication of a Thakurbari was not the act of a pious Hindu . . . In his secular capacity he had a perfect right to make the gift and to impose the conditions which he did impose. The only question of substance in the case is whether in his capacity as Shebait he exceeded his authority in accepting the gift on the Thakur's behalf subject to the conditions. The test to be applied is whether the condition with which we are immediately concerned in the present case was

* I. L. R. 23 Cal. 645 (1896).

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or was not for the benefit of the Thakur," and he held that the restriction as interpreted as aforesaid was for the benefit of the Thakur on the ground that "the Thakur is at least secured from undignified journeys from one place to another." The learned Judge continued :—"As the worship of the deities was made by Mutty Lal a charge on his estate, now converted into a trust fund, Jadulal has no right, I think, to the title of a founder of the endowment. His liberality, however, should dispose his successors and the Court to respect his wishes as far as possible . . . and in my opinion the condition cannot be said to be unreasonable."

Sanderson, C. J., in a short judgment, in effect concurred with the judgment of Richardson, J.

Messrs. Dunne, K. C. and Hyam for the Appellant.—The position of a Shebait is laid down in *Prosunno Kumari Debya v. Golab Chand Baboo* (8), *Greedhareejee v. Rumanlolljee* (3) and *Rajeshwar Mullick v. Gopeswar Mullick* (9).

He has power to deal with the dedicated property only for the benefit of the idol and in cases of necessity. He has no power to deal with the location of the idol.

The idols were founded by Mutty Lal who made a valuable foundation in their favour.

Jadulal succeeded his adoptive father and was Shebait of a hereditary Thakur even before he executed the deed of 1888. He was not entitled as Shebait to add restrictions to the foundation to which he had succeeded.

There is nothing intrinsic in Hindu law to prevent a Shebait from taking an idol to his own house during his turn of duty.

(8) L. R. 16 I. A. 137; s. c. I. L. R. 27 Cal. 3 (1889).

(9) L. R. 2 I. A. 145; s. c. 14 B. L. R. 450 (1875).

(9, 12 C. W. N. 323 (1907).

See Stokes's Hindu Law Books, Maynkha (citing Narada), p. 80, Mitakshara, p. 467.

Dwarka Nath Roy v. Jannobee Choudhrai (10) and *Ram Soondur Thakoor v. Taruck Ch. Turkoruttun* (11).

There was nothing in the original foundation to restrict the removal of the deities and the evidence shows that they were actually removed both by Mutty Lal and Jadulal from the Thakurbari to the Puja Dalan on the occasion of the Durga and other pujas.

From this it is clear that the prohibition in the deed of 1888 was not imperative so as to apply to temporary removal for the purpose of worship.

The restriction in any case does not apply to the two Thakurs who are not mentioned in the deed.

They referred also to *Rambramaha Chatterji v. Kedar Nath Banerji* (1).

Messrs. DeGruyther, K. C. and Parikh for the Respondents.—If the Appellant's contention is upheld it would follow that each Shebait during his turn could remove the idol to his own house, with the result that it would never be in the Thakurbari: moreover it is quite probable that other Thakurs will be consecrated and in another generation they may be numerous.

The idol was the absolute property of Mutty Lal, it was in fact his chattel, with which he could deal as he pleased and as such it passed to Jadulal, who became sole proprietor. On dedication of the Thakurbari he had full power to impose any condition he pleased.

The Appellant is not a Shebait of the Thakurbari except under the terms of the deed of 1888 and under the terms of that deed he is not entitled to remove the idol.

(1) 36 C. L. J. 478 (1922).

(10) 4 W. R. 79 (1865).

(11) 19 W. R. 28 (1872).

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Apart from agreement a Shebait is not entitled under Hindu law to remove an idol to his private house.

Similarly apart from agreement family worship would have to take place in the Thakurbari.

Had there been an intestacy the idols and Thakurbari would have descended to Jadulal's heirs as joint property.

If each member of the family has a right to take them to his own house the idea of joint property is lost, and if there is a right to remove them, one member of the family may take them to the other end of India and prevent the other members from performing their pujas.

The passage in Narada cited by the Appellant states that when the family is joint the worship is joint, when the family is separate the worship is separate, but that does not give a right to one of the separated parties to remove the object of worship.

Stokes—Dayabhaga, sec. 1, ch. 6, sec. 2, ch. 6, para. 25, p. 285.

Mayne's Hindu Law, paras. 439 and 468.

Sethuramaswamiar v. Meruswamiar (12).

Bengal Regulation, XIX of 1814, sec. 11.

The decisions in *Dwarka Nath Roy v. Jannobee Choudhrai* (10) and *Rajeshwar Mullick v. Gopeswar Mullick* (9), on which the Appellant relies, lay down general propositions which are too wide and are not applicable to the present case which must be decided on the terms of its own deed of endowment. There is abundant authority for the proposition that although all the Shebait—because they are co-sharers—can remove an idol

from the Thakurbari, yet one of them has not that power.

Konwar Doorga Nath Ray v. Ram Ch. Sen (13), *Ramanathan Chetty v. Murugappa Chetty* (14), *Khetter Ch. Ghose v. Hari Das Bundopadhya* (2), *Nubkissen Mitter v. Hurrishunder Mitter* (15), *Mitta Kunth Audhicarry v. Neerunjun Audhicarry* (7), *Thandavaraya Pillai v. Shunmugam* (16) and *Sethuramaswamiar v. Meruswamiar* (17).

As to the relationship of the idols and the nature of the Salgram they referred to Hindu Manners, Customs and Ceremonies by the Abbé Dubois (Beauchamp's translation), Oxford Edition, Vol. II, p. 655, Hinduism by Monier Williams and Modern Hinduism by Wilkins.

Mr. Dunne, K. C., in reply contended that the property in an idol included a right to worship as well as a right to possession. After partition the right to worship is separate.

He referred to Manu, Chap. III, sec. 67.

Gour Mohan Chowdhury v. Madan Mohun Chowdhury (18).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—The questions raised by this appeal are of a wide and general importance. They have reference to the control and worship of a Hindu family idol. It may be explained that although one idol is referred to, called of course the Thakur, there were two others, the

(2) 1 L. R. 17 Cal. 557, 560 (1890).

(7) 14 Beng. L. R. 166 (1874).

(13) L. R. 4 I. A. 52, 53; s. c. I. L. R. 2 Cal. 341 (1876).

(14) L. R. 33 I. A. 139, 143; s. c. I. L. R. 29 Mad. 243; 10 C. W. N. 825 (1906).

(15) 2 Morley 146 (1816).

(16) I. L. R. 32 Mad. 167 (1906).

(17) I. L. R. 34 Mad. 470, 478 (1909).

(18) 6 Beng. L. R. 352 (1871).

(9) 12 O. W. N. 323 (1907).

(10) 4 W. R. 79 (1865).

(12) L. R. 45 I. A. 1; s. c. I. L. R. 41 Mad. 290; 23 C. W. N. 457 (1917).

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Thakurani, a female idol referred to in some of the papers as the consort of the Thakur, and there was also a third, a sacred or deified stone called the Salgram Sila. These three idols became the objects of the pious worship of the family of the founder, Mutty Lal Mullick, who originally installed them. But the points in the case can be more simply treated by referring to the one, namely, the principal idol the Thakur.

The appeal is from a decree, dated the 10th April 1923, made by the High Court in Calcutta in its Civil Appellate Jurisdiction reversing a decree, dated the 1st June 1922, made by the same Court in its Original Civil Jurisdiction.

The case was argued at great length, and a large mass of authorities was cited.

Before entering upon the legal questions which were debated, their Lordships think it not inadvisable to state the family history, in so far as it concerns the installation of this idol. It was established and consecrated many years ago by a wealthy Hindu inhabitant of Calcutta, Babu Mutty Lal Mullick, in his family dwelling-house, in a Thakur Ghar, or room therein, set apart for worship.

Mutty Lal Mullick died in 1846 leaving a widow, Ranganmoni, and an adopted son, Jadulal, then two years of age. He left a Will, dated 17th August 1846 (shortly before his death). He had for some time prior to his death set up and established and consecrated the idol, and no doubt is thrown upon the fact that the idol so installed became unquestionably the object of worship by himself and the family. The Will provided that his widow should be the malik or proprietor and attorney, for the protection and care of the whole of his estate until his adopted son Jadulal attained the age of 20, and the enumeration included the Sri Iswar

Thakurs, Thakuranis, etc., established by him and ancestral.

Upon the adopted son attaining 20 the property was to be made over to the son as his heir. There was a power to the widow in case the adopted son died without issue to adopt another. A gift was made to the widow of one lac of rupees, together with various jewels and silver with right of residence in the family residence. With regard to the maintenance and worship of the idol certain funds, amounting to Rs. 600 a month, were to be drawn by the widow and therewith she was to defray the expenses of the idol's Sheba (or worship) and for religious festivals and ceremonies, 'in the method that I have paid and defrayed the same hitherto.' Upon the adopted son attaining 20 the widow was to "make over the whole of the property to him fully and he will in a like manner protect the whole of the property and effectuate the Kream Karmas, or religious acts and ceremonies."

It seems accordingly clear that in Mutty Lal Mullick's life-time the idol was, as already stated, established as a household god; and the pious founder, narrating his own upkeep and maintenance of the deity, gave funds in order that those should be continued; and he prescribed the duty of continuance to the widow during the adopted son's minority and upon the son thereafter during his life.

One of the questions emerging at this point, is as to the nature of such an idol, and the services due thereto. A Hindu idol is, according to long established authority, founded upon the religious customs of the Hindus, and the recognition thereof by Courts of Law, a "juristic entity." It has a juridical status with the power of suing and being sued. Its interests are attended to by the person

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who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir. It is unnecessary to quote the authorities; for this doctrine, thus simply stated, is firmly established.

A useful narrative of the concrete realities of the position is to be found in the judgment of Mookerjee, J., in *Rambrahama Chatterji v. Kedar Nath Banerji* (1) :—

"We need not describe here in detail the normal type of continued worship of a consecrated image—the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice with flowers and water, and other like practices. It is sufficient to state that the deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the divinified image is regaled with the necessities and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest."

The person founding a deity and becoming responsible for these duties is *de facto* and in common parlance called Shebait. This responsibility is, of course, maintained by a pious Hindu, either by the personal performance of the religious rites or—as in the case of Sudras, to which caste the parties belonged—by the employment of a Brahmin priest to do so on his behalf. Or the founder, any time before his death or his successor likewise, may confer the office of Shebait on another.

Under the Will of Mutty Lal Mullick he did not adopt the latter course, but he acted as Shebait with the Brahmin assistance referred to. After his death his widow officiated similarly as the ministrant of the worship, and she used, as

directed, the endowed funds specially destined for the upkeep and worship of the deity. After the adopted son Jadulal reached the age of 20 he then became *de facto* the person, charged with the same duties, to be performed as fully as his adoptive father and mother had performed them.

It must be remembered in regard to this branch of the law that the duties of piety from the time of the consecration of the idol are duties to something existing which, though symbolising the Divinity, has in the eye of the law a status as a separate *persona*. The position and rights of the deity must, in order to work this out both in regard to its preservation, its maintenance and the services to be performed, be in the charge of a human being. Accordingly he is the Shebait custodian of the idol and manager of its estate. And so, paying proper respect to the religious proprieties of the case, the father, mother and adopted son were successively and *de facto* ministrants and custodians of this idol.

The period during which this state of matters existed was in the narrative from anterior to 1846 till the year 1864. The widow's charge of the affairs of the idol had come to an end; and Jadulal the son's period of administration, he having reached the age of 20, had begun. Jadulal died in the year 1894. What had happened during his period of administration was this: that in 1881 he enlarged the old family dwelling-house containing the Thakurbari in which the household gods had hitherto resided and were worshipped. He had erected a puja dalan for the worship of all the family Thakurs, including the three referred to, that is to say, instead of one house with its Thakurbari for the family, two houses were erected on adjoining plots of ground and

(1) 26 C. L. J. 475 at p. 293 (1922).

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between these the puja dalan was erected, having a private entrance from each of the private dwellings so that the family worship was conducted with due decorum and propriety in what was practically an annexe to either house.

Two other events occurred which are important during this period of Jadulal's regime. In 1888 he executed a deed of trust providing particular premises for the location and worship of the deities in the puja dalan aforesaid. The terms of this deed are the centre of the contentions raised by the parties in the appeal and will be more particularly hereinafter referred to. The other fact affecting this period was that in the year 1891 Ranganmoni, the widow of Mutty Lal Mullick, died. She made a very large endowment in favour of the family idol, amounting to about one lac of rupees. By her Will she appointed Jadulal her executor and trustee and she made a disposition of her property in these terms :—

"I give and devise my tenanted land, No. 129, Bowbazar Street in Calcutta, to my said trustee, his heirs and representatives to be held by him and them upon trust, to apply the rents and income thereof, after providing for the payment of taxes and other outgoings, in the performance of the daily and periodical worship of the idol, consecrated by my late husband, called Radha-Shamsunder, such worship to be performed by my said son and his descendants."

Jadulal died in 1894, leaving issue three sons and four daughters. The estates were large, and a suit for partition among the three sons ensued. Questions of importance were raised as to :—

- (1) The provisions of Jadulal's Will; and
- (2) The endowment by Ranganmoni.

On the former head the disputes and differences were submitted to the arbitration of the late Mr. W. C. Bonnerjee, who delivered an award in 1899. That award was made a rule of Court. In the partition proceedings, Mr. Bonnerjee declared

that the three sons, as Jadulal's heirs, were entitled to the residue of the father's estate in three equal shares. He allotted one of the two houses to the first son, another to the third son, and, in regard to the second son, the present Appellant, he was, so to speak, paid out in money in order that he might erect a desirable residence for himself. Among other trusts declared in Jadulal's Will was the following, namely :—

The trust for the worship of the said Jadulal Mullick's hereditary Goddess Sri Sri Singhabahini Debi and other family deities during his turn or pala of worship.

It is to be observed that, although the turn or pala of worship as amongst the three sons was recognised in that part of the award the idols in question in this case were not named.

In a subsequent part of the award various turns of worship were given to the sons in order. As to the Thakurbari, or puja dalan, plans were referred to, and it was declared to be the joint property of the three sons. Prohibition was made against the two sons vested in the adjoining properties raising any structure or building of any kind which might interfere with the joint property. The situation created by this deed accordingly was that, while the deities were not named, the joint property of the three sons in the house dedicated to the idol was declared and the system of worship by turn or pala was established.

With regard to Ranganmoni's estate and endowment, a suit was brought in 1904, and in June 1905, it was decreed that a scheme should be framed for carrying on the varied trusts of the lady's Will and, subject to provision being made therefor, her estate should be divided into three equal shares among the Plaintiff and Defendants in this suit. A commission

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was accordingly issued to Babu Bhupendra Nath Basu to frame a scheme of worship and to partition the residue. This was done by return to the commission, which appointed the worship of Thakur Sri Sri Radha Shamsunderji, the idols in question in this suit, in the following terms :—

"I direct that the sheba and worship of the Thakur Sri Sri Radha-Shamsunderji and of the Thakur located at Mahesh and Brindaban and the Ekodistha sadh will be performed by the parties and their heirs by turns of one year each, the first turn commencing from the 1st day of Baishakh in the Bengali year 1317 and such first turn shall devolve on the said Pradyumna Kumar Mullick and his heirs, the second turn commencing from first day of the month of Baishakh 1318 shall devolve on the said Pramatha Nath Mullick and his heirs, and the third turn commencing from the first day of the month of Baishakh 1319 shall devolve on the said Manmatha Nath Mullick and his heirs, and so on by rotation. On the demise of any one of the parties, his heirs will become entitled to his turn of worship, and the party having the turn of worship will perform such worship without any interference by any of the other parties."

The family very sensibly acted in accordance with the rules set down in these proceedings. The practical result was that the parties, now judicially separated, continued the worship of the idols. The idol was, of course, not removed by the parties during their period of worship or pala because in the building as constructed the idols were located as mentioned in a building adjoining their respective houses.

In the year 1910-11 the second son's establishment was set up. The idol was removed to his house in connection with certain festivals considered suitable for the occasion and, after these were concluded in February 1911, was brought back to the puja dalan. In May 1911, the second son's year of pala, or turn of worship, came round and the family idol was removed to the Thakurbari of his house and family worship continued there for one year. In 1914 the same thing occurred, the first

Respondent being still an infant. It is not suggested in any part of the case that these temporary transfers of the location of the family idol (such temporary transfers on occasions of festivals are familiar in the community) were not conducted with complete reverence and propriety and without interruption of the ordinary daily services tendered to the idol or any of the rights connected with its worship. In short, the results of the partition suit, the interpretation of the Wills of Jadulal and Ranganmoni, and the awards made therein, were so far worked out without defect or friction.

When the Appellant's pala, however, again came round, namely, in 1917, the transfer of the idol by him as before to his Thakurbari was objected to by the first Respondent, who had now attained majority (with whose objection the third son concurs); and the broad question in this appeal is whether that objection is well founded in law.

In substance the objection is founded upon the deed executed in 1888 by Jadulal.

The argument in the Appellate Court is thus recorded by Richardson, J. :—

The learned Standing Counsel, Mr. B. L. Mitter, founding on Mutty Lal's Will, argued that the testator treated the idols or images which he had set up as his personal property and left them absolutely to Jadulal. When pushed, Mr. Mitter said that Jadulal might, if he had so pleased, have thrown them into the river.

The Appellate Court rejected that proposition. And this Board can give no countenance to it. As is added in the judgment referred to :—

The inclusion of the idols, however, among items of property, movable and immovable, does not show that the testator regarded his interest in them in the same light as his interest in his secular property. The careful directions given later in the Will show that the testator intended the worship of the ancestral deities and the deities he had established to be a charge upon his estate.

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There may be, in the nature of things, difficulties in adjusting the legal status of the idol to the circumstances and requirements of its protection and location and there may no doubt also be a variety of other contacts of such a *persona* with mundane ideas. But an argument which would reduce a family idol to the position of a mere moveable chattel is one to which the Board can give no support. They think that such an argument is neither in accord with a true conception of the authorities, nor with principle. The Board does not find itself at variance with the views upon this subject taken in the Appellate Court or with the analysis of the authorities there contained.

The Appellate Court, it is true, felt itself constrained by the terms of the deed of 1888 to arrive at a conclusion adverse to the case of the Appellant; but upon the main points in argument, both as to the contention that the household god was mere property, and as to Jadulal's right being absolute therein, this appeal was argued before the Board by the Counsel for the Respondents here on the footing that if the Appellate Court's decree depended on the reasons given, it could not be defended. The Board is, on the contrary, of the opinion that, upon the two points they discussed, the reasoning and view of the High Court are sound.

Their Lordships would only add, on the subject of property, that the argument is said to be supported by the judgment of Banerjee, J., in *Khetter Chunder Ghose v. Hari Das Bundopadhyaya* (2). In that case the facts were that the household idol was made over to relatives, owing to the family, whose idol it was, being unable to carry on the worship on account of the paucity of profits of the endowed lands,

and it was held that the transfer was justified in the interests of the idol. It was a proper and a pious act. The Shebait, being charged fundamentally with the duty of seeing to the worship being carried off, and, having the concurrence of the entire family to the transaction, did have power to carry through the transaction "for the purpose of performing its worship regularly through generation to generation." The members of the family were thereby deprived of no right of worship. The interests of worshippers and idol were conserved. Their Lordships do not think that such cases form any ground for the proposition that Hindu family idols are property in the crude sense maintained, or that their destruction, degradation or injury are within the power of their custodian for the time being. Such ideas appear to be in violation of the sanctity attached to the idol, whose legal entity and rights as such the law of India has long recognised.

The argument as to property being thus displaced, their Lordships have now to consider the position of Jadulal, the grantor of the deed of 1888.

Was he Shebait of this idol in the narrower sense as the Appellant contends or did he succeed by virtue of Mutty Lal's Will to the rights and privileges possessed by the testator? In the deed of 1888, Jadulal declares as follows:—"Whereas the said Babu Mutty Lal Mullick, the father of the said Jadulal Mullick, established and consecrated the Thakur called Radha Shamsunderji." As has been seen, during his life Mutty Lal Mullick had *de facto* performed piously and regularly all the duties which the law would charge upon the custodians of the idol. It stands without question that Jadulal himself was fully performing similar duties and functions. As was said by

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Lord Hobhouse in *Gossammee Sree Greshdarreejee v. Rumanlolljee Gossammee* (3),

"According to Hindu law, when the worship of a Thakur has been founded the Shebaitship is held to be invested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution."

A similar principle appears also to have been implied in the judgments of *Jaganath Prasad Gupta v. Runjit Singh* (4), *Sheoratan Kunwari v. Ram Pargash* (5) and *Musammat Jai Bansi Kunwar v. Chhattar Dhari Singh* (6).

To apply this law to the present case, Jadulal was the sole heir of his father and, by the general law of India, he thus stood vested with the right of custody of, and management of the trust for, the family idol which his father had consecrated and set up. So far as the legal status and rights of Jadulal as grantor of the deed of 1888, the deed proceeds to narrate :—

"Whereas the said Jadulal Mullick is now desirous of dedicating the said premises to the said Thakur in the manner hereinafter expressed."

This is perfectly correct language in acknowledgment of the fact that the Thakur existed and was the capable recipient in law of the property dedicated to it. The deed then proceeds to declare that certain premises, described in the schedule,

"shall be for ever held by the said Jadulal Mullick his heirs executors administrators and representatives to and for the use of the said Thakur Radha Shamsunderji to the intent that the said Thakur may be located and worshipped in the said premises and to and for no other use or intent whatsoever Provided always that if at any time hereafter it shall appear expedient to the said Jadulal Mullick his heirs executors administrators or representatives so to do it shall be lawful for him or them upon his or their providing and dedicating for the location and worship

of the said Thakur another suitable Thakur Bari of the same or greater value than the premises hereby dedicated to revoke the trusts hereinbefore contained and it is hereby declared that unless and until another Thakur Bari is provided and dedicated as aforesaid the said Thakur shall not on any account be removed from the said premises and in the event of another Thakur Bari being provided and dedicated as aforesaid the said Thakur shall be located therein but shall not similarly be removed therefrom on any account whatsoever."

This passage has been quoted in full so as to make clear the three propositions which seem to follow, namely, First, the recognition as mentioned of the idol as the dedicatee : Second, the conveyance in no respect whatever appears to be a conveyance of the idol, but is a conveyance of the premises described in the schedule to and for the use of the idol and for no other use : Third, this use is not to be interfered with by Jadulal's heirs, executors, administrator or representatives except upon providing for the dedicatee another Thakurbhari of the same or a larger value. When that is done Jadulal's heirs, etc., could revoke the trusts of the premises affecting the present puja dalan, and unless and until that is done the idol is not to be removed therefrom.

It is this last proposition which raises the real difficulty in the case and their Lordships express no surprise that the High Court should have felt it. Upon a full consideration their Lordships have come to the conclusion that this was not a dedication, in any sense of the word, of the idol as property, nor of the idol at all. It was a dedication of real estate in trust for the idol, recognised as a legal entity, to which such dedication might be made.

The true view of this is that the Will of the idol in regard to location must be respected. If, in the course of a proper and unassailable administration of the worship of the idol by the Shebait, it be

(3) L. R. 16 I. A. 137, 144 : s. c. I. L. R. 17 Cal. 3 (1889).

(4) I. L. R. 25 Cal. 354 (1897).

(5) I. L. R. 18 All. 227 (1886).

(6) 5 Beng. L. R. 181 (1870).

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thought that a family idol should change its location the Will of the idol itself, expressed through his guardian, must be given effect to. This is in accordance with what would appear to be the sound principle of the position and it is further in accord with the authority on the subject. In the case already referred to so far did the decision go that it was expressly said by Lord Hobhouse in *Gossammee Sree Greedharreejee v. Rumanlolljee Gossammee* (3), "The Thakur Dowjee. or those who speak for him on earth, need not take advantage of this gift."

A fortiori it is open to an idol acting through his guardian the Shebait to conduct its worship in its own way at its own place always on the assumption that the acts of the Shebait expressing its will are not inconsistent with the reverent and proper conduct of its worship by those members of the family who render service and pay homage to it.

A question was raised whether the right of worship of an idol can be made the subject of partition. Their Lordships have already referred to this point when dealing with the arbitration proceedings.

In 14 Bengal L. R., page 166, the point arose especially in the case of *Mitta Kunth Audhicarry v. Neerunjun Audhicarry* (7). The head-note is as follows:—

"The reasons for which one of several joint owners is entitled to a partition of the joint property, apply also to the case of a joint right of performing the worship of an idol. The joint owners of such a right are entitled to perform their worship by turns."

And, in Sir Richard Couch's judgment, the following rule of law is referred to:—

"The suit is founded upon the right of the Plaintiff, as property, to a partition. No doubt the Plaintiff is entitled to that; and the decree of the First Court was right in awarding it. But that decree has not made provision for the turn that each of the three

persons, the Plaintiff and the two Defendants, should have, and does not state whether the Plaintiff is to have his turn first, or second, or third. We must therefore direct the Extra Assistant Commissioner to determine by lot in what order the Plaintiff and the two Defendants shall exercise the right to worship the idol. And having determined that, he should insert in his decree, so that it will be settled in what order they are to exercise the right of worship."

The sole objection made in these proceedings to the removal by one of the Shebait during his pala or turn of worship to his residence is founded upon the deed of 1888 already analysed. In para. 18 of the defence "this Defendant admits that the Plaintiff's turn of worship commenced on and from . . . the 14th April 1917. On the 2nd April 1917, this Defendant, who had attained majority on or about 20th November 1914, . . . objected." In the evidence of the first Respondent, he deposed as follows:—

"Babu Bhu endra Nath Basu divided the turn of worship of 6 Thakurs, and each of us have one year . . . my only objection is based on the deed of dedication; apart from the deed there would be objection to the removal because the Thakur has its own house where arrangements are made for sheba. I have said that my only objection is on the deed of dedication."

While, however, this is the only objection actually made by the objecting Defendant, it has to be pointed out that the idol is not otherwise represented in the proceedings, though the result might conceivably vitally affect its interests. In that sense the contest has related to the establishment of individual rights as between contesting Shebait. The interests of the female members of the family, especially in view of the fact that they are excluded from the managership of the idols, might need special protection. They are entitled to participate in the worship established by Mutty Lal Mullick without obstruction or inconvenience.

Their Lordships are accordingly of opinion that it would be in the interests of

(3) L. R. 16 I. A. 137; s. c. I. L. R. 17 Cal. 8 (1899).

(7) 14 Beng. L. R. 166 (1874).

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all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined, and a scheme should be framed, for the regulation of the worship of the idols.

Their Lordships will therefore humbly advise His Majesty that the case should be remitted to the High Court to be dealt with in accordance with this report. It will be necessary in these circumstances to set aside the decrees of both the Courts below. The parties must bear their own costs in the Courts of India and before this Board; any costs paid under either of the decrees of the Courts below will be repaid.

Solicitors: Messrs. Sandersons & Orr, Dignams for the Appellant.

Solicitors: Messrs. J. G. Edwards & Co. for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM ORIGINAL DECREES

Nos. 122 AND 123 OF 1922.

WALMSLEY, J.

PAGE, J.

1925,

28, January.

BASANTA KUMAR PAL
and anr., Defendants

Nos. 4 and 5,

Appellants,

v.

HARENDRA NATH
MUKHOPADHYA and
ors., Plaintiffs,
Respondents.

Public Demands Recovery Act (III, B O, of 1913), s. 37—Questions relating to irregularities in execution of certificate, must be determined by certificate officer—Bar to suit in Civil Court—Maintainability of suit on the ground of fraud—Sec. 36 (b), scope and effect of.

After an auction sale held in execution of a certificate under the Public Demands Recovery Act, the certificate-debtors first made an application to the certificate

officer for setting aside the sale and then brought a suit for a declaration that the sale was void as being obtained by fraud and also on the ground of irregularities in relation to the execution proceedings. It was found that the Plaintiffs failed to substantiate the allegation of fraud:

Held—That the allegation of fraud being negatived the Plaintiffs' suit failed under the provisions of the Public Demands Recovery Act.

It is not open to a certificate-debtor to evade the provisions of secs. 36 and 37 of the Public Demands Recovery Act by making a fictitious allegation of fraud.

Under sec. 37 of the Act any question relating to the confirmation or setting aside of a sale held in execution of a certificate granted under the Act and arising between the certificate-holder and the certificate-debtors or their representatives shall be determined not by suit but by order of the certificate officer before whom such question arises or of such other certificate officer as he may determine.

The procedure laid down by sec. 37 must be adopted notwithstanding that the purchasers under the auction sale may be impleaded as being interested in the result.

PROSANNA KUMAR SANYAL v. KALIDAS SANYAL (1) applied.

These were appeals against the decrees of Babu Jagadish Chandra Sen, Subordinate Judge of Zillah Jessore, dated the 16th of January 1922.

The facts of the case will appear from the judgment.

Dr. D. N. Mitter and Babu Narain Chunder Kar for the Appellants.

Mr. N. K. Basu, Babus Profulla Chunder Chukerbutty and Surendra Nath Guha and Mr. Nuruddin Ahmed for the Respondents.

(1) I. L. R. 19 Cal. 683 (1922).

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The JUDGMENT OF THE COURT was as follows :—

No. 122 of 1922.

PAGE, J.—The Plaintiffs, who are the Respondents in this appeal, in the suit out of which the appeal arises claimed a declaration that a sale by auction pursuant to a certificate granted under the Public Demands Recovery Act, III (B. C.) of 1913, was void as being obtained by fraud and also on the ground of certain irregularities in relation to the execution proceedings. The suit was decreed and the 4th and 5th Defendants prefer this appeal and contend that the suit was incompetent and was not maintainable having regard to the provisions of sec. 37 of the Public Demands Recovery Act. At the auction sale, the property in question was purchased by the second Defendant who subsequently assigned his interest therein for value to the 4th and 5th Defendants.

Now, certain irregularities which were material and, therefore, would have justified an application to the certificate officer to set aside the sale were canvassed before us, the two main irregularities being that no notice was served upon the certificate-debtors as provided by sec. 7 of the Act and that no sale-proclamation was published. Originally, an application was made on behalf of the Plaintiffs *inter alia* to set aside the sale under sec. 23 and the Appellants contend that the suit was incompetent by reason of the provisions of sec. 36 (b) of the Act which provides that "notwithstanding anything hereinbefore contained, a sale of immoveable property in execution of a certificate shall not be held to be void on the ground that the notice required by sec. 7 has not been served; but a suit may be brought in the Civil Court to recover possession of such property or to set aside such sale on the ground that such notice has not been serv-

ed and that the Plaintiff has sustained substantial injury by reason of the irregularity: provided that no such suit shall be entertained if the certificate-debtor has made appearance in the certificate proceeding or has applied to the certificate officer under sec. 22 or sec. 23 to set aside the sale." The answer of the Respondents is that their complaint was not merely that the notice required by sec. 7 had not been served but that there were other material irregularities in the execution proceedings and that, therefore, sec. 36 would not render their suit incompetent. The Appellants further contend that the irregularities complained of were irregularities which involved the decision of questions between the certificate-holder and the certificate-debtors or their representatives relating to the confirmation or setting aside by an order of the Court under the Public Demands Recovery Act of a sale held in execution in such certificate and that, pursuant to sec. 37 of the Act, the suit was not maintainable because that section provides that "any such question shall be determined not by suit but by order of the certificate officer before whom such question arises or of such other certificate officer as he may determine." Now, it is, in my opinion, clear that the questions which arose with respect to the irregular process of execution were questions which arose between the certificate-holder, that is, the Secretary of State, and the certificate-debtors, because, if the questions in issue were determined in a manner favourable to the certificate-debtors (who are the Respondents in this appeal), the effect would be that the execution levied pursuant to the certificate on behalf of the Secretary of State would be rendered nugatory. It is settled law that, where a question arises between the certificate-holder and the

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certificate-debtors or their representatives, the procedure laid down by sec. 37 must be adopted, notwithstanding that the purchasers under the auction sale may be impleaded as being interested parties in the suit. See *Prosanna Kumar Sanyal v. Kalidas Sanyal* (1). But that case is an authority for another proposition, namely, that it was the policy of the legislature in enacting the Public Demands Recovery Act to provide that such questions as would arise in the course of execution proceedings should be settled in the manner provided by sec. 37. Lord Macnaghten in delivering the judgment of the Board in the case to which I have referred observed as follows:—"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of sec. 244 and that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result has never been held a bar to the application of the section." In my opinion, those observations are apposite in a consideration of the provisions of sec. 37 of the Public Demands Recovery Act: and, in relation to any question which comes within the ambit of that section, recourse must be had to the procedure therein specified. I, therefore, think that, if the present suit was a suit based merely on the irregularities in the execution proceedings to which our attention has been adverted, it was not maintainable. *A fortiori* it was not maintainable when, in point of fact, an application in that behalf had been made

to the certificate officer pursuant to the Act and in this suit it was sought to canvass anew the same question.

The Respondents, however, take one further point in opposition to the objection raised by the Appellants to the maintainability of the suit. The learned Advocate on behalf of the Plaintiffs has strenuously urged that sec. 37 in any event has no application, because in the suit it was sought to set aside the sale and to recover possession of the premises, the subject-matter thereof, on the ground that the execution proceedings were brought about by the fraud of the Defendant: and he argues that the terms of the first paragraph of that section are to take effect subject to the proviso that "a suit may be brought in a Civil Court in respect of any such question upon the ground of fraud." Now, it is abundantly clear from a perusal of the record in this case that the main contest in the trial Court ranged on the question as to whether the sale had been brought about through the fraud of the Defendants. Evidence was led for the purpose of proving that the Plaintiffs' Gomastha Najimuddin, the auction-purchaser, (the Defendant No. 2) and Krishna Behari Ray, a co-sharer with the Plaintiffs in the property in question, had combined to defraud the Plaintiffs of a valuable property by so acting in the matter of the execution proceedings that the sale should take place without the Plaintiffs having knowledge of, or, being privy to, such proceedings. My learned brother and I invited the Advocate for the Respondents to draw our attention to the evidence in support of this charge of fraud; but the evidence to which he referred us, in my opinion, was wholly inadequate to found a charge of fraud. With respect to the allegation of fraud, the learned trial Judge has arrived at a clear finding ad-

(1) L. L. 10 Cal. 688 (1892).

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verse to the Plaintiffs. So far am I from disturbing that finding that I find myself, after a perusal of the evidence, in full accord with it. The matter, therefore, stands thus: The Plaintiffs, after taking steps to have the sale set aside by making application to the certificate officer pursuant to the provisions of the Act, seek in this suit to re-open the same questions and, in addition, have added a claim to the same relief upon an allegation of fraud which proves to be groundless. If it were open to a certificate-debtor to adopt such a procedure, the provisions of secs. 36 and 37 would to a large extent become nugatory; for, a certificate-debtor, if minded to evade the provisions of the 37th section, could always bring a suit by making a fictitious allegation of fraud in respect of matters which under the section and in the absence of fraud, must be determined by means of the procedure therein specified. In my opinion, in the circumstances obtaining in this case, the allegation of fraud having been negatived, there is no other alternative but to hold under the terms of the Act that the Plaintiffs should fail in their suit unless they satisfy the Court that they are entitled to a decree based upon some ground other than those to which sec. 37 is made applicable. To my mind, the Plaintiffs have wholly failed to make out their claim on any such ground, and this suit must be held to be not maintainable. The decree passed therein must, therefore, be set aside and the suit dismissed with costs both here and below. The transferee Defendants Nos. 4 and 5 and the Secretary of State for India are entitled to separate sets of costs in both the Courts.

WALMSLEY, J.—I agree.

No. 123 of 1922.

The judgment that has just been delivered in appeal No. 122 will apply equally

to this case also. This appeal is also decreed and the Plaintiffs' suit dismissed with separate sets of costs to the transferee Defendants Nos. 4 and 5 and the Secretary of State for India in Council.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM APPELLATE DECREES

Nos. 1262 AND 1263 OF 1923.

GREAVES, J.
B. B. GHOSH, J.
1925,
10, June.

GOUR CHANDRA DAS,
Defendant No. 1,
Appelant,
v.
SUBASHINI DAS,
Plaintiff, Respondent.

Hindu law—Gift to two persons—Interest of donees, whether joint—Survivorship—Joint tenancy or tenancy in common—Death of Defendant during pendency of proceedings—Decree passed without the legal representatives being brought on the record—Effect of such decree.

In a suit by a member of a Hindu family for recovery of possession of two jamas a compromise was arrived at and it was stipulated in the solenama that the Defendant would possess the properties during her life-time and after her death her two granddaughters would get them. Subsequently rent suits were brought by the landlord against the Defendant in the aforesaid suit and after her death which took place when the suits were pending decrees were passed without bringing her legal representatives on the record. In execution of these decrees the properties were sold and purchased by a stranger who took possession through Court. One of the granddaughters then died and after her death the other granddaughter brought a suit for possession of the entire properties:

Held—That the rent decrees were void and infructuous as having been passed against a dead person but the Plaintiff was

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entitled to recover possession of eight annas share only of the properties inasmuch as the two sisters took not as joint tenants but as tenants in common.

The principle of joint tenancy is unknown to Hindu law except in the case of coparcenary between the members of an undivided Mitakshara family.

These were appeals against the decrees of R. F. Lodge, Esq., District Judge of Zillah Murshidabad, dated the 15th of December 1922, modifying the decrees of Babu Rabindra Kumar Bosu, Munsif, Additional Court at Jangipur, dated the 27th of September 1921.

The facts of the case will appear from the judgment.

Babu Urukramdas Chakravarti for the Appellant.

Mr. Mahendra Nath Roy (Advocate) (with Babu Satindra Nath Mukerjee) for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—These two appeals are against the judgment and decrees of the District Judge of Murshidabad modifying those of the Munsif of Jangipur. There were two suits for declaration of title and *khas* possession of two *jamas*. The lands originally belonged to Gagan Chandra Majhi and Uday Chandra Majhi and were mortgaged by them to one Keshab Choudhury.

Keshab Choudhury died sometime in 1889 and left a widow, a grandson and two granddaughters by his predeceased son. The widow was named Rukmini. The grandson Asutosh died in the year 1899 leaving a widow Rajabala.

The two granddaughters of Keshab were named Subashini and Bindubashini. Rukmini, as guardian of Keshab's grandson Asutosh, enforced the mortgage and

purchased the mortgaged property in execution of the mortgage decree on the 16th June 1892. Thereafter, Rajabala brought a suit against her for possession of the properties left by her husband Asutosh. This suit was compromised by a *solenama*, dated the 22nd January 1902. Under that *solenama* it was stipulated that certain properties, including the properties in suit, would be possessed by Rukmini during her life-time and after her death her granddaughters Subashini and Bindubashini would get them and they being entitled to them would possess them (Satvabati and Dakhal Karini). Then in 1914 and 1915, two rent suits were brought by the landlord against Rukmini with regard to the lands in dispute.

Rukmini died on the 14th January 1915 and decrees in the rent suits were passed after her death without bringing on the record the legal representatives of Rukmini. The rent decrees were then put into execution and the Defendant purchased the properties and took possession through Court in August 1917. Bindubashini died sometime in 1920. The present suits were brought by Subashini alone for possession of the entire lands in dispute. The Munsif passed a decree in favour of Subashini with regard to eight annas share on the ground that the rent decrees in execution of which the Defendant No. 1 had purchased the property were void and infructuous as having been passed against a dead person. After the death of Rukmini, Subashini and Bindubashini were entitled to eight annas share each of the properties in dispute and as the heirs of Bindubashini did not bring any suit, Plaintiff was only entitled to a decree for joint possession of eight annas share of the lands in each of the suits. There were appeals by both parties against the decree of the Munsif. The District

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Judge held that by the terms of the *solenama*, the plaint lands went to Rukmini and after her death to her two granddaughters for their lives and he further held that after the death of Rukmini her two granddaughters Subashini and Bindubashini succeeded to the properties in dispute as joint tenants, and that after the death of Bindubashini, Subashini was entitled to the whole of the lands as the survivor of the two joint tenants. In that view he passed a decree for the entire lands in favour of the Plaintiff. The Defendant No. 1 appeals, and the ground urged on his behalf is that the learned Judge was wrong in holding that Subashini and Bindubashini took as joint tenants. It ought to have been held that they were tenants in common. It was further contended that the two sisters were entitled to absolute interest in the properties and not only for their lives. It is not disputed before us that Subashini is not the legal heir of Bindubashini and the decree of the learned Judge can only be supported if his decision that the two sisters took as joint tenants and not as tenants in common is correct. There is nothing in the *solenama* which would show that the two ladies were to take as joint tenants. As was observed by the Privy Council in the case of *Jogeswar Narain Deo v. Ram Chandra Dutt* (1). "The principle of joint tenancy appears to be unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family." The District Judge, therefore, was in error in holding that the two sisters took as joint tenants. The contention on behalf of the Appellant that the ladies took an absolute interest was not persisted in, but it was argued that even if they took as life-tenants the share which belonged to

Bindubashini would revert to the true owner; and in this case it would be Rajabala. The mere fact that Rajabala's representatives do not dispute the interpretation of the *solenama* could not confer any right on the Plaintiff to eject the Defendant from the entire land. The Defendant is entitled in a suit for ejectment to plead the title of a third party and to show that the Plaintiff is not entitled to the whole of the interest she claims. The Plaintiff's share is only eight annas.

It must, therefore, be held that the Plaintiff is entitled to recover possession of eight annas share only in the lands in dispute. The judgment and decree of the District Judge must, therefore, be set aside and those of the Munsif restored with costs in both appeals in this Court and in the lower Appellate Court.

GREAVES, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER

No. 118 OF 1924.

PEARSON, J.

GRAHAM, J.

1924,

Heard, 20 and

21, May.

Judgment,

2, June.

KAYEM BISWAS,
Defendant, Appellant,
v.

BAHADUR KHAN and
ors., Plaintiffs,
Respondents.

Civil Procedure Code (Act V of 1908), sec 47, Or 41, r. 23, Or. 43 (1) (n) Decree as drawn up alleged to include more land than claimed in the suit—Matter, if for executing Court or for fresh suit—Remand order—Appeal.

The Appellant sued the Respondents for recovery of possession of 5 bighas of land alleged to be within specified boundaries and got an ex parte decree. In a suit by the latter against the former to set aside the decree on the grounds, first, that the decree had been obtained by fraud, and

(1) L. R. 23 L. A. 37: S. C. I. L. R. 23 Cal. 370 (1900).

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secondly, that it was beyond the Court's jurisdiction in that it gave the Plaintiffs in that suit more land than he had claimed, the trial Court held that no fraud had been made out and that there was no substance in the other objection. On appeal, the Appellate Court without displacing the finding of the trial Court on the question of fraud remanded the suit for trial on the merits, being of opinion that the decree made in the previous suit was in excess of the Court's jurisdiction, having included land outside the subject-matter of the claim :

Held, on further appeal to the High Court—*That an appeal lay to the High Court as the order though irregular was in form and substance one made under Or. 41, r. 23 of the Civil Procedure Code.*

BASUMATI DEBI v. TARIT BASINI DAS (1) and PRASANNA CHANDRA CHATTOPADHYA v. BAIDYA NATH MISTRY (2) followed.

That the Court in the previous suit had territorial jurisdiction over the land in suit, and if the area specified in the decree in that suit which in terms gave them the 5 bighas claimed included any land which did not form the subject of the suit, that was a matter for determination under sec. 47 of the Code and not by a suit.

This was an appeal preferred on the 26th February 1923, against the order of K. N. Chowdhury, Esq., Additional District Judge of Zillah Khulna, dated the 1st of December 1922, reversing the order of Babu Jogendra Kumar Dey, Munsif, Additional Court at that place, dated the 20th of June 1921.

The Appellant Kayem Biswas had obtained an *ex parte* decree against the Respondents Bahadur Khan and others in

1915 for recovery of possession of lands on establishment of his title. The latter then brought the present action for setting aside the said *ex parte* decree of 1915 as fraudulent and without jurisdiction. The trial Court, holding that no fraud had been established and that there was no substance in the objection as to jurisdiction, dismissed the suit. The Appellate Court without displacing the finding of the trial Court on the question of fraud, was of opinion that the decision of the Court in the previous suit was without jurisdiction, because it included land in excess of what was claimed in the plaint and set aside the decree and remanded the case for fresh trial. Against this order Kayem Biswas preferred the present appeal.

A preliminary objection was raised that no appeal lay as the order of remand was not under Or. 41, r. 23. The questions on the merits raised were, (1) whether the decree in the former suit, which is sought to be set aside in the present suit, having comprised land in excess of that which formed the subject-matter of the said former suit can be impugned by a fresh suit, or its validity could be determined only by an execution Court in an execution proceeding under sec. 47, Civil Procedure Code; and (2) whether in the absence of any finding of the lower Appellate Court as to fraud the trial Court having found no fraud the suit was competent.

Dr. Jadunath Kanjilal for the Appellant.
Babus Surendra Chandra Sen and *Hemendra Chandra Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal is against the judgment and decree of the Additional District Judge of Khulna reversing a decision of the Munsif of the Additional Court at Khulna and re-

(1) 31 C. L. J. 854 (1918).

(2) 31 C. L. J. 300 (1920).

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manding the case for fresh decision in accordance with certain instructions given in the judgment of the lower Appellate Court.

The Defendant No. 1 Kayem Biswas, now Appellant, brought a suit in the year 1915 against the Plaintiffs-Respondents for recovery of possession of certain lands on establishment of title, and obtained an *ex parte* decree. The Plaintiffs then filed the present suit to set aside the said decree as fraudulent and without jurisdiction, and for confirmation of their title to the land, and for other consequential reliefs.

A number of issues were framed upon the pleadings, one of which No. 8 was in the following terms :—

“ Is the decree in Title Suit No. 343 of 1915 fraudulent and without jurisdiction as alleged? Is it liable to be set aside? ”

The Munsif found upon this issue that no fraud had been established and that there was no substance in the objection as to jurisdiction. He accordingly in view of his findings on this issue and on issues Nos. 9 and 11 dismissed the suit.

On appeal the learned Additional District Judge without going into the question of fraud, or coming to any finding thereon, held that the decree was without jurisdiction inasmuch as the claim was for 5 bighas odd, whereas the decree was for 12 bighas 15 cottas. He therefore set aside the decree and remanded the case for fresh decision in the manner indicated above. The Defendants thereon filed this second appeal.

A preliminary objection has been taken on behalf of the Respondents to the hearing of the appeal, the argument being that there are only two provisions in the Code of Civil Procedure, relating to remand, *vis.*, rr. 23 and 25 of Or. 41, and that, as the present case does not come under either, no appeal lies. It is clear

that the order was not made under Or. 41, r. 25. It is urged, however, on behalf of the Appellant that in form and substance the order, though it may have been irregular, must be held to have been made under r. 23 of Or. 41, and that, that being so, an appeal lies. This view is supported by authority, see *Basumati Debi v. Tarit Basini Dasi* (1) and *Prasanna Chandra Chattopadhyaya v. Baidya Nath Mistry* (2) and we think following those decisions that we must hold that the appeal is competent.

On the merits two points have been urged before us on behalf of the Appellants. Firstly, it is argued that having regard to the findings of the lower Appellate Court and the admitted facts in the Court of first instance the question which arises being, as to whether the decree in the former suit comprises excess land which did not form the subject-matter of the suit, is a question which can only be gone into by the execution Court under sec. 47 of the Code of Civil Procedure and a fresh suit did not lie. Secondly, it was contended that, inasmuch as the Plaintiffs sought to set aside the former decree on the ground of fraud, they could only succeed on proving fraud, and in the absence of such finding the merits of the case could not be gone into in the second suit.

In regard to the first point objection is taken on behalf of the Respondents that this question was not raised in the Court of Appeal below, and that it ought therefore not to be allowed to be argued here for the first time. We think, however, that we are bound to take notice of the argument. It appears to us too to be well-founded. Sec. 47, Civil Procedure Code, lays down that all questions arising between the parties to the suit in which

(1) 81 C. L. J. 354 (1918).

(2) 81 C. L. J. 360 (1920).

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the decree was passed, on their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

The main object underlying this section is to prevent multiplicity of suits and to secure that all matters, which can be decided in the suit, shall be so decided. The question which then arises is whether the matter arising in this particular instance was one which ought to be determined by the executing Court and not by separate suit. Now the kernel of the matter according to the lower Appellate Court was that the decree was for land in excess of that which formed the subject of the suit, and that it included land which ought not to have been included. It seems to us that these are matters for determination by the Court executing the decree, and that looked at from that point of view the subsequent suit was bad.

Coming to the second point it is to be observed that the main contention in the present suit was that the decree had been obtained by fraud. The trial Court came to a definite finding that fraud had not been established. That finding has not been displaced in the judgment of the lower Appellate Court. Indeed the learned Judge has not gone into the question of fraud at all. The finding of the first Court upon this point must therefore stand, and in the absence of any such finding in the Court of Appeal below we do not think it was open to the learned Judge to go into the merits of the case. The learned Judge without entering into the question of fraud held that the decree had been passed without jurisdiction and upon this ground held that it should be treated as a nullity and set it aside. We do not see how the decree can be regarded as having been made without jurisdiction.

The word jurisdiction may be used in two senses, *viz.*, in the sense of jurisdiction over the subject-matter of the litigation, or in the sense of power to make the order. Jurisdiction certainly does not fail here in the former sense, as the Court clearly had territorial jurisdiction over the land in suit, nor has this apparently ever been disputed. It seems to follow therefore that jurisdiction must have been held by the learned Judge to be defective in the other sense, *viz.*, that the trial Court had no power to make the decree as drawn up. In this connection the learned Additional District Judge has observed as follows :—

“ Now jurisdiction of a Court in a particular suit is confined to the subject-matter of litigation as specified or set forth in the plaint. No Court can by its decree go beyond that subject-matter so as to affect matters outside, or matters not included therein, nor has any Court power to give a Plaintiff more than what he claims, or to give him one thing when he claims a different thing altogether in his suit.”

The question is, were the Plaintiffs in the original suit given a decree for something different from what they asked for? What they asked for was for about 5 bighas of land within certain defined limits. The decree apparently gave them about 5 bighas (*vide* opening sentences of the judgment of the trial Court), and if the area so decreed included any land which did not form the subject of the suit, that was a matter for the determination of the Court executing the decree, and could not form the subject-matter of a separate suit.

For the reasons stated we think that the decision of the lower Appellate Court cannot be supported. The appeal must accordingly be allowed with costs of both Courts, the decree of the Court of Appeal

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below set aside, and the judgment and decree of the Munsif restored.

H. D. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1678 OF 1921.

MANINDRA CHANDRA

[NANDI, Defendant No. 1,

Appellant,

v.

BHAGABATI DEVI

CHAUDHURANI and ors.,

Respondents.

SUBRAWARDY, J.
DUVAL, J.

1925,

11, March.

Appeal, competency of—Parties, defect of—Decree for joint possession of land—Appeal by Defendant—Death of one Plaintiff-Respondent pending appeal—Dismissal of application for setting aside abatement—Effect of abatement of appeal as against one Plaintiff-Respondent, if renders whole appeal incompetent—Application in such circumstances for adding legal representative of deceased Respondent as party, maintainability of—Civil Procedure Code (Act V of 1908), Or. 22, r. 4, cl. (3), Or. 41, rr. 4, 20 and 33—Or. 41, r. 20, s. ops of, if overrides provisions of Or. 22—Addition of party—Court's inherent power

The Plaintiffs jointly sued for recovery of possession of certain lands on declaration of title thereto and obtained a decree for joint possession. The Defendant appealed to the High Court. During the pendency of the appeal one of the Plaintiffs-Respondents died. The Appellant applied after the period of limitation to have the abatement of the appeal as against that Respondent set aside and for substitution of his legal representative. A Rule was issued but it was discharged. Thereupon the Appellant filed an application to have the legal representative of the deceased Respondent added as a party. At the hearing of the appeal a preliminary objection was taken to the competency of the appeal:

Held—That the appeal was incom-

petent and could not proceed in the absence of one of the Plaintiffs-Respondents.

KALI DAYAL BHATTACHARJA v. NAGENDRA NATH PAKRASHI (2) followed.

DHEARANJIT NARAIN SINGH v. CHANDRESWAR PRASAD NARAIN SINGH (1) referred to.

CHANDERSANGH v. KHMABHAI (3) and UPENDRA KUMAR CHAKRAVARTI v. SHAM LAL MANDAL (4) dissented from.

That the provisions of Or. 41, rr. 4, 20 and 33 of the Civil Procedure Code, were not applicable, and the Appellant's application to add the legal representative of the deceased Respondent as a party was incompetent.

Or. 41, r. 4 is limited to the case of Appellants, and does not entitle a person against whom the decree is passed to have it varied in the absence of a person in whose favour it was made.

Or. 41, r. 20 is not intended to override the provisions of Or. 22 of the Civil Procedure Code.

PULIN BEHARI ROY v. MAHENDRA CHANDRA GHOSAL (5) referred to.

The right obtained by a Respondent when the appeal abates is a valuable right and should not be lightly treated.

Held, further—That whatever view might be taken with regard to the inherent power of the Court as contained in Or. 41 of the Civil Procedure Code or outside the Code, the present case was not one in which such power should be exercised.

This was an appeal against the decree of H. Comyn Maitland, Esq., District Judge of Zillah Rangpur, dated the 19th

(1) 11 C. W. N. 504 (1907).

(2) 24 C. W. N. 44; a. c. 30 C. L. J. 217 (1919).

(3) I. L. R. 22 Bom. 718 (1897).

(4) I. L. R. 34 Cal. 1020 (1907).

(5) 34 C. L. J. 405 (1921).

MANINDRA CHANDRA NANDI *v.* BHAGABATI DEVI CHAUDHURANI.

of April 1921, modifying the decree of Babu Manmatha Nath Basu, Subordinate Judge of that District, dated the 22nd of September 1919.

The facts of the case material to this report are as follows :—

The Plaintiffs jointly sued the Defendants for declaration of title to and recovery of possession of the lands in suit. The suit was decreed, and the Plaintiffs obtained a decree for *khas* possession. Defendant No. 1 preferred this second appeal. During the pendency of this appeal, the Plaintiff-Respondent No. 3 Gopal Das Roy Chaudhury died on the 26th November 1923. More than three months after the death of the said Respondent, the Appellant obtained a Rule [Civil Rule No. 574 (s) of 1924] on the 9th May 1924 to have the abatement of the appeal as against that Respondent set aside and for substitution of his legal representative in his place. The Rule was opposed and a counter affidavit was filed to prove that the Appellant knew of the death of the deceased Respondent just after his death. Their Lordships (Suhrawardy and Duval, JJ.) discharged the Rule with costs on the 18th February 1925.

The present appeal came on for hearing on the 11th March 1925. Before the hearing the Appellant filed an application praying to have the legal representative of the deceased Respondent added as a party to the appeal, and this application was heard along with the appeal.

Mr. Ram Chandra Majumdar, Babus Sarat Kumar Mitter and Kali Kinkar Chakravarty for the Appellant.

Babus Hemendra Chandra Sen, Pro-motha Nath Mitter and Jatindra Mohan Chaudhury for the Respondents.

Babu Biraj Mohan Majumdar for the Minor Respondents.

Babu Hemendra Chandra Sen for the

Respondents took a preliminary objection to the competency of the appeal. The appeal had abated as against the Plaintiff-Respondent No. 3, and his legal representative had not been brought on the record. The Rule for setting aside the abatement of the appeal as against the deceased Respondent and for substitution of his heir had been discharged. The whole appeal became incompetent in consequence and could not proceed in the absence of one of the Plaintiffs-Respondents. The decree obtained by the Plaintiffs was for joint possession. The effect of the abatement of the appeal as against one of the Plaintiffs-Respondents was that the appeal could not proceed as against the other Plaintiffs-Respondents. The appeal had become imperfectly constituted and the Appellant could not invite the Court to hear the appeal.

Referred to *Bijoy Gopal v. Umcs Chandra* (6), *Tarif v. Khatijannessa* (7), *Dharanjit v. Chandreswar* (1), *Baser v. Fazel* (8), *Azimuddin v. Tara Sankar* (9), *Sriram v. Hridoy* (10) and *Kali Dayal v. Nagendra Nath* (2). The point has been fully considered by Mookerjee J., in the decision in *Kali Dayal v. Nagendra Nath* (2) in which all the cases have been reviewed. Even in the case where the Plaintiffs' shares are specified it has been held that the abatement of the appeal as against one Plaintiff-Respondent renders the whole appeal incompetent. See the case of *Arjan Mirdha v. Kali Kumar Chakravarti* (11).

(1) 11 C. W. N. 504 (1907).

(2) 24 C. W. N. 44: s. c. 80 C. L. J. 217 (1919).

(6) 6 C. W. N. 196 (1901).

(7) 10 C. W. N. 981 (1908).

(8) 19 C. W. N. 290 (1914).

(9) 28 C. L. J. 201 (1918).

(10) 29 C. L. J. 461 (1917).

(11) 68 Ind. Cas. 194 (1922).

MANINDRA CHANDRA NANDI v. BHAGABATI DEVI CHAUDEHURANI.

Mr. Ram Chandra Majumdar for the Appellant.—The appeal was not imperfectly constituted and can proceed in the absence of one of the Plaintiffs-Respondents. Relied on *Chandersangh v. Khimabhai* (8) and *Upendra Kumar Chakravarti v. Sham Lal Mandal* (4) and Or. 41, r. 4 of the Civil Procedure Code. The appeal was not incompetent though one of the Plaintiffs-Respondents is not a party to the appeal. In any case, the Court was competent, under Or. 41, rr. 20 and 23 of the Civil Procedure Code, to add the legal representative of the deceased Respondent as a party to the appeal. An application for that purpose had been put in and the prayer ought to be granted. The order should finally be made in the exercise of the Court's inherent powers to have the legal representative of the deceased Respondent added as a party. Referred to *Pulin Behari Roy v. Mahendra Chandra Ghosal* (5).

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J.—The present suit was brought by several persons for declaration of title to, and recovery of possession of, the disputed land which is said to be on the boundary between the Plaintiffs' and the Defendant's Mouzahs. The real issue in the case that was tried was whether the disputed land forms part of the Plaintiffs' Mouzah Kadamtola or of the Defendant's Mouzah Sitaijhar. The trial Court decreed the suit in part holding that a portion of the land in suit belonged to the Plaintiffs' Mouzah. On appeal by the Plaintiffs, the learned District Judge found that the entire land in suit belonged to the Plaintiffs' Mouzah and decreed the suit.

Against this decree the present appeal has been preferred by Defendant No. 1 making all the Plaintiffs and some of the Defendants Respondents to the appeal. During the pendency of the appeal in this Court the Plaintiff-Respondent No. 3 Gopal Das Roy Chaudhury died and an application was made by the Appellant after the period of limitation fixed for that purpose to have the abatement of the appeal as against that Respondent set aside and for substitution of his heirs in his place. A Rule was issued by this Court, but it was finally discharged on the 18th February last. The result of the decision in the Rule is that the appeal as against the Plaintiff-Respondent No. 3 has abated.

At the hearing of this appeal a preliminary objection is taken on behalf of the Respondent that the appeal is incompetent and cannot proceed in the absence of one of the Plaintiffs-Respondents against whom it must be taken to have been dismissed. I am of opinion that this objection must prevail. The suit was brought jointly by a number of persons for recovery of possession of a certain property. The suit was decreed and the Plaintiffs without specification of their interest in the property were declared to be entitled to possession on a certain right claimed by them. Any person who is dissatisfied with the decree must have a declaration in the presence of the entire body of the Plaintiffs that they are not entitled to the right claimed by them which is based upon a common ground of title alleged by them. In a case like the present the real test to be applied is what is suggested in the case of *Dharanjit Narain Singh v. Chandreswar Prasad Narain Singh* (1), namely, whether the suit as framed could proceed in the absence of one of the Plaintiffs. There is yet another test—whether, if the

(8) I. L. R. 22 Bom. 718 (1897).

(4) I. L. R. 34 Cal. 1020 (1907).

(5) 34 C. L. J. 405 (1921).

(1) 11 C. W. N. 504 (1907).

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Plaintiffs were Appellants, the appeal could proceed in the absence of one of the Plaintiffs either as Appellant or Respondent. If the Defendant succeeds in this appeal and it is declared that the property in suit belongs to his Mouzah then there will be two decrees, one against all the Respondents on the record in whose presence it is decreed that the property belongs to the Defendant's Mouzah and another decree of the lower Court in favour of Plaintiff No. 3 who is no party to this appeal to the effect that the property in suit belongs to the Plaintiffs' Mouzah of which he was a part proprietor. In view of this anomalous result it has been held that an appeal arising out of a suit for possession of land to which one of the Plaintiffs-Respondents is not a party cannot proceed in his absence. The point was fully considered in the case of *Kali Dayal Bhattacharji v. Nagendra Nath Pakrashi* (2), where all the cases on the point have been referred to and commented upon. Most of these cases were placed before us by the Appellant and the question re-argued. I have given my best considerations to this point and decided to follow the decision in the case of *Kali Dayal Bhattacharja v. Nagendra Nath Pakrashi* (2). Reliance is placed on behalf of the Appellant on the decisions in the cases of *Chandersangh v. Khimabhai* (3) and *Upendra Kumar Chakravarti v. Sham Lal Mandal* (4) which follows the Bombay case. These cases have been considered in the case of *Kali Dayal Bhattacharja v. Nagendra Nath Pakrashi* (2) and have been justly distinguished and are not of much authority because no reasons were assigned in support of the view there taken. In

the Bombay case the real point was as to the competency of the appeal in the absence of one of the Appellants. In considering the case of one of the Respondents who had also died and whose heirs were not brought on the record, the learned Judges observed that the Court could proceed under sec. 544 of the Code of 1882 (corresponding to Or. 41, r. 20 of the present Code) against the rest of the Respondents. In the case of *Upendra Kumar Chakravarti v. Sham Lal Mandal* (4) the Bombay case was referred to and accepted without any argument. I do not find myself prepared to follow these cases. It is argued further on behalf of the Appellant that we should proceed in this case under Or. 41, r. 1, C. P. C., though one of the Plaintiffs-Respondents is not a party to this appeal. I do not think that we should follow the course suggested. That rule is limited to the case of Appellants. An analogous provision is to be found in the proviso to Or. 9, r. 13, C. P. C. Where a number of persons are adversely affected by a common decree any one of them may move the Court to have the decree varied and the Court may vary it not only in respect of such person but also in favour of other parties against whom it was passed. But it does not entitle a person against whom the decree is passed to have it varied in the absence of a person in whose favour it was made.

It is next prayed that we may proceed under the provisions of Or. 41, r. 20, C. P. C., and bring in the heirs of the deceased Plaintiff-Respondent No. 3 on the record and hear the appeal in their presence. An application for that purpose has been formally made. I do not think that we should accede to this request. Or. 41, r. 20 is ordinarily intended to apply to cases where the Court finds that it cannot

(3) 24 C. W. N. 44; s. c. 30 C. L. J. 217 (1909).

(2) 1 L. R. 23 Bom. 718 (1897).

(4) 1 L. R. 34 Cal. 1020 (1907).

(4) 1 L. R. 34 Cal. 1020 (1907).

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proceed with the suit without the presence of a party who was not made a party to the appeal. It is not intended to override the provisions of Or. 22, C. P. C. The right obtained by a Respondent when the appeal abates as against him is a valuable right and should not be lightly treated. Reference in this connection has been made to the case of *Pulin Behari Roy v. Mahendra Chandra Ghosal* (5), where the procedure suggested by the Appellant was adopted. Without examining the ratio of that case we are not prepared to follow the procedure adopted therein.

We are again asked to exercise our powers under Or. 41, r. 33. That provision of the law is also not applicable to this case. It is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the Appellate Court. Whatever view may be taken with regard to the inherent power of this Court as contained in Or. 41, C. P. C., or outside the Code, the present is not one in which such power should be exercised.

In the result, this appeal must be held to be incompetent and dismissed with costs.

The application filed by the Appellant is rejected.

DUVAL, J.—I agree.

H. C. S. *Appeal dismissed with costs.*

(5) 84 C. L. J. 405 (1921).

PRIVY COUNCIL:

[APPEAL FROM PATNA.]

LORD SHAW.

LORD CARSON.

SIR JOHN EDGE

MR. AMER ALI.

1925.

Heard, 23, February
and 10, 12 & 13,
March.

Judgment, 3, April.

A. H. FORBES,
Appellant,

v.

SIR L. E. RALLI and
ors., Respondents.

Evidence Act (I of 1872), sec. 115—Landlord permitting tenant to build, representing that written lease conferred permanency of tenure but at a variable rent—Landlord, if may eject tenant—Estoppel.

A tenant desiring to erect pucca structures on the leased land asked the permission of the landlord whose agent in reply wrote to say that the lease was a permanent lease and gave the tenant right to erect buildings, but it did not entitle him to hold at fixed rate and that the rent was liable to enhancement after proper legal notice and that pending consideration of a proposal to fix the rent permanently, the tenant might commence the house if he liked:

Held—That the statement in the letter was a statement of fact and not an expression of opinion, and the house having been erected, the landlord was estopped from ejecting the tenant by sec. 115 of the Evidence Act.

This was an appeal (No. 5 of 1924) from a decree of the High Court at Patna made in a Letters Patent appeal on the 17th May 1922.

That appeal reversed a decree, dated the 19th July 1921, of a single Judge of the said Court which had reversed decrees by the District Judge of Purnea, dated the 8th September 1919, and the Munsif of Araria, dated the 16th September 1918, who had dismissed the Appellant's claim.

The Appellant, as lessor, sued to eject

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the Respondents from certain lands in Pargana Sultanpur which had been leased to them by a *kabuliyat* and patta, dated the 22nd June 1894 and registered shortly afterwards. Certain buildings for trading purposes were contemplated by the lease and were erected by the Respondents, and in 1903 the latter applied for a licence to build a *pucca* house.

Permission was granted by the Appellant whose manager wrote to the Respondent's agent a letter, informing him that the lease was a permanent one but that the rent was liable to enhancement.

The house was erected and a "*nazarana*" or bonus paid to the Appellant. On the 23rd August 1916 the Appellant desiring to raise the rent on the land gave the Respondent firm notice to quit but offered them at the same time a new tenancy at Rs. 80 per bigha.

The Respondent firm refused to quit the premises and at the expiry of the notice the Appellant instituted this suit for possession.

The facts and the relevant documents are fully set out in the judgment of the Judicial Committee.

The suit was dismissed by the Munsif and his decision was upheld on appeal by the District Judge. A second appeal was preferred to the High Court and was heard by Ross, J., who was of opinion that the terms of the lease were plain and constituted a lease from year to year.

He rejected the plea of estoppel put forward by the defence and made a decree for ejectment.

A further appeal under the Letters Patent was heard by Dawson-Miller, C. J., and Mullick, J., who reversed the decision of Ross, J., and dismissed the suit. The learned Judges were of opinion that the lease in its inception did not create a permanent tenure but they held that the statements made on behalf of the Appel-

lant by the letter of the 31st December 1903 were statements of fact which constituted an estoppel under sec. 115 of the Indian Evidence Act, which operated to prevent the Appellant from evicting the Respondent firm.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant.—On the construction of the document the lease was not a permanent one. From its terms it was clearly a lease from year to year. That such was the intention is clear from the evidence, which is undisputed, that the Appellant was an executor and had no power to grant a permanent lease.

[LORD SHAW.—There is no plea that the lease was *ultra vires*.]

The Appellant does not raise that contention but the fact is relevant in construing the lease.

Further no permanent buildings were contemplated by the lease and when a permanent building was required both parties realised that a licence should be given for its erection.

There is no estoppel under sec. 115 of the Evidence Act. The letter of the 31st December 1903 did not in fact make any representation, but if it is construed as a representation, that representation was never acted on by the Respondents.

The letter was written without the Appellant's authority and at most it can only be construed as an unauthorised statement by the Appellant's manager on a question of law. The words in sec. 115 of the Evidence Act "to believe a thing to be true" make it abundantly clear that the representation to create an estoppel must be a representation of fact.

They referred to *Ramsden v. Dyson* (1), *Beni Ram v. Kundan Lal* (5), *Rashdall v.*

(1) L. R. 1 H. L. 129 (1865).

(5) L. R. 26 I. A. 58; s. c. I. L. R. 21 All. 496; 3 O. W. N. 502 (1899).

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Ford (6), *Jorden v. Money* (7), *Maddison v. Alderson* (8), *Beattie v. Lord Ebury* (9), *Gopee Lall v. Chundraolee Buhoojee* (10), *Narsingh Dyal Sahu v. Ram Narain Singh* (11), *Cooper v. Phibbs* (12), *Earl Beauchamp v. Winn* (13) and *Sarat Ch. Dey v. Gopal Ch. Laha* (4).

Sir John Simon, K. C., Messrs. A. M. Dunne, K. C. and S. Hyam for the Respondent firm.—The Respondents were under the impression that their lease was a permanent one and that construction is fortified by the fact that there was no fixity of rent and the lease was for building purposes.

Promoda Nath v. Sri Govindo (14).

In order that there should be no misunderstanding the Respondents obtained from the Appellant a written assurance confirming them in their view of the construction and on the faith of such assurance they erected a permanent building. There is no question of equitable estoppel outside the provisions of sec. 115 of the Evidence Act. That section which is probably based on the decision in *Freeman v. Cooke* (15) sets out the mode in which estoppel shall operate, and the facts proved in this case bring it within the section.

Sarat Ch. Dey v. Gopal Ch. Laha (4) shows that it is incorrect to say that a representation of law cannot operate as an estoppel.

But the representation here, even if it is

a representation as to a right of ownership, is a matter of fact. *Cooper v. Phibbs* (12).

The principle of English law laid down in that case and in *Earl Beauchamp v. Winn* (13) has been applied in India.

Narsingh Dyal v. Ram Narain (11), *Sarat Ch. Dey v. Gopal Ch. Laha* (4) and *Ahmad Yar Khan v. Secretary of State* (3).

Reference was also made to *Ismail Khan v. Joygoon* (16) and Ewart on Estoppel, pp. 74 and 75.

Mr. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This appeal arises out of a suit brought by the Plaintiff-Appellant in the Court of the Munsif at Araria in the District of Purnea to evict the Defendants from certain lands he had leased to them in the year 1894.

The suit was dismissed by the Munsif, as will be more particularly mentioned later in the course of this judgment. The Munsif's order was affirmed by the District Judge. The Plaintiff preferred an appeal to the High Court, which was heard by a single Judge, Mr. Justice Ross, who reversed the judgment of the District Judge, and decreed the Plaintiff's claim. On the Defendants' appeal under the Letters Patent, a Division Bench, consisting of the Chief Justice and Mr. Justice Mullick, reversed the decision of Mr. Justice Ross, and agreeing with the District Judge, dismissed the suit of the Plaintiff. He now appeals to His Majesty

(4) L. R. 19 I. A. 203 (1892).

(6) L. R. 2 Eq. 750, 754 (1896).

(7) 5 H. L. C. 185, 214 (1854).

(8) 8 App. Cas. 467, 473 (1880).

(9) L. R. 7 Ch. A. 777 (1872).

(10) L. R. I. A. Sup. 131, 14 Ben. L. R. 391, 395 (1872).

(11) I. L. R. 30 Cal. 833 (1903).

(12) L. R. 2 H. L. 149 (1867).

(13) L. R. 6 H. L. 223 (1878).

(14) 9 C. W. N. 463 (1905).

(15) L. R. 2 Exch. 654, 662, 663 (1848).

(3) L. R. 28 I. A. 211, 218; s. c. 5 C. W. N. 634 (1901).

(4) L. R. 19 I. A. 203 (1892).

(11) I. L. R. 30 Cal. 833, 834 (1903).

(12) L. R. 2 H. L. 149 at p. 170 (1867).

(13) L. R. 6 H. L. 223, 224 (1878).

(16) 4 C. W. N. 210 (1899).

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in Council on the grounds that the High Court misconstrued the terms of the lease under which the Defendants were let into possession, and have wrongly applied, under the circumstances of the case, the doctrine of estoppel in respect of his claim.

A brief narration of the facts which have led to this unfortunate litigation will explain the position of the parties.

Mr. Forbes, the Plaintiff, owns considerable landed property in the District of Purnea. The Defendants are Greek merchants trading largely in country produce in India under the name and designation of Ralli Brothers. On the 22nd June 1894, the Defendants' agent, one Acatos, obtained from the Plaintiff a lease of four bighas of land "for the purpose of erecting buildings, putting up presses, etc., for trading." The lease (Ex. 5) is in English. Acatos executed a *kabuliyat* which is identical in terms with the lease. As the question for determination turns, in a great measure, on the words of this lease, their Lordships think it desirable to give, so far as is necessary, the actual language of Ex. 5. It is as follows :—

"That whereas land is required by Mr. C. Acatos, Agent of Messrs. Ralli Brothers, Merchants, of Calcutta, for the purpose of erecting buildings, putting up presses, etc., for trading, I, A. T. Ricketts, Manager for A. H. Forbes, Executor to the Estate of the late A. J. Forbes, agree to give a lease of four bighas of land to the aforesaid Mr. C. Acatos for the above purpose from year to year at an annual rental of Rs. 45 per bigha or total annual rental of Rs. 180."

Admittedly the Defendants took possession of the leased lands for the purposes stated in Ex. 5. In 1903 a gentleman of the name of Carras took the place of Mr. Acatos as the local agent of Ralli Brothers at Purnea. So far as appears from the record, he resided at a place called Forbesganj, which had been established by the Plaintiff or his father as the centre of his estate. A railway station had been open-

ed close by, and Forbesganj acquired a certain importance.

About this time circumstances appear to have arisen which necessitated the erection of a *pucca* or masonry building for the residence of Mr. Carras. As the lease, to use the language of the District Judge, was somewhat vaguely phrased, the Defendants, Ralli Brothers, considered it expedient to obtain the Plaintiff's express permission for the purpose of erecting the structure they proposed for their agent. At this time a Mr. Duff was acting as Mr. Forbes' manager or agent.

After going carefully through the evidence, their Lordships have no doubt that both the Munsif and the District Judge have correctly held that at the interview which took place in consequence of the Defendants' applications for permission to raise the structure they proposed, and at which the terms of the lease of 1894 were discussed, Mr. Forbes was personally present. In his evidence in the Munsif's Court the Plaintiff states that he does not remember whether he was present or not. Mr. Carras positively swears that he was present and, in fact, took part in the discussion. Mr. Duff, for some reason or other, has not been examined on behalf of the Plaintiff. If, as it is said, he was ill at the time and unable to attend, he could have been examined, as the lower Courts point out, on commission.

Their Lordships are thus left face to face with two statements, one by Mr. Forbes saying that he does not remember, the other by Mr. Carras, who positively swears that Mr. Forbes was present.

In their Lordships' opinion, the Courts which were by law vested with the jurisdiction to deal with the facts have properly come to the conclusion that Carras' statement should be accepted. The letter of the 31st December 1903 (Ex. A), which

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Duff wrote to Carras, is clear and precise on this point. Mr. Duff, writing as manager of the Sultanpur Estate, namely, the Plaintiff's estate, says as follows:—

"My dear Carras,

"Referring to your conversation of this morning with Mr. Forbes and myself, I write (?) at your request to say that the lease executed by Mr. C. Acates, dated the 22nd June 1894, is a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at fixed rate, and the rent is liable to enhancement after proper legal notice. If your firm desires to have a permanent lease at a fixed rate of (torn) will be glad to see the proposed draft of lease and to show it to Mr. Forbes. In the meantime, you can commence the house if you like to do so."

With reference to this letter the Plaintiff has raised a number of objections which appear to their Lordships to be feeble and untenable. In the first place, he says that it was a private letter. The District Judge held, as their Lordships think rightly, that it is an official letter written by Duff in his capacity as manager. It is precise in its language and tells the Defendants that the lease of June 1894 is "a permanent lease and gives you the right to erect buildings, but it does not entitle you to hold at fixed rate and the rent is liable to enhancement."

The Defendants appear to have paid a bonus or *nazarana* for the permission to raise the structure they proposed, and on the 10th January 1904, a "parwangi" was issued from the Plaintiff's *zimidari* *cutchary* in the Hindi language, the vernacular of the Province, giving the sanction for the erection of the building. The *parwangi*, as it is called, requires some attention. Its translation is as follows:—

"To the Manager,

"Permission granted to Messrs. Ralli Brothers, Gole-dar of Gola at station Forbesganj, Pargana Sultanpur.

"Whereas you prayed through the agent of the said Gola for permission to erect a Pucca house in your Bandobasti (settled) Gola. As on enquiry and

measurement you wish to erect a house on 2 C. 15 Dhurkis of land on payment of Rs. 21 as *Nazarana* per mensem, and the said sum has under a Chalan been deposited through your agent in the estate. Therefore permission is granted to you to erect a masonry house on 2 C. 15 Dhurkis of land in your Bandobasti (settled) Gola. A *Nazarana* (bonus) of rupees twenty per Cottah will be taken in case more land is occupied in constructing the Pucca house. All rights which you possess in your Bandobasti (settled) Gola land under the Patta and *Kabuliat* will remain intact. No other right will be created under this permit. This *Parwangi* (sanction) or permission is intended for the said house only. Dated the 10th January 1904. Sultanpur."

Considerable stress was laid by Plaintiff's Counsel on the words which appear towards the end of this document—"No other right will be created under this permit;" and it was urged that the intention of the Plaintiff was to restrict the rights of the lessee within the limits imposed by the original lease of 1894. Mr. Carras deposes that he does not know the Hindi language and did not, therefore, know of the terms of this document until some time after, and that he took it to be an acknowledgment of the bonus that he had paid. This statement has been accepted by both the Munsif and the District Judge. In their Lordships' opinion, in whatever way this document may be understood, it does not affect in any degree the effect of what took place at the interview with Mr. Forbes and Mr. Duff, the result of which is embodied in (Ex. A) the letter of the 31st December 1903.

Acting on the suggestion contained in the letter of Mr. Duff of the 31st December 1903 (Ex. A), *viz.*, that if the Defendants desired to have a permanent lease at a fixed rate (of rent), he would be glad to see a proposed draft of lease and to show it to Mr. Forbes, the Defendants appear to have instructed their solicitors, Messrs. Sanderson and Co., to prepare the necessary draft.

From the document, to which reference

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will be made presently, it appears that 'Sandersons' applied to Mr. Forbes for the production of a number of papers which they wished to inspect before preparing the draft.

The Defendants have put in the reply of Mr. Duff to this application of Messrs. Sanderson and Co., but not the letter Sanderson and Co. wrote to Mr. Forbes.

The Plaintiff's advisers appear to have produced in the Munsif's Court a certain paper which, for purposes of identification, appears to have been marked "X." It was alleged that that was the communication in question, but they failed to prove the signature and naturally it was not admitted in evidence.

Another effort was made in the first Court to introduce the paper in question among the exhibits. They again failed to prove it. No question regarding the non-admission of this paper was raised before the District Judge or in the High Court. Although in the appeal to the High Court twenty-three grounds were taken, not one relates to it; nor is there any reference to this rejected letter in the grounds for leave to appeal to His Majesty's Council in the case lodged by the Plaintiff before the Registrar.

Their Lordships are of opinion that there is no substance in the present contention relative to what is called "X."

Coming to the letter addressed by Duff to Messrs. Sanderson (Ex. A1), it bears date the 23rd January 1904, and is in these terms:—

"Sirs,

"With reference to your No. 302 of 13th instant to the address of Mr. A. H. Forbes, I am desired by him to inform you that matters of greater importance than the lease of a few bighas of land are constantly transacted in this estate without the production of such papers as you wish to inspect. There are no special title deeds for the plot of land which Messrs. Ralli Brothers have held for the last nine years, and if Mr. Forbes had no title, it follows that Messrs. Ralli

Brothers have also had no title for the past. Mr. Forbes, therefore, declines to produce such valuable papers as he holds, and considers that the existing lease, with the addition of the sanction recently given to erect the building is sufficient for all requirements."

This being the position of the parties, the point for determination resolves itself into a simple question of fact. There can be no question that upon the letter (Ex. A) of the 31st December 1903, the Defendants commenced the building for the residence of their agent and completed it at considerable expense. Mr. Forbes knew of it and frequently visited the place. No question was raised until 1916. In that year the Plaintiff's zemindari cutchary (estate office) was burnt down. He demanded contributions from his tenants to rebuild the cutchary. They all agreed to pay except the Defendants, who stood on their rights. It was then that the question of their eviction was first mooted. His evidence, long and involved as it seems to their Lordships, appears thoroughly consistent with the view taken by the District Judge.

Both the Munsif and the District Judge, in view of the purpose for which the lease was granted and the surrounding circumstances to which they refer in their judgments, were of opinion that the demise in its inception was of a permanent character, save and except as to the rate of rent; and that the words "from year to year" did not affect the permanent character of the lease, but only gave expression to the provision that the rent was variable from year to year upon proper notice. They also held that the Plaintiff was estopped by his acts and representations from questioning the permanency of the tenure.

In the view their Lordships take of the case, they do not think it necessary to determine whether in its inception the lease created a permanent tenure, for they fully agree with the Courts in India that the

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Plaintiff is estopped from interfering with the Defendants' right to hold the land.

The doctrine of estoppel which the Courts in India, save and except Mr. Justice Ross, have applied to the claim of the Plaintiff is embodied in sec. 115 of the Indian Evidence Act of 1872. It is as follows :—

“When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.”

The Munsif and District Judge have rightly held, in their Lordships' opinion, that the statement in Ex. A is a statement of fact and not an expression of opinion, as is contended by the Plaintiff. The Plaintiff distinctly represented to the Defendants' agent, Carras, that the lease granted in 1894 was a permanent lease, and that under it he was entitled to erect buildings, as the lease distinctly stated; but that there was no fixity of rent. It has been urged on behalf of the Plaintiff that it was a yearly tenancy, and to hold that the Plaintiff was estopped by his conduct as evinced by the letter of the 31st December 1903, from enforcing eviction, would be tantamount to creating a new contract. It is said also that the contract of 1894 was a registered document, and no variation or alteration or change can be made in it except by a registered contract. The Defendants did not contend that it was a new contract or ask for a new contract; nor have the Courts in India held that estoppel creates a new contract. Estoppel prevents the Plaintiff from evicting from their holding the Defendants, whom he, the Plaintiff, induced by his

representation and conduct to believe that they had a fixity of tenure, although not of rent, in the lands that had been leased to them. It gives effect to the representation that induced them to act as they did.

In the case of *Ramsden v. Dyson* (1), the principle which governs this class of case is stated by Lord Kingsdown in the following terms :—

“The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (2), and, as I conceive, is open to no doubt.”

This principle has been accepted by this Board in the case of *Ahmad Yar Khan v. The Secretary of State for India* (3).

The exposition by Lord Shand in *Sarat Chunder Dey v. Gopal Chunder Laha* (4) of the rule of equitable estoppel embodied in sec. 115 of the Indian Evidence Act has been quoted *in extenso* in the judgment of the learned Chief Justice in the present case, and does not need repetition. Their Lordships desire to record their full concurrence with the principle there laid down.

They do not consider it necessary to refer to all the authorities that have been cited on both sides, as they think that the views expressed by Lord Kingsdown and Lord Shand completely answer the contentions of the Appellant. Upon a re-

(1) L. R. 1 H. L. 129 (1865).

(2) 18 Ves. 328 (1811).

(3) L. R. 28 I. A. 211: s. c. 5 C. W. N. 634 (1901).

(4) L. R. 19 I. A. 203 (1892).

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view of the facts as well as of the authorities, their Lordships have come to the conclusion that the judgment of the High Court is right and that this appeal should be dismissed with costs, and their Lordships will humbly recommend His Majesty accordingly.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

Solicitors: *Messrs. Sandersons and Orr, Dignams* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF
THE PUNJAB.]

LORD DUNEDIN.
LORD SAW.
SIR JOHN EDGE.
1925,
19, March.

MUST. LAJWANTI and
ors., Appellants,
v.
SAFA CHAND, since
deceased, and ors.,
Respondents.

Parties—Persons added as co-Plaintiffs under alleged assignment of share in subject of suit—Decree, whether can be made jointly in favour of all Plaintiffs without the consent of Defendants or without production of deed of assignment by original Plaintiff—Proper decree in such a case, safeguarding rights of added Plaintiffs.

Persons who assert that they have a derivative interest in the stake of a suit cannot, by getting added as Plaintiffs, be associated in a decree in favour of the person who has the only real title. The Defendants have an interest in this as well as the Plaintiff, and it is at least safe to say that no decree would be granted to the real Plaintiff and the added Plaintiffs jointly unless there had either been a consent signified by the Defendants or a legal conveyance or assignment produced by the real Plaintiff of a share of the subject of the suit.

Judgment was given in favour of the real Plaintiff but with the addition that this was to be without prejudice to the added

Plaintiffs to recover in respect of any conveyance or assignment made or of any contract to convey or assign such share of the property recovered under the judgment as might appertain to them in respect of such conveyance, assignment or contract.

This was an application by the Appellant and Plaintiff Musammat Lajwanti for the rescission of an order in Council made in appeal No. 60 of 1922, and a fresh order made in conformity with the words of the judgment.

The appeal was heard on the 10th and 11th of December 1923 and the judgment of the Judicial Committee was delivered on the 29th January 1924 and was reported in 28 C. W. N. 960.

In the concluding paragraph of the judgment of the Board (28 C. W. N. at p. 962) the following words appeared: "The result is that the appeal must be allowed and judgment pronounced in favour of the Plaintiff"—the word being used in the singular. The order in Council pronounced judgment in favour of the "Appellants," in the plural, and the present application was by Lajwanti who contended that the order should be amended so as to conform to the judgment pronounced and that the relief granted should be in her favour alone.

Mr. W. Wallach for the Petitioner.

Messrs. DeGruyther, K. C. and Dubé for the other Appellants.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—This petition is presented under somewhat peculiar and unsatisfactory circumstances. In the recent appeal of Musammat Lajwanti and others, judgment was pronounced in which their Lordships said that they would humbly advise His Majesty to

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allow the appeal and pronounce judgment in favour of the Plaintiff. That by the expression "Plaintiff," their Lordships designated Musammat Lajwanti alone without the addition of the other Appellants, is made perfectly clear not only by the use of the singular and not the plural, but also by a sentence in the judgment in which their Lordships, after narrating the claim and suit of the Musammat, added, "Certain persons who might have been Respondents backed up the Plaintiff and were added as Plaintiffs, a very unnecessary proceeding, as no decree could pass in their favour." No representation was made to their Lordships as to there being any error in this.

On the judgment being presented to His Majesty in Council for embodiment in the formal order, the word "Appellants" in the plural was used. The Plaintiff and Appellant, Musammat Lajwanti, now presents this petition to have the order made rescinded and an order pronounced in favour of herself alone. Now in ordinary circumstances this petition would be granted as a matter of course. It is the duty of their Lordships to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him.

But the petition is opposed by the other Appellants. The Counsel who at the hearing pleaded the case of the Musammat now appears for these other Appellants and points out that the Musammat herself in her original pleading had set forth that by arrangement between her and three other Appellants she was to take only three-fifths of all she recovered, the other two-fifths going to them; and it is further alleged that the Musammat herself has not authorised this petition.

An affidavit is presented to that effect. It is met by counter-affidavits.

Their Lordships disregard the affidavits on both sides. They are quite contradictory and it is impossible to determine what the truth is.

Their Lordships have no doubt that the prayer of the petition must be granted in so far as it prays to have the Order in Council made to conform to the judgment pronounced. Even had the facts now brought forward been clearly set before their Lordships, it would not follow that the judgment would have been altered. It is out of the question that persons who assert that they have a derivative interest in the stake of a suit can, by getting added as Plaintiffs, be associated in a decree in favour of the person who has the only real title. The Respondents have an interest in this as well as the Plaintiff. At least it is safe to say that no decree would have been granted in favour of all the Appellants jointly unless there had either been a consent signified by the Respondents or a legal conveyance or assignment, produced by the real Plaintiff of a share of the subjects of the suit.

At the same time their Lordships wish to do justice and not to allow anyone to take advantage of a slip in order to appropriate to himself property that is not fairly his. Their Lordships will therefore humbly advise His Majesty to rescind the order complained of and to pronounce judgment in favour of the Plaintiff Musammat Lajwanti alone, but with the addition that this judgment is to be without prejudice to the Appellants other than Lajwanti to recover in respect of any conveyance or assignment made or of any contract to convey or assign, such share of the property recovered under the judgment as may appertain to them in

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respect of such conveyance, assignment or contract.

As their Lordships think that both parties were in fault, there will be no costs of the petition.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Petitioner Lajwanti.

Solicitor : *Mr. H. S. L. Polak* for the other Appellants.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 1170 OF 1924.

BUCKLAND, J. 1925, 20, August.	}	RAMLAL MURLIDHAR v. JOGENDRA KRISHNA RAY.
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Merger, a question of intention—Pre-existing debt on an original hatchitta, whether merges in a subsequent mortgage for the same debt.

Where for money lent on a hatchitta, a subsequent mortgage was executed for the same debt, but in which there was no express covenant to pay :

Held, construing the mortgage deed—That the original debt had not merged in the mortgage. Merger is a question of intention. Such intention is to be gathered from the deed itself and surrounding circumstances.

ETHEL GEORGINA KERR v. CLARA B. RUXTON (1) *referred to and approved.*

The facts of the case are as follows :—On the 14th November 1920, the Plaintiff firm lent on a *hatchitta* Rs. 25,000 to the Defendants at interest 10½ per cent. On the 4th May and 23rd May 1921, the Defendants paid Rs. 619-12 as. for interest. On 3rd May 1921, by way of further security the Defendants executed a mortgage in favour of the Plaintiff firm on certain colliery properties, in which there was no personal covenant to pay.

The suit was instituted to recover the
(1) 4 C. L. J. 510 (1906).

money on the *hatchitta*, the defence was that no suit lay as the cause of action on the *hatchitta* had merged in the subsequent mortgage executed for the same sum.

Mr. S. C. Mitter for the Plaintiff.—Merger is always a question of intention. Refers *Goluk Nath v. Premlal* (3), *Palmer v. Bramley* (3) and *Lachanbati Kumri v. Bodhnath Tewari* (4).

Ghose on Mortgage (Fifth Edition), at p. 516. *Jones on Mortgage*, 374.

If there is a recital that the deed was executed merely for the purpose of a security for the re-payment of the old debt, Courts in England have held that it would not amount to merger.

Twopenny v. Young (5).

Remedies available in respect of the old debt are not co-extensive with that on the mortgage as there is no personal covenant to pay.

Ram Gopal v. Blaquiere (6).

Hence there is no merger.

Kerr v. Ruxton (1).

Mr. S. C. Bose for the Defendant.—The old debt is merged in the subsequent security. Personal covenant may be implied. On an analogy with *Illus. (b)*, sec. 62 of Indian Contract Act, it may be argued that the mortgage is a novation of the old debt. There is merger.

Salmon v. Dean (7).

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—This is a suit to recover the sum of Rs. 25,000 as principal, and Rs. 7,853, the balance of interest due on a

(1) 4 C. L. J. 510 (1906).

(2) I. L. R. 3 Cal. 307 at p. 309 (1877).

(3) [1895] 2 Q. B. 405 at p. 406.

(4) L. R. 48 I. A. 485 at p. 49; s. c. 26 C. W. N. 565 (1921).

(5) 3 Barn. & Cresswell at p. 208 (1824).

(6) 1 B. L. R. O. C. 35 (1887).

(7) 3 Mac. & G. 344 (1851).

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hatchitta with further interest in default. The principal sum was advanced on the 14th November 1920. The Defendants on the same day signed a *hatchitta*. The *hatchitta* is admitted and also payments of interest subsequently made.

It appears that on the 3rd May 1921 the Defendants by way of security executed a mortgage in favour of the Plaintiff and other creditors charging certain property for the purpose of securing their pre-existing debts.

The only point taken on behalf of the Defendant is that the debt on the *hatchitta* is merged in the mortgage and that the Plaintiffs are not entitled to recover on the *hatchitta* exclusively.

No oral evidence has been adduced on either side, and I have been referred to the terms of the mortgage itself. It is argued under sec. 62 of the Indian Contract Act that the parties agreed to substitute one contract for the other. But this is a question of fact and intention, *viz.*, whether the mortgage was intended to be collateral or in substitution.

I have been referred, on behalf of the Plaintiffs, to *Ethel Georgina Kerr v. Clara B. Ruxton* (1), where it was held that where there is an existing debt, and the payment of it is secured by a deed intended to operate as a mortgage, the pre-existing personal liability of the debtor is not superseded. Upon the deed itself, it does not, in my opinion, appear that it was the intention of the parties to substitute it for pre-existing debt, and in consequence the liability of the debtor was not thereby superseded.

The mortgage, in my opinion, was merely intended as a collateral security. As regards this, the Plaintiff asked for leave under Or. 2, r. 2 of the Civil Procedure Code, to reserve his rights under the

mortgage. Such leave has been granted; If necessary, I grant it now and there will be a decree for the amount claimed with costs on scale No. 2, interest on judgment at 6 per cent.

Messrs. K. K. Dutt & Co., Solicitors for the Plaintiff.

Mr. J. N. Mitter, Solicitor for the Defendant.

S. N. B.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM APPELLATE DECREES

Nos. 1253 AND 1347 OF 1922.

SUBHAWARDY, J. } AMBIKAWONI DASI,
DUVAL, J. } Defendant No. 3,

1925,

Appellant,

Heard, 18 and

v.

19, March.

KHETTRA GHOSAI and

Judgment,

ors., Plaintiffs,

19, March.

Respondents.

Decree tainted with fraud, voidable or void—Suit for declaration that mortgage decree and sale thereon were fraudulent and void, in effect a suit for setting aside decree on ground of fraud—Such suit brought after three years from knowledge of fraud, if barred by limitation—Limitation Act (IX of 1908), Art. 95.

The Plaintiffs sued to have their possession confirmed after declaration of their alleged title to the lands in suit or in the alternative for recovery of possession of the disputed lands after declaration that an ex parte mortgage decree passed against them and the auction sale in execution thereof were fraudulent and void, and if necessary, after setting aside the decree. It was found that the suit was brought more than three years after the Plaintiffs came to know of the decree and the sale:

Held—That a decree tainted with fraud is not void but only voidable and must be avoided within the statutory period in an appropriate proceeding.

That the Plaintiffs' suit was for all in-

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tents and purposes a suit for setting aside the decree and the sale and having been brought more than three years after they came to know of the fraud was barred by limitation under Art. 95 of the Limitation Act.

These were appeals against the decree of the Subordinate Judge, 3rd Court of Zillah Midnapur (Babu Gopal Das-Ghosh), dated the 28th February 1922, modifying the decree of the Munsif, 1st Court at Contai (Babu Raman Ch. Banerjee), dated the 28th February 1921.

The facts of the case appear sufficiently from the judgment.

Mr. J. C. Hazra and Babus Charu Ch. Ganguly (in No. 1253) and *Apurba Charan Mukerjee* (in No. 1347) for the Appellant.

Babu Santosh K. Pal for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SUHRWARDY, J.—The facts of this case are that Defendant No. 3 brought a suit (being mortgage suit No. 79 of 1914) against the Plaintiffs and obtained an *ex parte* decree against them in execution of which the property in suit were sold and purchased by Defendant No. 1 who obtained symbolical possession of the properties on the 20th February 1916. The present suit was brought on the 28th February 1920 in which the Plaintiffs prayed "to have their possession confirmed after declaration of their alleged title to the lands in suit or in the alternative for recovery of possession of the disputed lands, after declaration that the decree in the mortgage suit No. 79 of 1914 and the auction sale in execution thereof were fraudulent and void, and if necessary, after setting aside the decree." One of the pleas raised by the Defendants was that of limitation and that is the only point

pressed before us on behalf of the Defendants-Appellants. The Plaintiff in his plaint alleged that he came to know of this decree on the 10th December 1918. The first Court accepted that statement and finding that the decree and sale were fraudulent gave the Plaintiffs a decree for all the properties in suit which were described in two schedules being *Schs. (ka)* and *(kha)*. The Defendant No. 3 appealed and the learned Subordinate Judge found that in the mortgage bond the property described in *Sch. (ka)* was fraudulently interpolated and therefore the decree obtained by the Defendant on the strength of the bond so far as it related to that property was void as also the sale held under that decree. Regarding the properties described in *Sch. (kha)* he found that the properties were mortgaged to the Defendant under the bond and therefore so far as the properties of that schedule were concerned the suit should be dismissed.

As regards *Sch. (kha)* the learned Subordinate Judge observes that the auction-purchaser is a third party and he was not a party to the fraud by which the decree was obtained nor did he collude with the other Defendants; so the Plaintiff cannot recover possession of the land described in *Sch. (kha)* unless he gets the sale and the decree set aside; and he thought that Art. 95 of the Limitation Act applied to the case. After making these observations the learned Judge raises the issue :—So the question is if the Plaintiffs are within three years of the date of their knowledge of the fraud, *i.e.*, the forgery in the bond. On this issue he records his finding in these words : "In fact I am convinced that they (the Plaintiffs) knew of the same (the decree and the sale) on the 20th February 1916 when the symbolical possession was delivered and the Defendants

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wanted them to vacate the *bastu*. This suit is brought on the 28th February 1920. Therefore the suit is evidently after three years from the date when the Plaintiffs knew of that fraud." As to Sch. (ka) the learned Subordinate Judge is of opinion that as the land described in that schedule was interpolated in the mortgage bond after its execution, "the decree and sale have not affected the lands of Sch. (ka)." The learned Judge seems to think that different legal considerations should apply to different portions of the decree obtained by the Appellant. If this is the view taken by the learned Judge it must be held to be wrong. A transaction tainted with fraud is voidable and not void. A decree obtained by fraud, collusion or any other unlawful means is a pronouncement of a Court of Justice and it cannot be treated as a waste paper. The only objection that can be made to a decree as being void or a nullity must be on ground that it was passed without jurisdiction or that the Court which passed it had no territorial or pecuniary jurisdiction over the subject-matter of the suit. It is conceded that the Court which passed the mortgage decree had jurisdiction over the properties in suit and was pecuniarily competent to try it. That decree therefore is a decree which is binding upon all the parties to the suit unless set aside in a properly constituted proceeding. The view that a decree passed with jurisdiction, however tainted it may be with fraud, is not void, hardly needs any support from authorities; for it has been repeatedly held that a Plaintiff will not succeed in obtaining any relief before he, if the decree passed against him was by a competent Court, gets it vacated. Reference may be made to the case of *Ram Sona Chaudhurani v. Soma Mala Chaudhurani* (1), where it is observed

"that a judgment rendered by a Court having jurisdiction over the parties and the subject-matter, unless reversed and annulled in some appropriate proceeding, is not open to contradiction or impeachment in respect of its validity or binding effect by parties or privies in any collateral action or proceeding. The position is different when a judgment shows on its face that it is void for want of jurisdiction either of the person or the subject-matter. Such a judgment is treated as a nullity, collaterally impeachable by any person interested wherever it is brought in question." The same view has been expressed in the case of *Raj Kumar Sarkel v. Raj Kumar Mali* (2), where it was held that a sale in execution of a fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective. In that case which covers a greater part of the points raised in this case, the sale was sought to be set aside on failure to set aside the decree; and the learned Judges held "that it was essential that the Plaintiffs should seek, as they did in their plaint, to have the decree set aside on the ground of fraud before they could have the sale vacated. Consequently where the right to have the decree set aside as fraudulent has become barred by limitation, no decree can be made setting aside the sale only as made in execution of a fraudulent decree and as the Plaintiffs have lost their right to attack the decree, they cannot consequently attack the sale." This view has been adopted in many rulings, one of which may be referred to, viz., the case of *Bejoy Chand Mahtab v. Asutosh Chukraborty* (3). The result of all these authorities is that the Plaintiffs

(2) 20 C. W. N. 659 (1915).

(3) I. L. R. 48 Cal. 454: s. c. 25 C. W. N. 42 (1920).

(1) 13 C. L. J. 404 (1911).

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cannot get the relief which they seek to obtain in this case before they get rid of the decree which stands in the way. According to the findings of the learned Judge the Plaintiffs came to know of the existence of the decree and the sale more than three years before the date of the institution of the suit which is a suit to all intents and purposes for setting aside the decree and the sale. The decree and the sale being only voidable, they must be avoided within the period of limitation fixed by statute. But it is argued on behalf of the Respondent that the suit was only one for a declaration that the decree and the sale were not binding on the Plaintiffs and therefore it may be treated as a declaratory suit. This is an attempt to evade the clear provisions of law. To hold that the Plaintiffs are entitled to have a declaration that a certain decree is not binding against them though they were parties to such proceedings would be to make nugatory such provisions of the law which makes it obligatory on a party to set aside the decree and the sale in order to remove an impediment which stands in the way of his obtaining the relief he seeks. For instance, the Plaintiff, to avoid Art. 91 or 92 of the Limitation Act, may not seek to have the instrument which purports to have been executed by him cancelled or set aside but may merely sue for a declaration and possession of property or other ancillary reliefs. This he cannot be allowed to do. It cannot be said that the Plaintiff is entitled to regard the transaction to which he is said to be a party a nullity.

I am conscious of the view taken in some cases that there are cases where the Plaintiff may not be required to remove an apparent obstruction to his right before he seeks possession of the property from which he has been dispossessed.

But the view taken in such cases is based upon a different ground. In the present case the Plaintiffs were parties to the transaction or proceeding; but in a case in which the Plaintiff is not such a party he may not be bound to have the transaction set aside; he may ask for a declaration that it is not binding on him. But where there is a judgment of a Court against him he cannot succeed unless he gets the hindrance removed. In the view I take of this case, the decree and the sale were not absolutely void but were voidable and the Plaintiff not having sought the proper remedy within three years from the date of his knowledge, i.e., 20th February 1916, the present suit for setting aside the decree and the sale thereunder is barred and therefore the Plaintiffs have lost their right.

The result of the above consideration is that these appeals succeed, the decrees of the Courts below are set aside and the Plaintiffs' suit dismissed. In S. A. No. 1253 of 1922 the Appellant will get his costs in all the Courts but in S. A. No. 1347 of 1922 the Appellant will not get her costs in any Court.

DUVAL, J.—I agree that these appeals must be allowed. The facts shortly are as follows :—The Respondents are the mortgagors and the Appellant in S. A. No. 1347 of 1922 is the mortgagee. The latter brought a suit in 1916, obtained an *ex parte* decree on her mortgage, and put the properties to sale which were purchased by the Appellant in S. A. No. 1253 of 1922. Thereafter this latter Appellant as auction-purchaser took symbolical possession on the 20th February 1916 and the present suit was brought on the 28th February 1920. The Plaintiffs-Respondents' case was that as a matter of fact one of the items in the schedule of the mortgage deed was fraudulently interpolated.

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after the mortgage was executed. They brought the suit on the 28th February 1920 alleging before the Munsif that they only came to know of the decree and the sale on the 10th December 1918, i.e., within three years of the date of the suit. It is clear therefore that the suit as framed recognises that Art. 95 is the appropriate article. The learned lower Appellate Court, however, has found that as a matter of fact they were aware of the fraudulent decree more than three years before the suit was instituted. The lower Appellate Court also found (disagreeing with the first Court) that the Appellant in S. A. No. 1253 of 1922 (the auction-purchaser) neither had any previous knowledge of any fraud in the decree nor acted in collusion with the Appellant in S. A. No. 1347 of 1922. The only argument addressed to us on behalf of the Appellant is that as Art. 95 is the article applicable and as the learned lower Appellate Court has found that the Plaintiff had knowledge of the decree more than three years before he brought the suit, the suit is barred under that article. In this Court a defence is set up on behalf of the Respondents that as a matter of fact Art. 95 is not applicable but another article, namely, the residuary article, i.e., Art. 120 applies, and the learned vakil for the Respondents has argued that this is not a suit to set aside the decree but a suit for declaration that the decree and the sale under it are not binding on them: it is only a declaratory suit and the Plaintiff is still in possession. The only point therefore that appears to me to be arguable is whether, on the form of the suit as framed, this suit is one to set aside a decree. My learned brother has dealt with that point and I agree with him in his finding that it is a suit to set aside the decree passed in Suit No. 79 of 1914 and that the Plaintiffs can-

not get over the limitation of three years by arguing that it is a suit for a mere declaration or that it is a case for declaration with certain reliefs. I therefore agree with my learned brother that both the appeals must be allowed.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2364 OF 1921

WITH

RULE No. 31 OF 1919.

SUBRAWARDY, J.

CHOTZNER, J.

1924,

Heard,

26, February.

Judgment,

27, February.

WAJUDDI PRAMANIK,
Defendant, Appellant,
v.

MD. BALAKI MORAL,
Plaintiff, Respondent.

*Bengal Tenancy Act (VIII of 1885), sec. 153—
Suit for rent dismissed for misjoinder of parties
and absence of separate collection—Appeal, if lies—
Second appeal, if lies to High Court when appeal
entertained by lower Court was incompetent.*

*The Plaintiff's suit for his share of rent
amounting to less than Rs. 100 was dismissed
on the ground of misjoinder of parties and also
that there was no separate collection. In appeal
this decision was reversed and there was a second
appeal to the High Court:*

*Held—That none of the grounds on
which the decision of the Court of first
instance was arrived at came within the
exception to the rule that in a suit for rent
below a certain value no appeal lies and
an appeal against that decision was incompetent.*

*It is settled law that if the Court of Appeal
below entertains an appeal which it has no
jurisdiction to do, an appeal will lie from
the decree of that Court.*

This was an appeal preferred on the 18th of November 1921 against a decree

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of the Subordinate Judge, 5th Court of Zillah Dacca (Moulvie Osman Ali), dated the 13th August 1921, reversing a decree of the Munsif, 5th Court at that place (Babu Mohendra Nath Lahiri), dated the 29th June 1920.

The facts of the case will appear from the judgment.

Babus Surendra Chandra Sen and Satish Chandra Choudhury for the Appellant.

Babus Mohendra Nath Ray and Mon-motha Nath Ray for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The suit out of which this appeal arises was one for rent valued at Rs. 9-11 which the Plaintiff claimed from the Defendant as landlord in respect of 4 as. share of the property. The defence was first that the Plaintiff was not entitled to maintain the suit in the absence of other persons interested in the 4 annas share claimed by him : and, secondly, because there had been no separate collection of the Plaintiff's share of the rent. The learned Munsif gave effect to both these pleas. He found that there were other brothers or their heirs who were interested in the 4 annas share claimed by the Plaintiff, and that there had been no separate collection of the Plaintiff's share of the rent. He accordingly dismissed the suit. There was an appeal by the Plaintiff and the learned Subordinate Judge reversed that decision. The learned Judge was of opinion that the Plaintiff and the *pro forma* Defendants were the only persons interested in the 4 annas share and that the Plaintiff had succeeded in showing by both oral and documentary evidence that the collection in the 4 annas share was separate. As a result of these findings he decreed the Plaintiff's suit. This second appeal has

been preferred to this Court mainly on the ground that no appeal lay to the Court of first appeal inasmuch as the officer who tried the suit was specially empowered under sec. 153, Bengal Tenancy Act. This allegation has not been controverted by the Respondent but two preliminary objections have been taken by him with reference to this appeal.

It is contended that as there was no appeal to the lower Appellate Court according to the Appellant's own showing, a second appeal to this Court was incompetent. This point has been before this Court on many occasions and it is now settled that if the Court of Appeal below entertains an appeal which it has no jurisdiction to do, an appeal will lie from the decree of that Court. *Kalipada Karmokar v. Sekhar Bashini Dasya* (1) and *Bandiram Mukerji v. Purna Chandra Ray* (2). This view is also consonant with common sense. If a Court assumes jurisdiction (I purposely avoid the expression "usurps jurisdiction") over a matter over which it has no jurisdiction and passes a decree either in the suit or on appeal, and that decree is open to appeal under the ordinary law, no objection can be taken to an appeal from that decree on the ground that the Court below had no jurisdiction to try the matter, because an appeal may lie to a higher Court on the sole question of jurisdiction. To hold otherwise would mean that the judgment of a Court which has no jurisdiction would remain in force and has the same effect as that of a Court of competent jurisdiction. We are therefore of opinion that conceding that no appeal lay to the lower Appellate Court in this case, a second appeal to this Court is maintainable on the ground that the order passed

(1) 24 C. L. J. 225 (1915).

(2) 27 C. L. J. 115 (1917).

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by the lower Appellate Court is without jurisdiction.

We then come to the more important question in the case, namely, whether an appeal lay from the decree of the Munsif; that is, whether the Munsif decided any question relating to title to land or to some interest in land as between parties having conflicting claims thereto or as to the amount of rent annually payable by the tenant. No question of title has been raised in this case by parties with conflicting claims. The point left therefore for consideration is whether the question of the amount of rent annually payable by a tenant was determined. As we have observed, there is no dispute with regard to the rent payable in respect of the entire holding nor is there any question of the amount of rent payable to the Plaintiff—it being established that the Plaintiff has a right to the 4 annas share of the rent. The only objections to the Plaintiff's right to recover rent were that the Plaintiff had other co-sharers and so the suit was bad for defect of parties and that there was no separate collection. None of these grounds, in our opinion, comes within the exception to the rule that in a suit for rent below a certain value no appeal lies. It is argued on the authority of the decisions in the cases of *Narain v. Manofi* (3) and *Sudhanya Santra v. Basanta Kumar* (4) that the present case is covered by the principle laid down in those cases. We think that these cases are distinguishable from the present one. In the Full Bench case of *Narain v. Manofi* (3), the Plaintiff brought a suit for rent claiming a certain share in the property. The Defendant stated that the Plaintiff's share was not what it was alleged to be, but much less. The effect of the defence was

that the Plaintiff was not entitled to recover the amount claimed by him as rent but that he was entitled to recover a sum less than the sum claimed by him. The Full Bench was of opinion that the question of the amount of rent annually payable by a tenant was in issue. The whole controversy turned upon the meaning of the expression "amount of rent annually payable." On one side, it was argued that the expression meant the amount of rent annually payable in respect of the entire tenancy. It was contended, on the other, that the expression referred to the amount of rent annually payable by the Defendant to the Plaintiff. To the same effect is the decision in the case of *Sudhanya v. Basanta* (4). In that case the Plaintiff brought a suit for the entire rent on the allegation that he was entitled as landlord to the extent of 6 annas 8 gds. share and in the rest he had acquired an *ijara* lease from the other co-sharers. The Defendant admitted the extent of the Plaintiff's share as landlord but denied the existence of the *ijara* lease. It is clear therefore that the question raised in that case was whether the Plaintiff was entitled to recover the entire rent or rent in respect of 6 annas 8 gds. share only. It was held that as it was a case for the determination of the question of the amount of rent annually payable to the Plaintiff, an appeal lay to the lower Appellate Court. These cases therefore are no authority for the proposition urged by the learned vakil for the Respondent. If the decree of the first Court had decided that the Plaintiff is not entitled to the 4 annas share claimed by him but to a smaller share, an appeal would probably have lain on the authority of the cases above cited. We accordingly hold that that ap-

(3) I. L. R. 17 Cal. 499 (F. B.) (1890).

(4) 24 C. L. J. 578 (1921).

(4) 24 C. L. J. 579 (1921).

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peal to the lower Appellate Court was incompetent.

The second objection taken to the hearing of this appeal is that the *pro forma* Respondents were not made parties to the appeal. It appears that they were mentioned as parties in the memorandum of appeal but no steps were taken by the Appellant to secure their proper representation. We do not think that in the peculiar circumstances of this case this objection should be allowed to prevail. The suit was brought by the Plaintiff alone impleading certain persons as *pro forma* Defendants who, it is said, were the heirs of one Uraj who was the only other person interested in the 4 annas share claimed by him. These Defendants applied to be made Plaintiffs but their application was rejected. The suit was dismissed and the Plaintiff alone appealed. The *pro forma* Defendants did not question the correctness of the order made by the Munsif refusing their application to be made Plaintiffs. The appeal succeeded and the Plaintiff's suit was decreed. The objection taken by the Defendant in this Court is against the maintainability of the Plaintiff's appeal to the lower Appellate Court. This is a question in which the *pro forma* Defendants are not interested.

We may mention that the Appellant has also filed an application under sec. 115, C. P. C., and obtained a Rule thereon. As we hold that the lower Appellate Court had no jurisdiction to entertain the appeal we can set aside the order of the lower Appellate Court in the exercise of jurisdiction vested in us under that section. But as we are of opinion that the second appeal lies to this Court from the decree of the lower Appellate Court, it is not necessary to consider this question further.

The result is that this appeal is allowed, the decree of the lower Appellate Court

set aside and that of the Court of first instance restored with costs in all the Courts.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 458 OF 1925.

CUMING, J.

MUKERJI, J.

1925,

Heard, 21 and

24, August.

Judgment,

26, August.

H. W. SMITH,

Appellant,

v.

THE KING-EMPEROR,

Respondent.

Indian Penal Code (Act XLV of 1860), sec. 304 -- Causing death by rash and negligent act - Criminal rashness, criminal negligence, what is - Road closed to traffic for repairs - Coolies sleeping on closed road at night - Driving a motor car into the closed road and running over coolies, if rash and negligent act.

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence.

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge arises, was the imperative duty of the accused person to have adopted.

A person driving at night a motor car along a portion of a road which was closed to traffic for repairs cannot be reasonably expected to take precautions against the chance of coolies sleeping on that portion.

Two coolies who were so sleeping with their bodies covered except for their faces

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having been run over and killed by the accused driving over them in a motor car in the above circumstances, the latter could not be held to have caused their death by a rash and negligent act.

This was an appeal preferred on the 15th July 1925 against an order of the Chief Presidency Magistrate, Calcutta, dated the 3rd July 1925, convicting the accused under sec. 304A, I. P. C. and sentencing him to one month's simple imprisonment and a fine of Rs. 500 to be made over in equal proportions to the dependants of the deceased as compensation under sec. 545, Cr. P. C.

The facts of the case will appear from the judgment.

Mr. Bagram, Counsel and Babu Tarakeswar Pal Choudhuri for the Appellant.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This is an appeal against an order of the learned Chief Presidency Magistrate Mr. T. Y. Roxburgh convicting the accused, one H. W. Smith, under sec. 304A, I. P. C. and sentencing him to one month's simple imprisonment and a fine of Rs. 500.

The fact appears to be these .—

The occurrence took place at about 10-30 or 11-30 P.M. on the night of the 12th May last.

The accused Smith lives in Howrah and had come into Calcutta driving his own car, a Mors car No. 1990, with a friend Mr. Williams. He got as far as the Mayo statue and was then coming from west to east. At the Mayo statue he determined to go home *via* the Red Road and therefore turned to the right and went along the Dufferin Road. About half way up the

road he ran over and killed two coolies who were sleeping on the road.

The case of the prosecution is that the road was under repairs and that there was a barrier right across the road to prevent people driving along the road and that the accused killed these two coolies by doing a rash and negligent act, to wit, driving his motor car rashly or negligently from north to south along the Dufferin Road which was closed to traffic and barricaded and having red light across, the road being in various stages of repair. The defence case is that there was no barrier across part of the road and that the accused entered the road by the open portion. He went over then to the proper side of the road. He did not see the coolies who were lying wrapt up in *gamchas* on the road, did not even know he had driven over them and knew nothing till he was stopped by the constable at the south end of the road by the Dufferin statue. His car is a very old and noisy one. It cannot travel at more than 10 miles an hour and he was not driving negligently or carelessly. The learned Magistrate found that at the time of the accident the barrier did not reach right up to the tram line on the west of the road. The accused, he holds, must have heard one of the warnings he got, one being from the witness Ramzan that there were coolies sleeping on the road. That he must have heard the shouts after the accident and hence known he had gone over some one. Finally the learned Magistrate holds that the accused entered a road on which there were warning lights and that he was talking to the man at his side. This was itself negligence and that accused must have known from the lights that special caution was necessary and that had he driven with reasonable care the coolies would not have been killed. He finds that excessive speed has nothing to do with the

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case as the car cannot do more than 10 miles an hour.

First as to the fact—

Mr. Bagram contends that even if Ramzan did shout to the accused that there were men sleeping on the road it does not necessarily follow that the accused heard him and with this I agree. The coolies in the hut close by did not hear Ramzan. The accused was driving. The car was old and noisy and there is nothing improbable in the allegation of the accused that he did not hear any one shouting that there were coolies sleeping on the road. The only person who shouted this information was Ramzan. Then there is the evidence of the constable at the north end of the road by the Mayo statue that he shouted to the accused that the road was under repairs. The evidence when considered would shew that he must have been some forty yards from the accused. Again the accused may or may not have heard him and if he did hear him may not have realized what he said or even that he was shouting to him. Even if accused heard him and realized he must not go on the road because it was under repair, it does not affect the case as I shall afterwards show. The prosecution contends that accused must have known he had gone over these coolies and still drove on after doing so. It does not follow that because the accused felt a bump he must have known he had gone over anyone. The road was under repair and he may well have thought he had gone over some road material, though it is his case he noticed nothing. But the accused's conduct after the accident in no way affects his guilt or innocence so far as the present charge is concerned.

The facts which I find proved are that accused entered the road through an opening at the end of the barrier on the west

side of the road and then crossed to the east side, the proper side of the road on which to drive, that he was driving at a speed not exceeding 10 miles an hour and he drove over the two deceased who were sleeping on the road killing them. I have now to consider whether the accused caused the death of these two unfortunate men by a rash and negligent act. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. This is the law on the point as laid down by Straight, J., in the case of *Reg. v. Idu Beg* (1) and with the view of the law I am in entire agreement. Reference may also be made to the case of *Reg. v. Nidamarti Naga Bhushanam* (2). We have then to consider what is the criminal rashness or negligence which has been attributed to the accused and whether what he did comes within the mischief of criminal rashness and negligence. If I understand the case of the prosecution rightly it is that he drove along a road which was under repair and while doing so was talking to a friend alongside of him. Now there is nothing rash or negligent *per se* in driving along a road under repair or partly under repair

(1) L. L. B. 3 All. 776, 779 (1881).

(2) 7 Mad. H. C. R. 119 (179).

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any more than on a road not under repair except perhaps to the person driving. During the day time no doubt there would be men working on the road the avoiding of whom would require caution as the avoiding of anyone on a road does. At night normally it is not to be expected that men would be found working on a road nor is it the allegation of the prosecution that anyone was working on the road the particular night. As a matter of fact one would expect less traffic if any traffic at all at night on a road under repair. Anyone driving on a road under repair would be called on to exercise the same caution as he would on a road in its normal condition, that is to say, to look out to see what persons or vehicles were on the road making the ordinary use of the road. What further caution is called for I fail to see. A driver cannot be expected to look out for what can only be described as a very abnormal condition of things. The normal use of a road is for the purpose of passing or re-passing on it. It certainly cannot be said that one of the normal uses of a road is for the purpose of sleeping. I do not think that it can possibly be held that a driver should anticipate that he will find persons sleeping on a road, even at night, though a road under repair, and that he must look out for persons making such an abnormal use of the road and if he does not do so he is guilty of negligence or rashness.

As I have pointed out there is no special danger *per se* in driving along a road under repair except perhaps to the driver himself. The accused in this case was not driving recklessly. He was driving at 10 miles per hour. The deceased had wrapt themselves up in *gamchas* and so in the night even, though there were lamps, would be extremely difficult to distinguish. The accused cannot reasonably be held liable to

anticipate that he should find persons sleeping on a road. If therefore he did not look for persons sleeping on a road he cannot be held guilty of rashness or negligence for not doing so. He could not know that his act in driving on the road was dangerous because people were sleeping or might be sleeping on it and yet did the act taking the risk of running over these sleeping people. It is not suggested his speed was excessive. In fact it was very slow for a motor car. The fact that he was talking to a friend does not show he was driving rashly or negligently. Even if he had not been talking it is highly improbable he would have looked out for persons sleeping on the road. There is nothing to prevent a man talking and at the same time taking the ordinary precautions against accident. I do not think that the engaging in conversation whilst driving is necessarily a rash or negligent act. It might be in some circumstances, as for instance, in busy crowded traffic. The decision to which I must come therefore on a consideration of all the facts of the case is that the accused in acting as he did, did not act either rashly or negligently. That these two unfortunate men have lost their lives is to be much deplored but the accused cannot be held criminally responsible for their death. As to the accused's conduct after the accident so far as the present charge is concerned it is immaterial. But in view of the Magistrate's remarks in justice to the accused himself I should deal with this point because clearly if he drove on knowing he had run over these men his conduct would be deserving of the severest censure. It would be the act of a man entirely callous and indifferent to the injury he inflicted on his fellow creatures. I am not however satisfied that he must have known he had driven over someone.

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He may have been aware of the bump although both he and Mr. William state they felt no bumps, but bumps would probably be met with on a road under repair and being expected may not have been noticed. No doubt the other coolies there shouted. But it does not follow that the accused necessarily must have heard the shouting or, if he did, have realised they were shouting at him. The shouting would not begin at once. The car was as has been noted before an old and very noisy one. It is significant that accused when stopped by the police constable on duty at the Dufferin statue said at once, "Why should I stop? I have committed no offence" and at once went back to the place of occurrence when requested to do so. The accused at once stopped when asked to by the constable at the end of the road and made no attempt to go away.

Taking all the facts and circumstances into consideration I do not think that the learned Magistrate was justified in drawing the inference he did that the accused must have known he had run over some one. I think on this point the accused is entitled to the benefit of the doubt. The result is, the finding and sentence must be set aside and accused should be acquitted; the fine, if paid, to be refunded.

MUKERJI, J.—I agree that this appeal should be allowed and the accused acquitted and I wish to add a few words.

The difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision.

Sec. 304A has been judicially interpreted in a number of decisions of which two stand out as the most valuable. In the case of *Reg. v. Nidamarti* (2), Holloway, J., said this: "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening, the imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have the consciousness. The imputability arises from the neglect of the civic duty of circumspection." In the case of *Reg. v. Idu Beg* (1), Straight, J., observed as follows:—"Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without the intention to cause injury or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted." The learned Deputy Legal Remembrancer has cited before us a number of other decisions in which sec. 304A of the Indian Penal Code or the English law of Manslaughter

(1) 1 L. R. 3 All. 776 (1921).

(2) 7 Mad. H. C. R. 119 (1873).

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by negligence has been explained, and also referred to some cases dealing with negligent use of public way, in order to show under what circumstances special care is necessary, want of which will make one liable for the offence. The one principle of universal applicability deducible from all these cases is that which was laid down by Alderson B. in *Blyth v. Birmingham Waterworks Co.* (3) and adopted by Brett, J., in *Smith v. London and South-Western Ry. Co.* (4): "Each case must be judged in reference to the precautions, which, in respect to it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened."

The question whether the accused's conduct amounted to culpable rashness or negligence therefore depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case.

Now as to the circumstances I would prefer to take the findings of the learned Magistrate and rest my judgment on those findings.

The learned Magistrate has found that the barrier at the entrance did not extend right up to the tram lines; in other words that there was a space between the end of the barrier and the tram lines; over this space as also on the space on the other side of the lines there was no barrier. There were also a number of red lights and perhaps also a "road closed" notice. The accused's conduct in entering the road was unquestionably reprehensible, but the real

issue is, what did these circumstances indicate. In my judgment they indicated that the road was closed up, perhaps not to the extent of its entire width, certainly also that there was a possibility of men working, walking, or moving about on the road. They would also, in my opinion, suggest that there was every chance of one coming across excavations or obstructions or impassable portions of the road or such portions as were not fit for being used as a road. All these would put one on his guard and call for special care and circumspection on his part, but only to the extent of avoiding or getting round an accident such as would result from the possibilities to which I have referred. The idea, however, would hardly cross the average prudent and reasonable mind that there was chance of people sleeping on the road or rather on a side of the road with their bodies covered up except for the faces, and lying partly on the road and partly on the grass.

Then as to the various warnings and shouts alleged to have been given. As regards the warning given by the constable on duty at the Mayo statue, it conveyed nothing more than what was indicated by the barrier, the lights and the notice. The shouts of Ramzan calling out "Taxi-walla stop, the road is closed, it is forbidden to come" or "Admi Sota, Admi," it is reasonable to believe, were either not heard by the Appellant or were misunderstood by him. The utmost that it means is that the Appellant was not attentive to hear what was being shouted out by people on the road; but it is hardly obligatory on the driver of a car to have his attention directed to shouts so long as he can trust his eyes and sees nothing in front. The question whether the Appellant heard the shouts of the coolies after the car had passed over the men and the

(3) 11 Exch. 781; 35 L. J. (Exch.) 212 (1860);
(4) L. R. 5 C. P. 98 at p. 102 (1870).

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question whether the Appellant did or did not feel a bump are hardly relevant in the face of the finding that the Appellant was not driving at an excessive speed. If these shouts were heard and the bump was felt and the Appellant understood what had happened and if the circumstances, as deposed to by the constable at the other end of the road, under which the car was stopped be found to have been established, that touches the question of the Appellant's conduct as a gentleman, but has very little to do with the question of his culpability or otherwise in respect of the offence with which he was charged.

In my opinion though special care was called for on the part of the Appellant, the degree of care which the learned Magistrate has expected of him is not warranted by the circumstances of the case, and it has not been established that the Appellant was so rash or negligent as would render him guilty of an offence under sec. 304A, I. P. C. The Appellant therefore should be acquitted and released from his bail.

In conclusion I should like to observe that though the Appellant escapes a conviction as the law is unable to reach him, if he had not chosen to drive on the road which was not open to traffic, the lives of two poor and innocent men who perhaps were the only supporters of their respective families would not have been lost, and the code of honour and morality demands that he should make adequate amends to the very best of his means to the dependants of these two men for the lamentable error of judgment on his part.

S. C. M.

(CRIMINAL REVISIONAL JURISDICTION.)

Mrs. CASE No. 84 of 1925.

SUHWARDY, J.	MAHARANI DASSI,
PANTON, J.	Petitioner,
1925,	v.
7, July.	COMMISSIONER OF
	POLICE, CALCUTTA,
	Opposite Party.

Calcutta Suppression of Immoral Traffic Act (XIII, B. C., of 1923), sec. 5—Girl removed from brothel under sec. 4 - Police, if may retain her in custody after she attains 16 years of age—Application for her release—Criminal Procedure Code (Act V of 1898), sec. 491.

The Police in Calcutta cannot retain custody under sec. 5 of the Calcutta Immoral Traffic Act of a girl removed from a brothel after she has attained the age of sixteen years.

This was a Rule, granted on the 22nd June 1925, issued on the Commissioner of Police, Calcutta, to show cause why the Petitioner should not be set at liberty or such other order passed as to this Court may seem fit and proper.

The facts of the case will appear from the judgment.

Babu Dijendra Krishna Dutt for the Petitioner.

Mr. B. L. Mitter and Satindra Nath Mukherjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

It appears from the report of the Police Surgeon that the girl Maharani Dassi is over 16 years of age. She was removed from a brothel under the provisions of the Calcutta Suppression of Immoral Traffic Act 1923, and placed in a girls' school where she was receiving education. When the school closed for the annual vacation, she was placed in charge of a gentleman of the locality in compliance with the request made by a respectable

MAHARANI DASSI v. COMMISSIONER OF POLICE, CALCUTTA.

gentleman who is interested in her. The Police took all possible care for the welfare of the girl. It took charge of her under sec. 5 of the Act as she appeared to be below 16 years of age. This Rule was issued under sec. 491, Cr. P. C., for an order of this Court that she might not be further kept in charge of the Police and be set at liberty. Now, it appears that according to her own and her mother's statement as also in the opinion of the Police Surgeon she is over 16. The Police has no further jurisdiction to exercise under the Act of 1923. We therefore direct that she be immediately set at liberty.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL]

LORD SHAW.

LORD CARSON.

LORD BLANESBURGH.

SIR JOHN EDGE

MR. AMEER ALI.

1925,

Heard,

10, February.

Judgment,

27, March

PROBHUDAS,

Appellant,

v.

GANIDADA,

Respondent.

Indian Tariff Act (VII of 1894), sec. 10 (b)—Sale—Buyer's right to deduct decrease in custom duty from price—Tariff valuation and taxation distinguished from levy of duty.

Tariff values and their taxation are totally different from the duties and their levying. A change of duty means a change in the rate of duty, which follows Government and administrative action.

The contention that a change of tariff values of sugar is constructively a change in the sugar duty within the meaning of sec. 10 of the Indian Tariff Act VII of 1894 is untenable.

This was an appeal from a decree,

dated the 18th August 1924, of the High Court at Bengal, which affirmed a decree, dated the 1st August 1924, of the said Court in its Ordinary Original Jurisdiction.

The matter came before the Court in the form of a special case under sec. 90 and Or. 26 of the Code of Civil Procedure, 1908.

On the 15th and 18th December 1923 the parties entered into the contracts in question in this appeal. Each contract was for the sale by the Respondent to the Appellant of Java sugar, under the earlier contract "delivery to be taken and given ex Godown S. S. Calcutta to arrive at any time," under the later contract delivery to be "ex Godown between January, February and March."

The contracts were completed and questions outstanding other than the present claim were adjusted between the parties.

The buyer now claimed a refund from the seller of an amount calculated on the difference of the tariff value placed on imported sugar as from the 1st January 1923 compared with that prevailing for the previous year up to the 31st December 1922, a drop to Rs. 16-4 from Rs. 26-4.

The buyer contended that he was entitled to the benefit of the reduction in tariff value as fixed by the Government from 1st January 1923 and he relied on sec. 10 of the Indian Tariff Act, 1894, as amended by Act XIX of 1919.

The tariff value for sugar was fixed by Government on the average of the monthly prices paid for sugar during the preceding 12 months, and it was admitted that in October 1922 a notification had appeared in the Gazette stating that the average net value was Rs. 16-4 and that contracts for the ensuing year should be made on that basis.

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The case was heard by Pearson, J., who decided in the Respondent's favour and his decision was upheld by the High Court (Sanderson, C. J. and Walmsley, J.) in its Appellate Jurisdiction.

Both Courts held that there was a distinction in the Tariff Act between duty and tariff value and that an alteration of the latter did not place the parties in any different position to that in which they would have been if no tariff value had been fixed and the value of sugar had fallen after the making of the contract.

Mr. W. Wallach for the Appellant.

Sir Geo. Lowndes, K. C. and *Mr. H. B. Raikes* for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—The Courts below agreed. The question which arises has reference to the taxation upon sugar and the point involved is represented to be of very great general importance to all mercantile communities in India which deal with that article.

Their Lordships are satisfied that both the Courts below have come to a just conclusion.

From the documents produced with the stated case it is clear that the subject of sugar taxation, and particularly the methods of its imposition, have been for some time a matter of concern to the dealers in the article and of communication with the Government of India.

It is to be noted that in 1911 a letter was addressed by the Under Secretary to the Indian Government Department of Commerce and Industry to the Secretary of the Bengal Chamber of Commerce at Calcutta. The letter noted previous correspondence and in particular that it had been represented by the Karachi Chamber of Commerce supported by the Bengal and

Bombay Chambers of Commerce that reconsideration should be given to the then existing system. "It was represented," says Mr. Irwin's letter, "that, in the opinion of the Bengal Chamber of Commerce, the present system of fixing the tariff valuation of sugar, under which merchants have to make forward contracts in ignorance of the tariff value, was unsatisfactory, and that there was a strong and unanimous feeling amongst importers that the present system should be changed."

This request was acceded to. It was intimated that the Government of India had decided to fix the tariff valuation of sugar on the average price of one year from 1st October to 30th September. It was added that the necessary instructions would be issued to the Director-General of Commercial Intelligence to publish as early as possible a statement giving the information already available for the current year. In result, accordingly, monthly statements of average value per maund were issued and published in the Gazette and the definite Government value of sugar struck on the average prices calculated on the monthly returns as there described was to be fixed and officially intimated.

On the 21st October 1922, the supplement to the Gazette of India contained the notification, the effect of which is in question in this case. It notified that "returns have been received from October 1921, and the average value of Java 23 Dutch Standard and above for the 12 months October 1921, to September 1922, is notified below." The average nett value per cwt. is stated as Rs. 16 annas 4. There is then added the following:—

"The tariff valuation of sugar for each calendar year is fixed on the average nett market price ruling during the previous 12 months ending September.

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The above statistics are published in order to enable merchants to determine the probable tariff valuation of the next calendar year."

From that date forward accordingly merchants were notified of the probable tariff valuation, and the object aimed at by the Chamber of Commerce in providing the convenience to merchants in making forward contracts was thus secured. There had been great variations of prices and the intimated tariff valuation of Rs. 16 annas 4 was a reduction by Rs. 10 from its former figure of Rs. 26 annas 4. By a notification, dated 23rd December 1922, issued by the Government of India the reduction—which had thus been in October anticipated as probable—took place; the tariff valuation of imported sugar was reduced as stated with effect from the 1st January 1923. It was admitted in the High Court by Counsel for the Appellant that the Appellant must have had information of the notification of the previous October, and it seems out of the question to suggest that the contracts for sugar made in the succeeding December were not made by both well-known merchants in view of that published fact..

These contracts were made on the 15th and 18th December 1922, the former for 237½ tons of white Java sugar and the latter for 225 tons of the same article, the goods to be delivered ex Godown S.S. "Calcutta." The goods arrived in January under the first contract, and in January, February and March under the second, and they were settled and paid for between the parties. A question possible in the case was as to whether the transactions were not thereby definitely closed; but the point has not been raised in view of the importance of the other matter now to be alluded to.

The buyer claims, in this litigation, a

right to deduct, as against the seller, from the prices paid by him, the equivalent of a decrease of duty. The Government duty as such has not been decreased, but the buyer claims that it has constructively been decreased, because, as the duty was fixed upon the basis of a tariff valuation and that tariff valuation has been reduced, therefore—such is the argument—he must take the same duty applied to a smaller tariff valuation, and so constructively reckon that there is a decreased duty upon the goods sold.

Their Lordships agree with the Courts below in holding that there is no justification for such an operation.

The contention depends upon the provisions of sec. 10 of the Indian Tariff Act VII of 1894. The material part thereof, as amended by subsequent Acts, is as follows :—

"In the event of any duty of customs on any article being decreased after the making of any contract . . . for the sale of such article duty paid where duty was chargeable at that time—

* * * * *

(b) if such decrease so takes effect that the decreased duty only is paid the purchaser may deduct as much from the contract price as will be equivalent to the decrease of duty and he shall not be liable to pay or be sued for or in respect of such deduction."

So far in regard to "duty."

With regard to the other topic as to tariff valuation, that is dealt with by the Indian Tariff Amendment Act IV of 1916 in the following terms :—

"3. (2) The Governor-General in Council may by notification in the Gazette of India fix, for the purpose of levying the said duties, tariff values of any articles enumerated either specifically or under general headings in the said schedules as chargeable with duty *ad valorem* and may alter any tariff values for the time being in force."

These citations are made in order to show that the tariff values and their taxation are, of course, totally different from the duties and their levying. The former is matter of intelligent anticipation, based

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upon such knowledge of price variations as was available, and the desire for this knowledge was acquiesced in by the Government of India for the convenience of merchants. Their Lordships do not doubt that that convenience occurred in the present instance. The tariff value basis being thus anticipated, contracts are made; and, when the duty is not changed, these contracts take stock of the position with complete accuracy and there is no occasion in reason for any subsequent re-adjustment as between buyer and seller. But "duties" are in a different position. Their rate remains the subject of Government and administrative action. The parties who make forward contracts are not apprised of such changes, but have to wait for budget announcements. It is in this latter case that the Indian Act comes in to declare (to keep to the case in hand) that a change in the duty by decrease, the duty having been imposed between the making of the contract and the delivery of the goods, may be the ground of a claim by the buyer.

A change of duty means a change in the rate of duty. Their Lordships are of opinion that, there having been no change whatsoever in the rate of duty in the present case, the contention that a change of tariff values of sugar is constructively a change in the sugar duty is without justification. The rate of duty was not reduced. But suppose—to test the matter—suppose that the rate of duty had been reduced, and that the tariff values had also been reduced, the buyer would, then, be claiming two different reductions, one in respect of actual duty and a second in respect of a constructively reckoned duty. The Act could not mean that. To bring in tariff values into the question of increase or reduction of sugar duties, is to

introduce an improper and confusing element into the construction of the taxing Act.

Their Lordships will humbly advise His Majesty that the appeal should be disallowed with costs.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

VIC. UNT FINLAY.

LORD ATKINSON.

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1921,

Heard, 1, December.

Judgment,

21, December.

THE SECRETARY
OF STATE FOR
INDIA IN COUNCIL,
Appellant,

v.

THE GREAT
INDIAN PENIN-
SULA RY. CO.,
Respondents.

Indian Sea Customs Act (VIII of 1878), sec. 20, proviso to - Great Indian Peninsula Ry. Co., if agents or co-proprietors of the Secretary of State for India in Council—Stores purchased and imported by Company, if liable to duty.

The railway and works and all engines, stock, etc., pertaining thereto formerly belonging to the Great Indian Peninsula Railway Company vested by statutes 63 and 64 Vic. c. 38 in the Secretary of State for India in Council as from 30th June 1900:

Held, upon a construction of the agreement made between the Secretary of State in Council and the Company—*That the Company was thereunder constituted the agent for the maintenance and management and working of the railway and no more than the agent of the Secretary of State in Council. The receipt under the agreement of an one-twentieth share of the profits by the Company did not make it a partner with the Secretary of State in*

THE SECY. OF STATE FOR INDIA IN COUNCIL *v.* THE GREAT INDIAN PENINSULA RY. CO.

Council in the undertaking, the same being remuneration for services rendered as such agent. Consequently stores purchased by the Company with money supplied by the Secretary of State for India in Council and imported by them into India for the use of the undertaking were, at the time of the importation, goods belonging to Government and exempt from duty under the proviso to sec. 20 of the Sea Customs Act.

This was an appeal from a judgment of the High Court at Bombay (MacLeod, C. J. and Crump, J.), dated the 5th April 1923, on a case stated by the parties for the opinion of the Court under Or. 36, r. 1 of the Civil Procedure Code, 1908.

The question submitted for the opinion of the Court was whether stores purchased and imported into India by the Defendant Company for the use of their undertaking as mentioned in the case are at the time of importation goods belonging to Government. The object of the proceedings was to determine whether Government were justified in levying customs duty on such stores.

The answer to the question depended on the interpretation of an indenture made between the parties on the 21st December 1900. The High Court held in favour of the Company.

The facts are fully set out in the judgment of their Lordships.

Messrs. Dunne, K. C. and Kenworthy Brown for the Appellant contended that the goods in question were purchased and imported into India by the Railway Company and did not at the time of importation belong to the Government.

The Company are co-adventurers with Government in the undertaking and the goods are not the property of the Secretary of State until they have actually been landed and cleared the customs.

Sir G. Lowndes, K. C. and Mr. F. B. Raikes for the Respondents.—The undertaking was the property of the Appellant and the stores purchased therefor were purchased with the moneys of the Appellant and were his property when imported. There was no partnership between the parties but merely a working agency.

Indian Contract Act, IX of 1872, sec. 242.

Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This appeal is from a decree, dated the 5th April 1923, of the High Court at Bombay, which followed on a judgment pronounced in a special case under Or. 36 of the Code of Civil Procedure. The parties to the case are the Secretary of State for India in Council as Plaintiff and the Great Indian Peninsula Railway Company as Defendant, and the question stated for the opinion of the Court is "Whether stores purchased and imported by the Defendant Company into India for the use of the undertaking as mentioned in the case are, at the time of the importation, goods belonging to Government." On the decision of this question depends the liability of the Defendant Company to pay customs duties under sec. 20 of the Sea Customs Act, VIII of 1878. By this section customs duties are imposed which would attach to the stores unless they come within the proviso to the section that no such duties shall be levied on goods belonging to the Government. The answer to the question propounded depends largely on the legal effect to be attributed to the provisions of the agreement attached to the special case; but that this effect may be rightly understood a brief summary of the facts leading up to it is necessary.

THE SECY. OF STATE FOR INDIA IN COUNCIL *v.* THE GREAT INDIAN PENINSULA RY. CO.

The Defendant Company was incorporated in 1849 by an Act of the Imperial Parliament 12 and 13 Vict. Ch. LXXXIII. On the 18th August 1899, the Secretary of State in Council in exercise of powers vested in him gave notice to the Defendant Company of his intention to purchase the railway and works that had been constructed together with the telegraphs and the engines, carriages, stock, plant and machinery belonging to the railway and works. On the 30th July 1900, an Act of Parliament, 63 and 64 Vict. Ch. CXXXVIII, intituled an Act to provide for the vesting of the railways and other property of the Great Indian Peninsula Railway Company in the Secretary of State in Council of India and for other purposes was passed. After a preamble stating that notice of intention to purchase had been given and that it was expedient that arrangements should be made for the future working of the railways of the Company it was enacted that as from 30th June 1900, the railways and works should by virtue of the Act be transferred to and vested in the Secretary of State in Council. This then is how matters stand at the date of the agreement attached to the case, and it is to be borne in mind that at its date the Secretary of State in Council had become and was the owner of the railway undertaking and all that pertained to it. The agreement was made on the 21st December 1900, between the Secretary of State in Council of the one part and the Defendant Company of the other part, and in the opening recital it is stated that it had been agreed between the parties that the Defendant Company should maintain, manage and work the Great Indian Peninsula system on the terms thereafter mentioned. This recital is important; it is the key to the meaning and effect of the elaborate provisions that follow; on exa-

mination they will be found to be merely ancillary to the recited agreement.

Thus it is for the purpose of the contract that the Plaintiff is to hand over to the Defendant Company the Great Indian Peninsula Railway system together with the rolling stock, plant and machinery belonging thereto (cl. 5); and for the purpose of the undertaking that he is to deliver to the Defendant Company all stores belonging to the Great Indian Peninsula system (cl. 6). There is no derogation here from the property vested in the Secretary of State in Council.

Provisions follow for the maintenance and management of the undertaking which impose on the Defendant Company the obligation to keep the undertaking and the rolling stock, plant and machinery belonging to the undertaking in good repair and good working condition to the satisfaction of the Secretary of State (cls. 10 and 11). Then there are provisions as to the use and working of the undertaking and the conveyance of traffic throughout which the ultimate control is with the Secretary of State (cls. 15-22).

Capital money required for the purposes of the undertaking is at his option to be provided by the Secretary of State or be raised by debentures or debenture stock on such terms as he should determine (cl. 22a). All money received by the Defendant Company in respect of the undertaking is to be paid into the Treasury of the Government of Bombay or such other Treasury as the Secretary of State should direct or into the Bank of England to the account of the Secretary of State: all money required by the Defendant Company for the purposes of the undertaking is to be supplied by the Secretary of State; and the Secretary of State's sanction is required for all expenditure. (Cls. 23, 24, 25). The accounts are to be kept in accordance

THE SECY. OF STATE FOR INDIA IN COUNCIL v. THE GREAT INDIAN PENINSULA RY. CO.

with the Secretary of State's requirements. In all matters relating to the undertaking not specially provided for, the Defendant Company is subject to the supervision and control of the Secretary of State (cl. 45).

By Cls. 49-51 a ban is placed (a) on borrowing by the Company, (b) on its engagement in any other business, and (c) on its acquisition of property in India during the continuance of the contract without the sanction of the Secretary of State. And at the determination of the contract on the 30th June 1925, the Company is to give to the Secretary of State possession of the undertaking together with the rolling stock, plant and machinery belonging thereto and all stores and other articles specified in cl. 60.

These provisions (in their Lordships' opinion) are for the purpose of carrying into effect the recited agreement for the maintenance, management and working of the Great Indian Peninsula Railway system, and under them the Defendant Company is the agent and no more than the agent of the Secretary of State. In so saying their Lordships do not overlook the terms of cl. 39 (4) under which the surplus arising from excess of receipts over payments is to belong as to nineteen equal twentieth parts thereof to the Secretary of State and as to one equal twentieth part thereof in the Defendant Company. In their opinion the contention that this points to the Secretary of State and the Defendant Company being co-adventurers or partners is not well founded; the appropriation of one twentieth to the Defendant Company is not to be ascribed to any proprietary interest in it but is a remuneration for services rendered by it as agent for the Secretary of State.

The money for the purchase of the stores to which this case relates

was supplied by the Secretary of State and it was as agent for the Secretary of State that the Defendant Company purchased and imported the stores into India, for the use of the undertaking. In the circumstances the High Court rightly held that the stores at the time of importation belonged to the Government and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

There will be no order as to costs.

Solicitor : Solicitor, India Office, for the Appellant.

Solicitors : Messrs. Foyer, White, Borrett & Black for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1614 OF 1923.

GREAVES, J.
B. B. GHOSE, J.
1925,
21, July.

BIJRAJ BOYED and ors.,
Defendants, Appellants,

v.

RAJA BIJOY SINHA
DUDHORIA, Plaintiff,
Respondent.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 91, 93—Limitation Act (IX of 1908), Sch. I, Art. 97—Purchase money, recovery of, owing to the failure of the judgment-debtor's title—Limitation, if runs from the date of the decision declaring that the judgment-debtor had no title at the time of sale or from loss of possession—Rateable distribution.

The judgment-debtor's properties were separately sold in different lots in execution of a money decree and bought by the decree-holder himself (Plaintiff-Respondent). The Defendants' (Appellants') predecessor obtained another decree for money against the same judgment-debtor and a portion of the purchase money in deposit was given to him under Court's order upon his application for rateable distribution. The sale of some lots out of the several lots sold was ultimately set aside

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and declared to be invalid on 11th December 1916 on the ground that the judgment-debtor possessed no saleable interest therein at the time of sale but that the same belonged to his wife.

The Plaintiff-Respondent brought a suit on 4th September 1920 against the Defendants-Appellants for recovery of a proportionate share of the purchase money paid by him for those lots, and which the predecessor of the Defendants had taken out of Court under the above order :

Held—That the period of limitation in this case commenced to run from the 11th December 1916, the date on which the auction sale was declared to be invalid on account of the judgment-debtor's want of title, and not from the earlier date on which the Plaintiff lost possession.

Quære.—Whether Art. 97 of Sch. I of the Limitation Act applied to the case.

AMRITA LAL BAGCHI v. JOGENDRA LAL CHOWDHURY (4) *approved.*

JUSCURN BOID v. PIRTHI CHAND PAL (1) *and GURSHIDAWA v. GANGAVA* (2) *referred to.*

This was an appeal against the decree of R. F. Lodge, Esq., District Judge of Zillah Murshidabad, dated the 1st of March 1923, modifying the decree of Babu Ashutosh Pal, Subordinate Judge of Berhampur, dated the 22nd of December 1921.

Plaintiff-Respondent in execution of a decree for money obtained against one Chatrapat Singh purchased at auction the judgment-debtor's properties on 19th November 1907 for Rs. 14,050. The Defendants' predecessor in execution of a decree obtained against the same judg-

ment-debtor Chatrapat, got Rs. 2,800 under order of Court, for rateable distribution, dated 15th February 1908. The judgment-debtor's wife Mina Kumari brought an action for declaration of her title to and recovery of possession of some of those properties and her suit was ultimately decided by their Lordships of the Judicial Committee in her favour on 11th December 1916 declaring the sale of those properties invalid and she obtained possession thereof on 29th September 1917. The present action the Plaintiff brought against the Defendants on 4th September 1920 for recovery of the money paid to them under rateable distribution.

The trial Court gave the Plaintiff a decree for Rs. 2,605-11 without interest.

The Defendants appealed and their appeal was dismissed by the lower Appellate Court who on the Plaintiff's cross-objection awarded him interest also.

The Defendants appealed to High Court.

Dr. Dwarka Nath Mitter, Mr. Sachindra Nath Ghose and Babu Charu Chandra Ganguli for the Appellants.

Babu Joyesh Chandra Roy (for Mr. Mahendra Nath Roy) and Babu Ramani Mohan Chatterjee for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This is an appeal against the judgment and decree of the District Judge of Murshidabad modifying the decree passed by the Subordinate Judge. The Plaintiff had obtained a decree against one Chatrapat Singh in 1907 in execution of which he put up for sale certain properties as belonging to his judgment-debtor. The properties were sold in different lots and they were all purchased at the auction sale by the Plain-

(1) L. R. 46 I. A. 52: s. c. I. L. R. 46 Cal. 670; 23 C. W. N. 721 (1918).

(2) I. L. R. 22 Bom. 753 (1897).

(4) I. L. R. 46 Cal. 187 (1912).

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tiff on the 19th of November 1907, the total value of the properties being Rs. 14,050. The predecessor of the Defendants had also obtained a decree for money against the same judgment-debtor, and he applied for rateable distribution of the sale proceeds under the provisions of the Civil Procedure Code and obtained Rs. 2,800 and odd out of the money in deposit under an order of the Court on the 15th February 1908. The wife of the judgment-debtor Mina Kumari Bibi commenced a suit in 1907 against the Plaintiff, in which the judgment-debtor was also made a party, for declaration of her title to and for possession of some of the properties which were sold in execution of the Plaintiff's decree. She eventually succeeded in establishing her claim to those properties on appeal to the Privy Council and the order in Council was dated the 11th December 1916. Mina Kumari took possession of the properties on the 29th September 1917. The Plaintiff commenced the present suit on 4th September 1920 against the Defendants for recovery from them of a proportionate share of the price paid by the Plaintiff for those properties which the predecessor of the Defendants had taken out of Court under the order for rateable distribution. The Subordinate Judge allowed the Plaintiff a sum of Rs. 2,605-11 ans., but did not give him any interest. The appeal of the Defendants was dismissed by the District Judge, who allowed the cross-objections of the Plaintiff with regard to interest which he allowed from the date of dispossession of the Plaintiff of the properties. The Defendants appeal to this Court against that decree. Several questions were raised on behalf of the Appellants, but the principal question which requires consideration is that of limitation. It was assumed by both parties before us that Art.

97 of the Limitation Act applies to the present case and it was so held by the Court of Appeal below. It may be a question whether this is a suit for money paid upon an existing consideration, as it can hardly be said that the Plaintiff paid money for any consideration from the Defendant. As however the question was not argued before us, I do not think it necessary to pursue the matter beyond stating that we do not decide that such a case as this falls within Art. 97. The controversy before us turned upon the point as to the time from which the period of limitation began to run. It is contended by the Appellants that it runs from the date of the decision of the Privy Council that the properties belonged to Mina Kumari and not to the judgment-debtor, while the Respondent contends that the consideration failed only from the date when the Plaintiff was deprived of possession of the properties and limitation should commence to run from that date. Several cases were cited before us in support of the contention of each party but most of them do not require consideration in detail as they arose out of suits by purchasers at voluntary sales against their vendors for the purchase money, as the vendors failed to secure them in possession of the properties sold on account of defect of their title. The cases proceeded either on the basis of the covenant for quiet enjoyment or on the ground that the sale was only voidable at the instance of third parties. Those cases do not appear to me to be of any assistance in the present case. The case principally relied on by the Appellants is *Juscurn Boid v. Pirthi Chand Pal* (1). In that case a purchaser of a *patni* under Reg. VIII of 1819 brought his suit for recovery of the purchase money from the

(1) L. R. 44 I. A. 52; s. c. I. L. R. 46 Cal. 670; 23 C. W. N. 721 (1918).

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zemindar as the sale of the *patni* had been set aside on the suit of a *darpatnidar*. The date of the decree of the Court of first instance setting aside the sale and not of the Appellate decree affirming the first decree was held to be the time from which limitation began to run. But it was contended before the Judicial Committee that the period of limitation began to run when possession was lost. With reference to this contention their Lordships observed:—"There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he brought involved in the decree of 24th August 1905. If further support of this view be required it may be found in the express provision of sec. 14 of the Regulation which directs that in the suit for reversal itself the purchaser is to be indemnified against all loss." The learned Judge below held that the decision of the Privy Council was based on the special provisions of sec. 14 of the Regulation and does not apply to the present case. He relied on the case of *Gurshidawa v. Gangava* (2), where it was held with reference to the provisions of sec. 315 of the Code of Civil Procedure of 1882 that the cause of action did not accrue till the purchaser was deprived of the property sold. It is sufficient to say with regard to the last point that the present suit is not one under the provisions of sec. 315 of the Code of 1882. The law relating to this matter has been altered,

(2) I. L. R. 22 Bom. 783 (1897).

and the words on which the decision in the Bombay case was based do not occur in the corresponding r. 93 of Or. 21 of the present Code. With regard to the main question it seems to us that the present case falls within the rule in *Juscurn Boid's* case (1), apart from consideration arising out of the provisions of sec. 14 of the Patni Regulation. In the present case there was a rateable distribution of the assets held by the Court under the provisions of the Civil Procedure Code. There was no undertaking by any person about the purchaser being put into possession of the properties sold. When the title to the properties was found by the Privy Council to be in Mina Kumari and not in the judgment-debtor there was a negation of the title of the judgment-debtor as well as that of the Plaintiff. The result of the decision was that the money which passed into the hands of the Defendants was finally declared not to be assets of the judgment-debtor which the Defendants were entitled to claim or retain. It was Plaintiff's money and he could recover it at once. I think therefore that the time from which the period of limitation began to run is the date of the decision and not the date of disturbance of possession with regard to which the Defendants had no concern. It is argued on behalf of the Respondent citing the case of *Hanuman Kamut v. Hanuman Mandar* (3), that the result of that case and the case of *Juscurn Boid v. Pirthi Chand Pal* (1) is that in such a case as this time would begin to run either from the date of the decree or from the disturbance of possession whichever is later. But the case of *Hanuman Kamut v. Hanuman Mandar* (3) hardly lends sup-

(1) I. L. R. 46 I. A. 52; a. c. I. L. R. 46 Cal. 670; 23 O. W. N. 721 (1915).

(3) I. L. R. 18 I. A. 155; a. c. I. L. R. 18 Cal. 123 (1891).

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port to such a contention, where the disturbance of possession, when time was held to commence to run, was earlier than the decree dismissing the Plaintiff's suit for possession. Only one other case need be mentioned, that of *Amrita Lal Bagchi v. Jogendra Lal* (4), where under circumstances similar to this the learned Judges computed limitation from the date the sale was declared invalid, although they held that Art. 120 of the limitation Act was applicable. The period of limitation in this case therefore commenced to run from 11th December 1916.

The other contentions of the Appellants need only be stated for being rejected. It is urged that the Plaintiff could not get the sale set aside if his judgment-debtor had any interest in the property sold and as the sale of all the properties has not been set aside, he cannot bring this suit for recovery of a part of the purchase money. But the fact found is that the properties were separately sold for separate sums of money, and there is no reason why the Plaintiff should not recover the purchase money for those properties the sale with regard to which was set aside or declared void. It was next contended that the Plaintiff had presented an application in insolvency proceedings against his judgment-debtor that all his debts had been satisfied, and the Plaintiff cannot therefore recover the money claimed. It does not appear why he cannot do so, as the money claimed is the Plaintiff's own money which has got into the Defendant's hands. The last plea was that the Plaintiff was not at any rate entitled to interest. This also has no substance as the Defendant had the use of the money and he was rightly held liable for interest.

As however the Appellants succeed on the question of limitation, as the suit was

(4) L. R. 40 Cal. 187 (1912).

brought more than 3 years after the date of the decree of the Privy Council, this appeal is allowed and the suit dismissed with costs in all Courts.

GREAVES, J.—I agree.

H. D. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1626 OF 1922.

GREAVES, J.

MUKERJI, J.

1925,

17, January.

NABIN CHANDRA SAHA

PODDAR and ors.,

Plaintiffs, Appellants,

v.

DULU MIA and ors.,

Defendants,

Respondents.

Res judicata.—Decision in previous rent suit on rate of interest, if *res judicata* in subsequent rent suit when law altered by judicial decisions after passing of previous decision—Stipulation in *kabuliyat* about interest at 75 per cent., if penal.

The Plaintiffs sued for rent on a *kabuliyat* in which interest for arrears of rent was stipulated at 75 per cent. per annum. It appeared that in a previous suit for rent between the same parties it was held that the stipulation as to interest was of a penal nature and interest was allowed at 12 per cent. per annum:

Held—That the mere fact that 75 per cent. is the rate stipulated in a *kabuliyat* does not show that the rate was a penal one.

ASUTOSH DHAR v. JOYLA SARDAR (6) referred to.

That the law on the subject having been altered by judicial decisions since the judgment in the previous suit it could not operate as *res judicata*.

Cases must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit and if the said law

(6) 17 C. L. J. 50 (1912).

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has been altered in the meantime and the effect of the law has been differently interpreted by judicial decisions or altered by statute, the decision on the question of interest in an earlier suit for rent would not operate as res judicata with regard to the same question in a suit for rent for subsequent years.

ALIMUNNISSA CHAUDHURANI v. SHAMA CHARAN ROY (2) followed.

This was an appeal preferred on the 12th July 1922 against the decree of Babu Rajendra Lal Sadhu, Subordinate Judge, 1st Court of Zillah Bakerganj, dated the 22nd of February 1922, modifying the decree of Babu Protap Chandra Sen Gupta, Munsif, 2nd Court at Bhola, dated the 27th of May 1921.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Ray and Bhuban Mohan Saha for the Appellants.

Babu Sures Chandra Taluqdar for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of a suit for rent instituted by the Plaintiffs for the years 1923 to 1926, the allegation being that the Defendants were holding under a *kabuliyat* executed by their predecessor-in-interest for dwelling purposes in the year 1281. The Court of first instance decreed the Plaintiffs' suit. The lower Appellate Court gave the Plaintiffs a decree for the amount of rent claimed for the years in suit together with interest at the rate of 12 per cent. per annum, the rate of interest stipulated in the *kabuliyat* being 75 per cent. per annum at which the suit had been decreed by the Court of first instance. The Plaintiffs appeal to this Court, and

their contention is that the decision of the lower Appellate Court on the question of interest is wrong. It appears that the ground upon which the rate of interest was objected to in the Court of first instance on behalf of the Defendants was that it was penal and unconscionable. The learned Munsif held that according to the present trend of judicial decisions the stipulation as to interest cannot be held to be either penal or unconscionable. The learned Subordinate Judge on appeal was of opinion that the question as to the rate of interest was *res judicata* as between the parties by reason of a previous decision in a suit for rent as between the parties, which had been marked as Ex. 7 in the case; and inasmuch as in that decision it was held that the stipulation was of a penal nature it disallowed the interest at the rate mentioned in the *kabuliyat* and gave the Plaintiffs a decree, as I have said, at the rate of 12 per cent. per annum. It is contended on behalf of the Appellants that the decision in the previous suit on the question of interest cannot in law operate as *res judicata*. On behalf of the Respondents it is urged that the said decision does operate as *res judicata*, and it is further contended that in any event inasmuch as the Defendants were holding over, the Plaintiffs are not entitled to interest at the rate mentioned in the *kabuliyat* but are entitled only to such interest as in the opinion of the Court is fair and reasonable. So far as the question of *res judicata* is concerned it is necessary to refer to the decision, Ex. 7, upon which the Court of Appeal below has relied. It appears that in the previous suit the issue as to interest was as to whether the Plaintiffs were entitled to get interest at the rate mentioned in the *kabuliyat* and it was decided that the interest claimed was high and was therefore penal. This decision

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was passed on the 30th of April 1917. Since then there have been a number of decisions on the question of penal character or otherwise of interest stipulated in contracts, of which it is necessary to mention only one case, namely, the case of *Lala Balla Mal v. Ahad Shah* (1), a decision of the Judicial Committee, in which it has been laid down that in the absence of anything to prove undue influence or to show that there was an unconscionable bargain the mere high rate of interest is not to be treated either as penal or unconscionable. The law having thus been altered the question is whether the decision in the earlier suit should operate as *res judicata* in the present one. On behalf of the Appellants reliance has been placed with regard to this matter on the case of *Alimunnissa Chaudhurani v. Shama Charan Roy* (2). In that case it was laid down that cases must be decided upon the law as it stands when the judgment is pronounced and not upon what the law was at the date of a previous suit and if the said law has been altered in the meantime and the effect of the law has been differently interpreted by the judicial decisions or altered by statute the decision on the question of interest in an earlier suit for rent would not operate as *res judicata* with regard to the same question in a suit for rent for subsequent years. The decision, upon which the earlier decision was based in that case, had in the meantime been overruled by a Full Bench decision. That case seems to me very much the same as the present case. On behalf of the Respondents reliance has been placed upon a number of decisions, especially upon the decisions in the cases of *Rai Charan Ghose v. Kumud Mohon Dutta* (3), *Rambhari*

Sarkar v. Surendra Nath Ghosh (4) and *Waman Hari v. Hari Vithal* (5) for the purpose of contending that the decision upon a pure question of law, even though erroneous, may under certain circumstances operate as *res judicata*. There can be no dispute as to the proposition of law which is contended for on behalf of the Respondents. But, as I have said, the facts appearing in the present case are distinguishable from the facts appearing in the cases cited on behalf of the Respondents and I can see nothing upon which I can distinguish the case of *Alimunnissa Chaudhurani v. Shama Charan Roy* (2), upon which reliance has been placed on behalf of the Appellants. I am of opinion, therefore, that the decision in the earlier suit for rent does not operate as *res judicata*. The mere fact that 75 per cent. per annum is a rate stipulated in the *kabuliyat* does not show that the rate was a penal one nor is there anything to show nor any finding has been arrived at to the effect that the bargain was penal and unconscionable and this is not the first instance in which interest at the rate of 75 per cent. per annum has been allowed on the basis of a stipulation in a *kabuliyat*. I may refer for instance to the case of *Asutosh Dhar v. Joylal Sardar* (6), where in awarding interest in a suit for rent at the contract rate which was 75 per cent. per annum this Court observed as follows:—
“The rate no doubt is very high, 75 per cent. per annum, but the tenants have the remedy in their own hands. They have only to pay their rent regularly and no interest will be chargeable.” I can therefore see no reason for not awarding a de-

(1) 23 O. W. N. 233 (P. C.) (1918).

(2) I. L. R. 32 Cal. 749 (1905).

(3) I O. W. N. 687 (1897).

(2) I. L. R. 32 Cal. 749 (1905).

(4) 19 O. L. J. 84 (1913).

(5) I. L. R. 31 Bom. 128 (1906).

(6) 17 C. L. J. 50 (1912).

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cree to the Plaintiffs at the rate stipulated in the *kabuliyat*.

So far as the second ground is concerned a reference to the *kabuliyat* shows that on the face of it, it is not a *kabuliyat* for a period of nine years as contended for on behalf of the Respondents and there is nothing to show that as a matter of fact the Respondents were holding over after the expiry of the *kabuliyat*. On this ground it is not possible for us to say that the Defendants are liable to pay interest at any rate other than that mentioned in the *kabuliyat*. I, accordingly, think that the decision of the learned Subordinate Judge is not correct and I set it aside and restore the decision of the learned Munsif with costs in this Court and the lower Appellate Court.

GREAVES, J.—I agree.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORDER

No. 415 OF 1924.

GREAVES, J.
MUKERJI, J.
1925,
25, February.

MATEUR RASUL,
Judgment-debtor No. 2,
Appellant,
v.
ABDUL SOID, Decree-
holder, Auction-
purchaser, and ors.,
Respondents.

Civil Procedure Code (Act V of 1908), sec. 47—Mortgage decrees—Execution—Objection by judgment-debtor's son that property belonged to his mother and not father, and want of legal necessity—Objection regarding substitution of heirs out of time in the suit, if tenable in such application—Limitation for an application under Or. 21, r. 90, if can be saved by purporting to make it under sec. 47—Non-service of notice of execution on minor's guardian, if vitiates the execution sale.

An application purporting to be under sec. 47 and Or. 21, r. 90, C. P. Code, was made for setting aside a sale in execution

of a mortgage decrees. The objections that were put forward to bring the application under sec. 47 were that the properties were not liable for the decree inasmuch as they belonged to the mother of the applicant and the decree had been passed not for the debts of the mother but for those of her husband and that the latter had no legal necessity to mortgage the properties and consequently the properties of the applicant were not liable for the mortgage:

Held—That these objections which had been raised and overruled in the suit could hardly be considered as falling under sec. 47, C. P. C.

Where an application really came under Or. 21, r. 90, the mere fact that in the application sec. 47 was mentioned would not enable the applicant to save limitation if the application was not filed within 30 days of the sale.

Where it was contended in an application under sec. 47 and Or. 21, r. 90 that a final mortgage decree was bad, inasmuch as the judgment-debtor's heirs were not brought on the record within the time allowed by law:

Held—That this was not an objection which could be taken either on an application under sec. 47 or in an application under Or. 21, r. 90, C. P. Code. The executing Court was not competent to go behind the decree and enquire into any question challenging the validity of the decree itself.

Where no guardian ad litem for a minor judgment-debtor was appointed in the execution proceedings and notice of execution in connection with the issuing of sale proclamation was served upon the minor judgment-debtor:

Held—That this only amounted to an irregularity, and this irregularity could not be taken to have vitiated the sale, for non-

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representation of an infant by a guardian in execution proceedings is not itself a sufficient ground for avoiding an execution sale.

MALKARJAN v. NARHARI (1) and FANI BHUSAN v. SURENDRA NATH (2) *relied on.*

This was an appeal against the order of Bahu Aswini Kumar Das Gupta, Subordinate Judge, 2nd Court of Zillah Mymensingh, dated the 23rd of September 1924.

The facts material to this report will appear from the judgment.

M. Md. Nurul Huq Choudhury for the Appellant.

Mr. Fazlul Huq and Babu Radhicanjan Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of an order passed by the Subordinate Judge of Mymensingh refusing to set aside a sale held in execution of a mortgage decree. The Appellant was one of the judgment-debtors against whom the said decree was passed. A preliminary decree was passed on the 27th December 1922 and the final decree on the 23rd January 1923. The sale took place on the 15th March 1924, the decree-holder being the auction-purchaser at the sale. The application on which the order which forms the subject-matter of this appeal was passed was made by the Appellant on the 15th April 1924. The application purported to be one under sec. 47 of the Code of Civil Procedure and also under Or. 21, r. 90 of the same Code. The objections that were put forward on behalf of the Appellant in the said application in order to bring it under sec. 47 were mainly to the effect that the properties were not liable for the decree inasmuch as they be-

longed to the mother of the Appellant and the decree had been passed not for the debts of the mother but for those of her husband; and that the father had no legal necessity to mortgage the properties and consequently the properties of the applicant were not liable for the mortgage. The same objection is also to be found in another application which was filed on behalf of the Appellant previously on the 7th January 1924 and which was dismissed for non-prosecution on the 8th February 1924. It appears also that this objection was raised in the suit itself and the decree was passed on deciding the same against the applicant. This objection is really one which can hardly be considered as falling under sec. 47, C. P. C., and the order that has been passed by the Subordinate Judge against which the present appeal has been preferred really comes under Or. 21, r. 90 of the Code of Civil Procedure. That being so, the mere fact that in the application sec. 47 was mentioned would not enable the Appellant to save limitation if as a matter of fact the application was not filed within 30 days of the sale. The Respondent put forward a contention before us to the effect that the application was filed beyond 30 days from the date of the sale and that no reasons have been given by the Appellant such as would enable him to get an order extending the period of limitation provided for an application under that rule. The learned Subordinate Judge in his judgment states that the application for setting aside the sale was made on the last date of limitation. But looking at the dates on which the sale took place and the application was filed it will appear that it was filed a day too late. It should have been filed on the 14th April 1924, on which date, it appears, the Court was not closed and therefore as a matter of fact it

(1) L. R. 27 I. A. 216 : s. c. I. L. R. 25 Bom. 337, 5 O. W. N. 10 (1900).

(2) 85 C. L. J. 9 (1921).

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was filed a day too late, and the application, therefore, should have been dismissed as not having been filed within time. As however it was not so dismissed but was dealt with on the merits and as the learned vakil appearing on behalf of the Appellant has argued the appeal before us on the merits, I propose to deal with the case on its merits as well.

The objections put forward on behalf of the Appellant are mainly three. The first is that before the preliminary decree was passed on the 27th December 1922 one of the judgment-debtors, namely, Masturi Khatun had died and that no substitution had been made of her heirs in her place before the said decree was passed and that it was only when the final decree was about to be passed on the 27th January 1923, that is to say, about sixteen months after the date of her death that her heirs were brought on the record. It is contended that the decree that was passed was *ex parte* having regard to the fact that the judgment-debtor's heirs were not brought on the record within the time allowed by law. In our opinion, this is not an objection which can be taken either on an application under sec. 47 of the Code of Civil Procedure or in an application made under Or. 21, r. 90 of that Code. The executing Court is not competent to go behind the decree and enquire into the question, thereby in effect challenging the validity of the decree itself. The final decree that was passed was the decree that was the subject-matter of the execution proceedings and it was passed against the heirs of the deceased Masturi Khatun. If it had been wrongly passed against those heirs that may be a ground for setting aside the decree. But it is certainly not open to the executing Court to go into that question and to say as to whether the decree was validly passed against those heirs.

That objection is not, therefore, at all tenable.

The second ground put forward on behalf of the Appellant is that there was irregularity in publishing and conducting the sale and that in consequence of such irregularity the properties were sold at an inadequate price. The decretal amount was Rs. 20,258 and the properties were sold for Rs. 15,435. The learned Subordinate Judge has found upon the evidence that the properties consisted of some taluqs and some *khamar* lands and that the value of the taluqs would be Rs. 12,500 and that the *khamar* lands would be valued at Rs. 3,800. In his opinion the total value of the properties at the highest figure cannot exceed Rs. 16,300. The Appellant in these proceedings examined himself and two other witnesses in order to prove that the real value of the properties was much more than what was obtained at the sale. The Appellant himself was not in a position to give any clear evidence as to the value of these properties. He stated that the net income of the properties was Rs. 600 from which the *suddar* rent had got to be deducted and that such properties sell at 40 times the annual income. As to the *khamar* lands he stated that they were about 22 kanis in area of which about 19½ kanis were culturable lands. In cross-examination, however, he stated he was not able to state the value of any of the taluqs or their income nor was he in a position to say what the profits of any particular taluq were but that his Sarkar knew all about it. This Sarkar was not examined as a witness in the case. Witness No. 2 for the Appellant states that there are 22 kanis of *khamar* land and that each kani sells for Rs. 700 or Rs. 800 and that the taluqs sell at 30 or 35 times their annual profits. He, however, is a man who is a servant

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of the Appellant. The only other witness examined in the case on behalf of the Appellant is witness No. 3 who states that he does not know if any sale proclamation had been served or if there had been any beating of the drums. He states that each kani of land sells for Rs. 600 to Rs. 700 and that the taluqs sell at 30 times their annual income. He states that he himself purchased a taluq at 32 times its annual income. As the learned Subordinate Judge has pointed out, it is well known that small properties are sold at much higher values proportionately than large ones. On behalf of the decree-holders several witnesses were examined and they prove that as a matter of fact taluqs are sold at 25 times their annual income and even upon the deposition of the Appellant the total income of his properties would not exceed Rs. 500 and, therefore, the value of the taluqs would be about Rs. 12,500. As to the *khamar* land, upon the evidence adduced on behalf of the decree-holder, it would appear that on an average the price is about Rs. 200 per kani. On behalf of the Appellant copies of some cadastral survey *khatians* were filed and it was only at the very last stage of the case that an application was made on his behalf for time to have them certified. This application was rejected and in our opinion rightly rejected. Moreover what were filed were mere fragments and afford no real assistance to the Appellant.

The position then is that the Appellant has failed to prove the value of the properties, while upon the evidence on the record it cannot be said that the price fetched at the sale was inadequate.

Then as to the service of notices, beyond the negative evidence given by witness No. 3 examined on behalf of the Appellant to the effect that there was no publication

of notices there was no other evidence on his side. On the other hand, the decree-holder has examined peons, a *tahsildar*, a drummer who took part in the service of the notices and three other persons who were present at the time when the proclamation and notice were served and upon their evidence it has been satisfactorily established that as a matter of fact the notice and the sale proclamation were duly and properly served. It is, therefore, not established that there was any irregularity in publishing or conducting the sale far less that there was any inadequacy in the price that was fetched at the sale, consequent upon any irregularity.

The next ground taken on behalf of the Appellant is to the effect that the notices of execution in connection with the issuing of sale proclamation were served not upon the minors' guardian but were served upon the minor judgment-debtors. It is contended that Babu Debendra Prosad Roy who was appointed guardian *ad litem* of the minors in the suit was not appointed as such guardian in the execution proceedings and that inasmuch as there was no such appointment the service of notices on him cannot be said to have been proper service in the eye of law. It is true that there was no fresh order appointing a guardian for the minor judgment-debtors in the execution proceedings and it is also true that the guardian does not appear to have entered appearance in the course of such proceedings. It also appears that after the sale he made an application before the Court stating that he was informed that the sale which had taken place was vitiated by irregularities and was fit to be set aside and he asked for permission for making an application to set aside the sale and that no order was passed upon his application beyond the order that it should be filed. This, how-

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ever, only amounts to an irregularity. As has been laid down by the Judicial Committee in the case of *Malkarjan v. Narhari* (1), where a sale took place after the notice had been wrongly served upon a person who was not a legal representative of the judgment-debtors' estate and where the executing Court had erroneously decided that he was to be treated as such representative, the sale was not a nullity and should not be treated as invalid notwithstanding the irregularity, even though a material one, for the jurisdiction of the Court to execute the decree had been complete throughout. This irregularity cannot be taken to have vitiated the sale. As an authority for such a proposition reference may also be made to the case of *Fani Bhusan Bhuian v. Surendra Nath Das* (2), where it has been held that non-representation of an infant by a guardian in execution proceedings is not itself a sufficient ground for avoiding an execution sale and that such matter stands on a different footing from a case where the provisions of Or. 32 of the Code have not been observed in a suit by or against minors.

For these reasons we think that the appeal fails and must be dismissed with costs.

We assess the hearing fee at three gold mohurs.

GREAVES, J.—I agree.

J. N. R.

Appeal dismissed.

(1) L. R. 27 I. A. 216; s. c. I. L. R. 25 Bom. 337; 5 O. W. N. 10 (1900).

(2) 35 C. L. J. 9 (1921).

[CIVIL REVISIONAL JURISDICTION.]

REV. No. 639 OF 1925.

NEWBOULD, J.

GRAHAM, J.

1925,

19, June

BIMALA PRASAD

MUKERJI, Petitioner,

v.

LAL MONI DEVI and

ors., Opposite Party.

Plaint presented in wrong Court returned for filing in proper Court—Amendment of Court Fees Act before return of plaint—Court-fee, if to be paid as under new Act—Plaintiff, if to be credited with amount already paid.

A plaint was filed in a Court which was ultimately found not to have jurisdiction in the matter and the plaint was returned to be presented to the proper Court. Before the plaint was returned the Court Fees Act was amended:

Held—That when the plaint which has been returned is presented in a Court of competent jurisdiction the suit must be taken to be instituted on the date of such presentation and court-fee was payable under the amended Act. The Plaintiff would be credited with the amount already paid and was to pay the balance.

This was a Rule against an order of Babu Jagadish Chandra Sen, Subordinate Judge of Burdwan.

The facts of the case will appear from the judgment.

Babus Probodh Kumar Das and Apurba Charan Mukerji for the Petitioner.

Mr. Charu Chandra Biswas and Babu Manindra Kumar Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff filed a plaint in the Court of the Subordinate Judge of Alipur on the 2nd October 1920. After litigation up to the High Court it was decided that that Court had no jurisdiction to try the suit and the plaint was returned for presenta-

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tion to the proper Court on the 31st October 1922. The Plaintiff then filed it before the Subordinate Judge of Burdwan on the 14th November 1922. The question that arises in this Rule is, "What court-fee should be paid by the Plaintiff." The lower Appellate Court has held that he should pay court-fees in accordance with the amended Court Fees Act, which came into force on the 1st April 1922, after deducting the court-fees already paid.

For the Plaintiff, the Petitioner before us, it is contended that the court-fee originally paid is sufficient. On behalf of the Opposite Party, the Defendant, who appeared in this Rule it is contended that the Plaintiff should pay the court-fee under the amended Act without any deduction for the cancelled court-fee stamp on the plaint that was originally filed. We think that the learned Subordinate Judge is right in holding that the court-fee payable is that payable under the new Act after crediting the Plaintiff with the court-fee originally paid. The question as to the Plaintiff being entitled to be credited with the court-fee paid has been decided by Full Benches of the Madras and Bombay High Courts. No case of this Court clearly in point has been pointed out to us but our experience is that the practice in this province is the same as in the other provinces and we think that the Rule laid down in those cases should be followed.

As to the court-fee payable it is undisputed that the court-fee should be leviable under the law which was in force at the time when the suit was instituted.

The whole question in this Rule is, "Was the suit instituted when the plaint was filed in the Court which had no jurisdiction or when it was filed in the Court having jurisdiction." On this point the decision of a Division Bench of this Court

in *Hedlot Khasia v. Karan Khasiani* (1) is an authority for holding that when the plaint which has been returned is presented in a Court of competent jurisdiction the suit must be taken to be instituted on the date of such presentation. On behalf of the Petitioner reliance is placed on certain decisions of this Court reported in the Weekly Reporter which are discussed in the judgment of the Subordinate Judge. We agree with him in thinking that those cases turn on the question of limitation and merely apply the Rule which has since been made in the law by the passing of sec. 14 of the Limitation Act of 1877.

The result is that the Rule is discharged. The Opposite Party's application for a Rule directing an order to pay further court-fees is rejected.

The parties will bear their own costs.

The Petitioner will be allowed one month from this date to pay the deficit court-fees.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. NO. 38 OF 1925.

NEWBOULD, J.
B. B. GHOSE, J.
1925,
7, April.

RAM, PADA CHATTERJEE
and ors., Complainants,
v.
BASANTA BAISHNABI and
76 ors., Accused.

Eastern Bengal and Assam Disorderly Houses Act (II, E. B. & A., of 1907), sec. 3—Proceedings under Act not governed by Code of Criminal Procedure must be decided according to ordinary rules of fairness and propriety—Findings necessary to be arrived at to justify order of discontinuance under sec. 3—House must be used as described in sec. 2, cls. (a), (b), (c) to attract the operation of sec. 3—Joint enquiry about several houses—Necessity of individual finding as to annoyance to local inhabitants.

Proceedings under the Eastern Bengal and Assam Disorderly Houses Act are not governed by the provisions of the Code of

(1) 15 C. L. J. 241 at p. 245 (1911).

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Criminal Procedure and it is not necessary for the Magistrate to act only on legal evidence and he need not administer oaths but before passing an order under sec. 3 he must satisfy himself not only that the houses are used as brothels or for the purposes of habitual prostitution or as disorderly houses but he must further find an additional fact to bring it within the provisions of cls. (a), (b) or (c) of sec. 2 of the Act.

The Magistrate may come to his decision in any way that does not violate the ordinary rules of fairness and propriety.

While considering the cases of several houses together the Magistrate should apply his mind to the case of each house separately on the question whether annoyance was caused to the inhabitants of the vicinity.

This was a Reference made by the Sessions Judge of Zillah Rajshahi, recommending that the order of the Deputy Magistrate of Malda, dated the 30th September 1924, be set aside.

* The facts of the case will appear from the judgment.

Mr. Gopal Chandra Das and Babu Satyendra Kishore Ghose for the Complainants.

Mr. Narendra Kumar Bose and Babu Jatindra Mohan Chaudhuri for the Accused.

Mr. Ashraf Ali, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference made by the learned Sessions Judge of Rajshahi recommending that the order made by the Deputy Magistrate of Malda, dated the 30th September 1924, under sec. 3 of the Eastern Bengal and Assam Disorderly Houses Act (Act II of 1907) be set aside.

On a petition submitted to the Magistrate of Malda by 25 residents in the vicinity summonses were served on 31 persons described as owners and 87 persons described as occupiers directing them to appear before the Magistrate on the 30th September 1924. After questioning the persons who appeared before him and examining witnesses, but without administering any oath to the witnesses or recording their evidence or the statements of the persons against whom the proceedings had been taken, the Magistrate passed the following order : " I am satisfied that the houses occupied by the women named below are used as brothels and for the purpose of habitual prostitution and they and the owners of the houses occupied by them named in the left-hand column are directed to discontinue such use by the 30th October 1924."

In the case of *Rajani Khemtawali v. Pramoth Nath Chaudhuri* (1), it has been held that proceedings under sec. 3 of the Eastern Bengal and Assam Disorderly Houses Act of 1907 are not governed by the provisions of the Code of Criminal Procedure. It is not necessary for the Magistrate to act only on legal evidence and he need not and possibly he may not administer oaths. But before passing an order he must satisfy himself that the house is used as described in sec. 2, cls. (a), (b) or (c) and he may do this in any way that does not violate the ordinary rules of fairness and propriety. In the present case we agree with the learned Sessions Judge that the proceedings taken by the Magistrate do not appear to have been conducted within the ordinary rules of fairness. In the case referred to the order of the Magistrate was upheld on the ground that the principles had not been

(1) 1, L. B. 37 Cal. 287 : s. c. 14 C. W. N. 404 (1910).

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violated. The Judges had before them a full record not only of the evidence taken but also of a local enquiry held by the Magistrate in those proceedings. In the present case we have no record except the written statement filed by the parties proceeded against and the judgment of the Magistrate. In the present case the Magistrate does not appear to have properly realized that before he can pass an order under sec. 3 of the Eastern Bengal and Assam Disorderly Houses Act he must not only be satisfied that the houses are used as brothels or for the purpose of habitual prostitution or as disorderly houses, but he must further find an additional fact to bring it within the provisions of cls. (a), (b) or (c) of sec. 2 of the Act. Though in his subsequent explanation the Magistrate refers to the fact which might bring cl. (a) into operation, namely, that the houses are in the vicinity of educational institutions, but at the time of the enquiry the only allegation made before him was that the houses were used as brothels, etc., to the annoyance of the inhabitants of the vicinity. In his judgment he has stated that certain persons named by him have proved that all the women proceeded against with six exceptions are prostitutes and they use the houses occupied by them as brothels and for the purpose of habitual prostitution to the annoyance of the inhabitants of the vicinity including the witnesses examined by him. But in his final order he simply recorded that he is satisfied that the houses occupied by the women named below are used as brothels and for the purpose of habitual prostitution. He suggests that he has overlooked the importance of finding that each of these houses is used to the annoyance of the inhabitants of the vicinity. Under the law the Magistrate has no power to take action against the

keepers of brothels provided that the place is respectably conducted unless it is in the neighbourhood either of an educational institution or of a cantonment so as to draw the operation of cl. (a) or (c).

In order to decide whether a brothel is used as such to the annoyance of the inhabitants of the vicinity, there is a great risk of confusion with findings when the cases of such a large number of houses are jointly considered. We do not mean that it is necessary to draw up separate proceedings and hold separate enquiries in the case of each of these houses. But we think in deciding the question whether annoyance was caused the Magistrate should have applied his mind to the case of each house separately. It seems obvious that when there were several brothels in a portion of the town if some of them are used in a disorderly manner to the annoyance of the neighbours the Magistrate, unless he applies his mind to each case separately, is liable to hold that all are similarly used. In fact his finding in his judgment suggests that there has been such confusion. There is no clear finding that every house has been so used as to cause annoyance.

We therefore accept this reference and we set aside the order of the Deputy Magistrate of Malda, dated the 30th September 1924, directing the persons named in his order under sec. 3 of the Eastern Bengal and Assam Disorderly Houses Act to discontinue the use of the houses as brothels or for the purpose of habitual prostitution.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]**APPS. NOS. 382 AND 389 OF 1925.**

CUMING, J.
MUKERJI, J.
1925,
26, August.

PRAFULLA KUMAR
ROY CHOWDHURY and
anr., Appellants,
v.
THE KING-EMPEROR,
Respondent.

Conspiracy to commit criminal breach of trust—Only three accused alleged to be conspirators—Acquittal of two and its effect on the other accused—Penal Code (Act XLV of 1860), secs. 120/408.

Where the conspiracy alleged in the charge is one in which only three persons are said to have been participators and two of them are acquitted, the other is entitled to an acquittal as a matter of course.

These were appeals preferred against an order of the 3rd Presidency Magistrate of Calcutta, convicting the accused under secs. 120B and 408, I. P. C., and sentencing them each to one year's rigorous imprisonment and a fine of Rs. 500.

The facts of the case will appear from the judgment.

In Appeal No. 382/25.

Babu Probodh Chandra Chatterji for the Appellant.

Babu Satindra Nath Mukerji for the complainant.

Mr. Narendra Kumar Bose for the Crown.

In Appeal No. 389/25.

Babus Debendra Narayan Bhattachariya and *Radhika Ranjan Guha* for the Appellant.

Babus Satindra Nath Mukerji and *Bibhuti Bhusan Lahiri* for the complainant.

Mr. Narendra Kumar Bose for the Crown.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—These two appeals arise out of an order passed by the Third Presi-

dency Magistrate of Calcutta convicting the Appellants *Prafulla Kumar Roy Chowdhury* and *Manik Lal Sur* of an offence under secs. 120B/408, I. P. C. and sentencing them each to undergo rigorous imprisonment for one year and to pay a fine of Rs. 500 or in default to undergo rigorous imprisonment for six months and awarding the fines, if realised, to the complainant as compensation. There was another accused person one *Pramatha Nath Bose* who was tried along with the Appellants in respect of the same offence, but was acquitted.

The three accused persons were on the staff of the Bengali newspaper *Basumati*, *Prfulla* as a despatcher, *Manik* as an assistant accountant and *Pramatha* as checker of postage stamps. The prosecution case was that they conspired with each other and were members of a conspiracy with the object of committing criminal breach of trust in respect of postage stamp or the money equivalent thereof and that they did in fact commit the offence of criminal breach of trust in respect of 67,606 half-anna postage stamps of Rs. 2,112-11 as. their money value. The period was confined in the charge to that between the 3rd October 1924 and 23rd March 1925, both days inclusive. It was the prosecution case that a gigantic and well-organised swindle was being perpetrated in respect of postage stamps or their money equivalent for some considerable time, but for the sake of convenience of proof or to prevent embarrassment the charge was confined to such postage stamps as were meant to be affixed to cards which would require half-anna stamps to pass through the post as post cards. The circumstances under which the fraud was detected are fully described in the judgment of the learned Magistrate and need not be repeated here, but it is necessary to describe the procedure which

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obtained in the office in order to deal with the points which arise in the present appeal.

The procedure which was in vogue may be gathered, though not without considerable difficulty, from the evidence of the proprietor P. W. 4 and the Manager P. W. 1. The difficulty arises from the divergence as to the details in the evidence of these two gentlemen due mainly to the disregard of sequence in the events that they were asked to state. The procedure appears to have been somewhat cumbrous and to state quite shortly it was as follows:—Letters issued from the different departments of the office—and there are sixteen departments of the concern manned by a very large number of employees—are entered in the issue registers of the respective departments and placed before the proprietor in his room for his signature. After they are signed the despatcher takes them from the proprietor's room. The despatcher then gets an advance from the durwan requisite to cover the postage. This advance is made by the durwan from out of the cash which he has in his hand on account of sale proceeds of newspapers sold through hawkers. The despatcher takes this advance from the durwan after giving him a slip noting down therein the details of this amount. Stamp purchased with the amount so received is affixed by the despatcher to the letters and he produces them before the assistant accountant. The assistant accountant is supposed to check and count the number and value of the stamps on post cards, letters and packets and enter the same separately on a slip, and while retaining the slip with himself, returns the post cards, letters and packets to the despatcher. The slip is made over by the assistant accountant to a clerk for being entered in the stamp register. This clerk

ordinarily writes the stamp register, but in his temporary absence other persons as well write it including the checker of stamps. The despatcher takes the post cards, letters and packets to the checker of stamps whose duty it is to count them again and keep a note of the figures representing the stamps or their value. The articles are then despatched by the despatcher through some office peon to the post office. After the stamp register is written up the checker compares the entries with the notes kept by him and examines it with reference to the slip prepared by the assistant accountant which also passes on into his hands. The checker has also to compare the entries with the issue register of the different departments. The durwan when he makes over the cash to the cashier, produces before him a book in which he gets written up a sort of account in respect of his collections and disbursements and he also produces before him the slip which the despatcher gives him for the advance taken. The cashier receives the balance, if any, and puts down in this book the items mentioned in the slip and makes a calculation therein showing the amounts spent on different heads and also the cash he receives from the durwan. The cashier finds the amount taken by the despatcher to tally with what the stamp register shows and it is then inferred that the postage actually issued is the postage for which advance has been received from the durwan. It may be conceded that if this procedure was followed to the letter, there could be no fraud but for the complicity of the despatcher, the assistant accountant and the checker, and each one of them was a *sine qua non* in the conspiracy and possibly others may also have participated in it.

Now as regards the embezzlement there can hardly be any room for doubt. A good

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deal of argument has been advanced before us in order to show that the examination of the books of the office by the C. I. D. officer was not comprehensive enough, that the figures arrived at by him cannot be acted upon as they do not take into account the postage that must have been used in letters and packets, that the proprietor's personal correspondence and as well as stamps which must have been used by the Collection Department, the Ayurvedic Department, the Editorial Department and the Agency Department have not been included in the calculation. Our attention has also been drawn to some of the dates on which the number of letters actually despatched are far in excess of the number for which postage was charged for, and we have been asked to hold that if an audit embracing all the departments of the concern was made and for a sufficiently long period it would appear that there is no foundation for the charge. The learned Magistrate has dealt with all these matters very fully in his judgment and I entirely agree with him in his conclusions in this respect. Making all sorts of allowance that is conceivable or that may be necessary nothing approaching a plausible explanation can be offered of the gigantic discrepancy in the figures. There is in my opinion not the slightest doubt whatever that a gross fraud was perpetrated in the office on a well-organised system and for a considerable length of time, and but for the honesty of some people in the office, the fraud would have gone on without detection. The statements made by the Appellants in their written statement or in their defence only betray an innate depravity of nature and only create in our minds an amount of prejudice against them which personally I find it somewhat difficult to get over. The proprietor apparently did not realise that he had to deal with

a wicked world and it is this ignorance on his part that has caused him to suffer.

The substantial question for investigation in the case is as to the complicity of the two Appellants. As I have already stated, if the procedure which I have described was strictly followed, in other words, if the three members of the alleged conspiracy did what it was their duty to do every day, all three must have been parties to it. In a criminal case, however, we are not permitted to proceed upon an assumption that they actually did what they were required by the rules to do. The learned Magistrate has recognised the importance of this doctrine when dealing with the case against the checker Pramatha. With regard to that accused he thus observes in his judgment :—" There is ground for suspicion that accused No. 2 Pramatha was also in the conspiracy, as there is no doubt that he had the stamp register before him daily, because almost every day his initials are to be found under both the credit and the debit side. But it is said that he checked the totals only and did not compare with the issue register at all. None of these registers do, in fact, bear any initials of the accused No. 2 or any indication that he looked over them. It cannot therefore be said for certain that these registers were placed before him or seen by him daily in the evening as alleged by the prosecution. This work of daily checking used formerly to be done by the proprietor himself but as he was busy with litigation in 1924 he made over this duty to accused No. 2. The checking was done at the end of the day after a strenuous day's work. It is very doubtful whether the checking was ever done as it was intended to be done." He thus acquitted Pramatha giving him the benefit of the doubt. The acquittal of this accused strikes at the root of the prosecution case and reflects upon the

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case as against the two Appellants at least to this extent that we have got to be satisfied that the two Appellants before us did actually follow the routine that was prescribed for them in respect of the items covered by the period in the charge and to see what exactly has been proved in the case in this respect.

As regards the Appellant Prafulla there is not the slightest doubt upon the evidence of the manager P. W. 1, the proprietor P. W. 4 and the durwan P. W. 3, that the part ascribed to him in the routine used to be performed by him. There is other evidence corroborative of the evidence of these witnesses. To show that he was a party to the conspiracy, however, it has got to be proved that he took a larger sum of money from the durwan than was actually necessary for the postage. On this point there is no evidence. The slips which he used to give to the durwan are not available, the entries in the durwan's book (Ex. 19) which purported to have been made by the cashier from those slips have been proved only by proof of the handwriting of the cashier; the cashier has not been called. It is said he has left office. This is not altogether unnatural as Prafulla is his brother; but that does not relieve the prosecution from proving that the entries so made by the cashier really represented what Prafulla had stated in the slips. The durwan does not and indeed cannot be expected to say what amounts were taken by Prafulla. Prafulla's connection with the entries made in the stamp register or his knowledge of any other documentary evidence showing that larger amounts were being entered than were actually necessary has not at all been established. In fact it has not been shown that the conspiracy was not equally possible without Prafulla but with his brother the cashier as one of the

conspirators; and so long as this contingency is within the range of possibility Prafulla's complicity cannot be held to have been established. Prafulla's extrajudicial confession has not been relied upon by the learned Magistrate and his reasons for so doing are sound and substantial. To bring home the offence to Prafulla in my judgment we have to assume the very facts which the prosecution has failed to prove against him.

Besides the evidence to which I have referred the prosecution relies upon the pieces of documentary evidence, namely, Exs. 2 and 3. These are two of the slips which used to be prepared by the assistant cashier. All the other slips are missing from the office. One of them, Ex. 2, is said to relate to a date subsequent to the period covered by the charge and is only relevant as showing the practice and that the assistant cashier used to prepare such slips. The other slip, Ex. 3, of which the lower portion is said to have been in his handwriting shows that he made an entry indicating that postage was being charged for a number of post cards far in excess of those that were being issued on that particular day. The latter undoubtedly is a very valuable piece of evidence as against the Appellant Manik, but it does not touch the Appellant Prafulla.

In my opinion therefore there is no evidence which would justify the conviction of Prafulla upon the charge on which he has been tried, and his appeal should be allowed and he should be acquitted and released.

With the acquittal of Prafulla, the other Appellant Manik stands acquitted as a matter of course, for the conspiracy alleged in the charge is one in which only three persons are alleged to have been participators, of whom one was acquitted by the learned Magistrate and the other

PRAFULLA KUMAR ROY CHOWDHURY v. THE KING-EMPEROR.

Prafulla has just been acquitted by this Court. The Appellant Manik therefore should also be released.

CUMING, J.—I agree.

S. C. M.

PRIVY COUNCIL

[APPEAL FROM BENGAL.]

VISCOUNT HALDINE.]

LORD DUNEDIN.

LORD DARLING.

1925,

Heard, 5 and

6, March.

Judgment,

27, March.

UDYOG AND PANNA-

LAL, Petitioner,

v.

P. E. GAZAR & Co.,

Respondents.

Civil Procedure Code (Act V of 1908), sec. 110—Decree involving indirectly claim to property of appealable value—Connection must not be too remote.

Without attempting to define the word "property" as used in the second clause to sec. 110 of the Civil Procedure Code, the Judicial Committee held that in the present case where the actual subject of the suit was only Rs. 3,000 odd, the other claim alleged to be affected by the decree was not really consequential on the decree under appeal and too remote to be entitled to the description of being property indirectly involved in the issue of the suit.

This was an application for special leave to appeal to His Majesty in Council from a decree of the High Court in Bengal, dated the 30th January 1924.

The Petitioner entered into contracts with the Respondent Company for the purchase from the latter of 1,000 bales of jute. The jute was delivered but was rejected as of inferior quality and was invoiced back. Disputes arose between the parties and abortive arbitrations took place.

On the 5th July 1920 a sole arbitrator appointed by the Defendant Company

made an *ex parte* award in their favour for Rs. 18,987.

That award was set aside by the High Court in August 1921.

Another *ex parte* award in favour of the Defendant Company was similarly set aside in February 1922.

On the 20th February 1922 the Petitioner filed a suit for Rs. 81,617 for loss sustained under the contracts and interest thereon.

That suit was eventually stayed at the instance of the Defendant Company on the 28th July 1922 on the ground that the matters in dispute should be referred to arbitration. Thereafter each party appointed an arbitrator and each arbitrator was objected to by the Opposite Party. Nevertheless each arbitrator contended that his appointment was valid and each made a separate *ex parte* award. The arbitrator appointed by the Petitioner awarded him Rs. 81,617, the amount of his claim in the suit that was stayed, and the Respondent Company's arbitrator awarded the Company Rs. 3,953.

The Respondent Company thereupon applied to the High Court to set aside the award in favour of the Petitioner, and obtained an order as prayed for on the 5th December 1922.

On the 9th December 1922 the Petitioner filed a suit to set aside the award in favour of the Respondent; he obtained a decree from the trial Judge (Greaves, J.) which was set aside by the High Court on appeal (Sanderson, C. J. and Richardson, J.). The Petitioner then applied for a certificate that the case was a fit one for appeal to His Majesty in Council but that application was dismissed by the High Court (Sanderson, C. J. and Walsmsley, J.) on the 5th May 1924.

Messrs. DeGruyther, K. C. and L. M. Parikh for the Petitioner.—The amount

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or value of the subject-matter in dispute on appeal is over Rs. 10,000, so that an appeal lies to the Privy Council under the first paragraph of sec. 110 of the Code of Civil Procedure, 1908.

In any event it comes under the 2nd paragraph of sec. 110, in that there is involved indirectly a claim to property of over Rs. 10,000 in value.

The effect of the judgment of the Indian Courts is to deprive the Petitioner of something of the value of over Rs. 10,000, *viz.*, his right to prosecute his claim in the other suit.

The High Court hold that the word "property" in sec. 110 is intended to connote the element of materiality. That cannot be so, inasmuch as there are cases where no actual value can be assigned to the right in issue as, *e.g.*, in a suit to set aside an adoption.

The word "property" is nowhere defined in the Civil Procedure Code, but it is defined in the Transfer of Property Act, 1882. Sec. 130 of that Act clearly shows that property must include an "actionable claim," and an "actionable claim" as defined in sec. 3 would include the present right of the Petitioner.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondent Company.—No appeal lies under sec. 110, C. P. Code. In the Code the word "property" is not used in so wide a sense as in the Transfer of Property Act, 1882.

There is no actual definition but the meaning of the word can be gathered from a reference to the following portions of the Code :—

Sec. 2 (12), Or. 20, rr. 9, 10, 11, 12, 13.

Or. 21, rr. 11, 17 (proviso).

From this it is clear that "property" in the Code means something tangible as separate from a chose in action.

In any event the Appellant's right to

his claim is conditional not merely on his setting aside the decree appealed from but also the decree of the 28th July 1922 from which no appeal has been lodged.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—The question raised by this petition is as to the meaning of sec. 110 of the Civil Procedure Code. The circumstances which have given rise to it are peculiar and complicated. They arise out of a contract for sale of goods made by the Respondents with the Petitioner. In the contract of sale there was a provision that all disputes arising out of the sale should be settled by arbitration. A dispute did arise and cross-claims were made. The parties commenced arbitration proceedings, but disagreed as to appointment of arbitrators. An arbitrator appointed by the Respondents made an *ex parte* award in their favour, but this was set aside by the Court. New arbitrators chosen in a manner ordered by the Court were then appointed. Another *ex parte* award was made and this also was set aside. Against this order setting it aside the Respondents appealed. The Petitioner then filed a suit claiming the damages he had sought in the arbitration. This was met by an application to stay the suit pending the disposal of the above-mentioned appeal, or otherwise until the matter was settled by arbitration. The High Court granted the stay. The Petitioner appealed against that order. The Court of Appeal then took up this appeal and the appeal before mentioned and it dismissed both appeals, the date of the dismissal of the last-mentioned being the 28th July 1922. The parties then again betook themselves to arbitration. Again the arbitrators were unable to agree and *ex parte* awards were made, one in favour

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of the Petitioner for Rs. 81,000 odd, the other in favour of the Respondents for Rs. 3,900 odd.

On the 5th December, the High Court, on the application of the Respondents, set aside the award in favour of the Petitioner. The Petitioner then raised a suit to set aside the award in favour of the Respondents, and it is in this suit that the petition comes before the Board. The High Court in its Original Jurisdiction set it aside, but on appeal the Appeal Court reversed and dismissed the suit. The Petitioner applied for leave to appeal, but this was refused upon the ground that the sum involved was neither directly nor indirectly of the value of Rs. 10,000.

The only question, therefore, is whether the case falls within the words of sec. 110; that section is as follows:—

110. In each of the cases mentioned in cls. (a) and (b) of sec. 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must evolve some substantial question of law.

Now, it is clear that the present case does not fall under the first paragraph because the actual subject of the suit is only Rs. 3,000 odd. Nor does it fall under sub-sec. (c) of sec. 109, which is as follows:—

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council,

because it has not been certified. It is, therefore, if at all, under the second paragraph of sec. 110. The learned Judges of the High Court have held that it does not so fall upon the ground that here what is affected directly or indirectly is not pro-

perty. The Appellant argued that it must be property because the right which the petition has to make good was the claim of right which, in the nomenclature of English law, is called a *chose in action*, and because the transference of such rights is dealt with in the Transfer of Property Act.

Their Lordships are not inclined to attempt any precise definition of the word "property." The Civil Procedure Code has not done so, and any definition might not be found in the future precisely to fit the circumstances which the kaleidoscope of actual experience may produce. But they think that the present is not a case where the issue of this suit can be said directly or indirectly to involve other property. Let the situation be considered. If this appeal were allowed and were successful, what would be the position? The Petitioner would indeed get rid of his present liability to pay Rs. 8,000, but that is the subject-matter of the suit and is not of the value of Rs. 10,000. What, then? The first thing that he would have to do would be to get rid of the judgment of the 28th July 1922, staying his suit. Against that judgment he did not appeal, and he feels that so much that he has appended to the present petition a further prayer to be allowed to appeal against that order. He would have to be successful in that appeal and then also he would have to succeed on the merits of his suit, and not till then would he be in possession of anything tangible in the way of money.

Their Lordships think that this is not really consequential on the present decree and too remote to be entitled to the description of being property indirectly involved in the issue of this suit. It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because

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such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-sec. (c) of sec. 109.

Their Lordships will humbly advise His Majesty to refuse the prayer of the Petitioner with costs.

Solicitors : Messrs. Downer & Johnson for the Petitioner.

Solicitors : Messrs. Watkins & Hunter for the Respondent Company.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

LORD SHAW.

LORD CARSON.

LORD BLANESBURGH

GHULAM RASUL

SIR JOHN EDGE

KHAN, Appellant.

MR. AMRER ALI.

v.

1925,

THE SECRETARY OF

Heard, 9 and

STATE FOR INDIA IN

10, February. COUNCIL, Respondent.

Judgment,

12, March

Public documents, entries in, admissibility of—Exception to rule of hearsay evidence—Reasons therefor—Evidence Act (I of 1872), sec. 74.

For a series of years since 1852 Plaintiff's family had been shown in the Revenue Records as belonging to a caste of Mohals, which, if true, would make the Plaintiff a Rajput and so a member of an agricultural tribe. The Appellate Court in India discounted these entries on the ground that "there was no proof that whoever first caused this entry to be made had any title to the use of the term Mohal."

Held—That the reason given was not sufficient to disregard entries in public records made in accordance with the requirements of the law, in a pedigree case.

Statements in public documents are receivable to prove the facts stated on the general grounds that they were made by

the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. The reason for this exception made to the rule of hearsay evidence is that in nearly all cases, after a lapse of years, it would be impossible to give evidence that the statements contained in such documents were in fact true.

This was an appeal (No. 2 of 1924) by special leave from a decree, dated the 25th October 1920, of the High Court at Lahore, which reversed a decree, dated the 24th June 1915, of the Court of the Subordinate Judge, Ludhiana.

The Appellant in 1912 purchased certain lands at Ramgarh and applied to have his name brought on to the register. An enquiry was held by the settlement officer who rejected the application on the ground that the applicant was not a member of an agricultural tribe and that the alienation was of a type which the legislature intended to prevent by the provisions of the Land Alienation Act, XIII of 1900. Appeals to the Deputy Commissioner and Financial Commissioner were dismissed.

On the 3rd November 1913, the Appellant instituted this suit for a declaration that he was a Mohal Rajput by caste and that in the Revenue papers he and his ancestors since 1852 had been wrongly described as Mohal Khayyat by caste. The only issue in the trial was "Is the Plaintiff a Rajput?"

The Subordinate Judge answered the question in the affirmative and made a decree in favour of the Plaintiff.

He held that one Mohal, a Rajput, became a Mahomedan in the time of the Emperor Akbar and was the founder of a clan of Rajputs which had since borne his name; that Nathu, a descendant of Mohal,

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was the great grandfather of the Plaintiff, and that he and his descendants had been described in the Revenue Records in the Ludhiana District as Khayyat Mohals, that Khayyat meant a tailor and signified a calling and not a caste, and that Khayyat Mohals had the same status as Mohal Rajputs. On appeal the High Court (Chevis and Scott Smith, JJ.) held that the Plaintiff's alleged descent from Mohal was not established and that there was no proof that Nathu had any real claim to be described as a Mohal. In conclusion they commented on the fact that the Plaintiff himself had failed to give evidence as to the families into which he and his relations had married.

In the event they held that the Plaintiff had not established his contention that he was a Rajput and they reversed the decision of the trial Court.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.

Messrs. Dunne, K. C. and Kenworthy Brown for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—The (Plaintiff) Appellant is a resident in the District of Ludhiana of the Punjab and is the owner of "culturable lands" in that District. In or about the year 1912 he bought certain other lands and applied for mutation of names. The Deputy Commissioner and, on appeal, the Financial Commissioner of the Punjab, on the 3rd May 1913, refused the application on the ground that the alienation in question was against the policy of the Punjab Alienation of Lands Act No. 13 of 1900—that Act by sec. 3 enacts as follows:—

"3.—(1) A person who desires to make a permanent alienation of his land shall be at liberty to make such alienation where—

(a) The alienor is not a member of an agricultural tribe; or

(c) The alienor is a member of an agricultural tribe and the alienee is a member of the same tribe or of a tribe in the same group.

"(2) Except in the cases provided for in sub-sec. (1), a permanent alienation of land shall not take effect as such unless and until sanction is given thereto by a Deputy Commissioner.

"(3) The Deputy Commissioner shall enquire into the circumstances of the alienation and shall have discretion to grant or refuse the sanction required by sub-sec. (2)."

The grounds of the decision both of the Deputy Commissioner and the Financial Commissioner were that the Plaintiff was described in the Revenue Records as "Khayyat Mohal," that that tribe was not one of the notified agricultural tribes of the Ludhiana District, nor was the Mohal tribe to which it corresponded. The Plaintiff alleged that although described in the Revenue Record of the land belonging to him as "Mohal Khayyat" he was nevertheless a Rajput and a member of an agricultural tribe. It was admitted that if he was a Rajput he was entitled to become the alienee of the property, as Rajputs were an agricultural tribe and were so declared in the "Punjab Gazette" of the 21st April 1904.

The Plaintiff then instituted this suit in the Court of the District Judge of Ludhiana against the Respondent and prayed for a declaratory decree to the effect that he was a Mohal Rajput and that all the entries in the Revenue papers showing his caste as "Mohal Khayyat" were incorrect. The parties went to trial on one issue only, namely, "Is the Plaintiff a Rajput?"

On the 24th June 1915, the Subordinate Judge, after hearing a number of witnesses and examining a number of documents on both sides, delivered judgment and passed a decree in favour of the Plaintiff. The Respondent appealed to the

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High Court of Judicature at Lahore and, on the 25th October 1920, that Court set aside the decree of the Subordinate Judge and dismissed the Plaintiff's suit. Hence the present appeal in which, admittedly, the only question for determination is whether the Plaintiff is a Rajput.

The case made by the Plaintiff, as the Appellate Court states, was that although in the Revenue Records the Plaintiff's family has been shown since 1852 as holding land and their caste been described as Khayyat Mohal, the term Khayyat does not denote a tribe, but merely a profession, *viz.*, tailoring, that his got (*i.e.*, subtribe) is Mohal and that his real tribe is Rajput and that there is no other tribe except that of Rajputs which contains a got of the name of Mohal. The Revenue Records of Mauza Shahna give his pedigree back as far as his great grandfather Nathu who by a pedigree propounded by the Plaintiff was alleged to be one of the four sons of Khana who was himself descended in the 13th generation from Mohal. The Appellate Court admitted that if Nathu was proved to be descended as alleged from Khana the Plaintiff would have proved his right to be a member of the Rajput tribe. That Court, however, refused to rely upon the evidence produced as proving that the Plaintiff traced his pedigree through his great grandfather Nathu to Khana and thence to Mohal. In the view that their Lordships take of the other evidence in the case proving that the Plaintiff's got is Mohal and that thereby his tribe is Rajput their Lordships do not think it necessary to pronounce any opinion as to whether Nathu was descended from Khana. As the Court of Appeal finds

"there seems to be little doubt that Mohal is the name of a sub-division of the tribe of Rajputs, and so far as the evidence in this case shows there is no

other tribe in the Punjab which has a got of the name of Mohal."

and the same Court also states—

"The conclusion at which we arrive is that, so far as is known, there are no persons in the Punjab who have any real right to be described as Mohals except Rajputs and some Jats, who rightly or wrongly claim that they are really of Rajput origin."

It is clear, therefore, that if the Appellate Court had been of opinion that the Plaintiff had a title to the use of the term Mohal that Court would have decided in favour of the Appellant. Now the first thing to be observed is that in the course of the present litigation S. Bachan Singh, the Respondent's pleader, stated on oath that it was conceded "that Plaintiff is Mohal got of Khayyat tribe" (*see* statement of 27th July 1914).

The Appellate Court has found that the mere fact that various members of the family have worked at tailoring cannot be regarded as any proof that the Plaintiff is not a Rajput, for, as stated in Ibbetson's Census Report, p. 333, which has been quoted by the learned Subordinate Judge, men of all castes follow the trade; or as the Subordinate Judge has stated, Khayyats do not make a tribal clan by themselves. It is proved beyond all doubt and so found by the Appellate Court that in the Revenue Records the Plaintiff's family has been shown since 1852 as holding land, their caste being described as Khayyat Mohal—and there are in evidence extracts from the settlement records of this District for 1853 in which Ilahia and Gahia granduncle and grandfather of the Plaintiff are put down as owners of 25 ghumaons of land in the village of Shahna, their quaum being mentioned as Khayyat (Mahommadan) and got as Mohal. Similar entries are to be found in relation to the settlement of 1882. It is admitted by the Appellate Court that if these records truly described the Plaintiff's family as

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Mohals it would prove the Plaintiff's right in this action, but they attempt to dispose of this evidence by saying "there is no proof that whoever first caused this entry to be made had any real title to the use of the term Mohal." That is the only link apparently which the Appellate Court has found to be absent from the evidence necessary to prove the Plaintiff's case.

Their Lordships cannot share the view of the Appellate Court that evidence of this character, taken from public records for a series of years since 1852 and recorded in accordance with the requirements of the law, can in a pedigree case be disregarded for the reason stated by the Appellate Court. No evidence is given and no suggestion is made that such entries were false or that there was any existing reason why deliberately false entries should have been made. In such a case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorised agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community (Taylor, Law of Evidence, 10th Ed., sec. 1591). In many cases, indeed, in nearly all cases, after a lapse of years, it would be impossible to give evidence that the statements contained in such documents were in fact true, and it is for this reason that such an exception is made to the rule of hearsay evidence. Their Lordships being of opinion that the Plaintiff has proved that he is entitled to the description of Mohal, it follows from the facts found by the Appellate Court, and already referred to, that the Plaintiff is a Rajput and is entitled to the relief claimed in this action. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed with costs

here and in the Court below and that the decree of the Subordinate Judge should be restored.

Solicitor: Mr. E. Delgado for the Appellant.

Solicitor: Solicitor, India Office, for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 160 OF 1924.

SANDERSON, C. J.	}	BALDEODAS LOHEA
BUCKLAND, J.		v.
1924,		SHUBCHURN DAS GOENKA
17, June.		and ors.

Order setting aside an ex parte decree and attachment thereunder, if appealable—"Judgment," what is, within cl. 15 of the Letters Patent—Civil Procedure Code (Act V of 1908), Or. 5, r. 17—"Due and reasonable diligence," meaning of, test of.

In execution of an ex parte decree in a suit under Or. 37, C. P. C., certain properties were attached. Subsequently the decree and attachment were set aside on the ground that the summons had not been duly served:

Held—That the order was not a "judgment" within the meaning of cl. 15 of the Letters Patent and was not appealable.

THE JUSTICE OF THE PEACE FOR CALCUTTA v. THE ORIENTAL GAS CO. (1) *relied on.*

MAHARAJ KISHORE v. KIRANSHOSHI (2) *referred to.*

Per SANDERSON, C. J.—It was not a judgment because it left the merits of the questions between the parties undecided. The setting aside of the attachment which was merely consequential upon the setting aside of the decree did not make the order appealable.

(1) 8 B. L. R. 433 (1872).

(2) J. L. R. 49 Cal. 616 (1921).

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Per BUCKLAND, J.—An order to be a “judgment” within cl. 15 must be one affecting the merits of the dispute between the parties deciding some right or liability. An order setting aside an attachment consequential on the setting aside of the decree under which the attachment was made, though it affects some right between the parties, does not make the order appealable.

What is “due and reasonable diligence” within the meaning of Or. 5, r. 17, C. P. C., depends on the facts of each particular case. Generally if a process-server goes to a place on a day and hour when he may expect to find the Defendant there and does all that is required under the section, if he cannot find the Defendant (and could not find him whatever further steps he took by reason of his absence), then it is not necessary for him to repeat his attempts to make personal service.

COHEN v. NURSINGDAS ADDY (3), RAJENDRA NATH v. SYED JAN MEAH (4) and SITARAM v. KALANDI (5) referred to.

This was an appeal from an order of Mr. Justice Page, dated the 22nd July 1924, passed in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. N. Sirkar for the Appellant.

Mr. A. K. Roy for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Plaintiff against an order made by my learned brother Mr. Justice Page on the 22nd of July 1924.

(3) I. L. R. 19 Cal. 202 (1892).

(4) 2 O. W. N. 574 (1898).

(5) 17 C.J.W. N. 999 (1911).

The facts which it is necessary for me to state are as follows :—

The Plaintiff filed the plaint on the 28th of February 1924, and summary proceedings were taken under Or. 37 of the Civil Procedure Code. On the 15th of April 1924, the Plaintiff obtained a decree, which was made *ex parte*. The Plaintiff, having obtained his decree, attached certain premises in Calcutta. On the 24th of June, notice of an application was issued on behalf of the Defendants for an order that the *ex parte* decree of the 15th of April 1924 and the attachment effected in execution thereof on the interests of the Defendants in the premises therein mentioned should be set aside and that the Defendants should have unconditional leave to defend the suit.

The learned Judge heard the application and on the 22nd of July 1924 made an order that the decree and all proceedings in execution thereof be set aside and that the attachment issued in execution of the said decree be withdrawn. It is against that order that the Plaintiff has appealed.

The learned Advocate, who appeared for the Defendants, took a preliminary point that no appeal lies on the ground that the order, which the learned Judge made on the 22nd of July 1924, was not a “judgment” within the meaning of cl. 15 of the Letters Patent.

The main question before the learned Judge was whether the summons had been duly and properly served.

The learned Judge heard evidence in respect of this matter and delivered a judgment in which he dealt with the various points, which had been raised, at considerable length.

At first sight it may seem unreasonable to suggest that this is not a “judgment.”

But the decisions of this Court go to show that the word “judgment” in cl.

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15 of the Letters Patent does not include every order which a learned Judge makes or every decision given by a learned Judge, even though it may be accompanied by a statement of the reasons which actuated the learned Judge in arriving at his decision.

The decisions of this Court upon this point are numerous. Many of them have been based upon the definition which was given by the learned Chief Justice Sir Richard Couch in the case of *The Justice of the Peace for Calcutta v. The Oriental Gas Co.* (1), and, some of them, in my opinion, are difficult to reconcile with the judgment of the learned Chief Justice in that case.

On previous occasions I have expressed the opinion that, whenever this point arises, it is for the Court to decide whether the particular order in question is a judgment within the meaning of cl. 15 having regard to the particular facts of the case and to the nature of the order. If the learned Judge had refused the Defendants' application to set aside the *ex parte* decree, it is not disputed that the Defendants would have had a right of appeal.

The reason for that is, that there would have been a final decision as to the merits of the questions between the parties in the suit, and the liability of the Defendants would have been finally established, so far as that Court was concerned.

That view of the matter is recognised in the Civil Procedure Code, because Or. 43, r. 1 provides that "An appeal shall lie from the following orders under the provisions of sec. 104, namely,"
(d) an order under r. 13 of Or. 9 rejecting an "application (in a case open to appeal) for an order to set aside a decree passed *ex parte*."

Though there is a right of appeal against

(1) 8 B. L. R. 433 (1872).

an order rejecting an application to set aside a decree passed *ex parte*, it does not follow that there is a right of appeal when the learned Judge, instead of rejecting the application, accedes to it and sets aside the *ex parte* decree.

As far as I am aware, this is the first case in which it has been alleged that there is a right of appeal in such a case as this : and, no case has been brought to our attention in which the exact point has been decided.

There must have been many cases, in which an *ex parte* decree has been set aside by a learned Judge sitting on the Original Side, and it is significant that, as far as I am aware, there has been no appeal to this Court from such an order.

I have come to the conclusion that there is no right of appeal ; and, I base my judgment upon the principle laid down in the case of *The Justice of the Peace for Calcutta v. The Oriental Gas Co.* (1) and upon the principle which I think underlies the decision in *Maharaj Kishore Khanna v. Kiranshoshi Dassi* (2).

The result of the learned Judge's order is, that the merits of the questions between the parties in the suit have not been decided. On the contrary the result is that the suit has been restored and the matters in dispute and the question whether the Defendants are liable for the amount claimed have yet to be decided.

The learned Advocate, who appeared for the Plaintiff-Appellant, submitted that the order in this case is not an order merely setting aside the *ex parte* decree, and he drew attention to the fact that it directed that all proceedings in execution should be set aside, and the attachment should be withdrawn : and, he argued that inas-

(1) 8 B. L. R. 433 (1872).

(2) I. L. R. 40 Cal. 616 (1921).

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much as the order included that provision, it was an appealable order.

That submission was at one period of the argument attractive to my mind, but on further consideration I am of opinion that it is not sufficient to justify the Court in holding that this order is appealable.

The proceedings in execution were consequential upon the decree, and if an order, which merely sets aside an *ex parte* decree, is not appealable, it seems to me impossible to hold that the decree is appealable simply because the Plaintiff had the time and opportunity to attach property in execution of the decree, before the appeal was filed.

It was further argued that the learned Judge in this case had not exercised the jurisdiction vested in him by Or. 9, r. 13 of the Civil Procedure Code and that the application was in reality an application for a review of the judgment by which he made the *ex parte* decree on the 15th of April 1924.

I am unable to accept that argument; I think there is no doubt that the application was made by the Defendants under Or. 9, r. 13, and the learned Judge purported to exercise the jurisdiction vested in him by that rule. The Court might find itself in difficulties in future cases if we were to accede to the learned Advocate's argument in that respect.

The conclusion, therefore, at which I have arrived is that no appeal lies. That is sufficient to dispose of the appeal and in my opinion it must be dismissed.

The appeal, however, was heard upon its merits; and the learned Advocate invited us to express our opinion upon the merits.

The learned Judge dealt with the matter under the second part of Or. 5, r. 17. That rule provides:—"Where the Defendant or his agent or such other person

as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the Defendant and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain"

The learned Judge came to the conclusion that one Madanlal was an authorised agent of the Defendants to take charge of legal proceedings. I am not sure whether he meant by that finding to hold that Madanlal was an agent of the Defendants empowered to accept service of the summons in this suit. If the learned Judge was of the opinion that Madanlal was an agent empowered to accept the summons on behalf of the Defendants it seems to me that there was evidence which went to show that the summons was tendered to Madanlal and that he refused to accept it, and it might be argued with considerable force that the first part of r. 17 applied to this case. But in the absence of an express finding upon that point, in my judgment, it would not be safe for this Court to rely upon it.

A further point was raised in the course of the argument, namely, that the application of the 24th of June 1924 was out of time: and, reliance was placed upon sec. 164 of the Limitation Act, which provides that for an application by a Defendant for an order to set aside a decree passed *ex parte* the period of limitation is 30 days, to run from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree.

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In this case the learned Judge held that the summons was not duly served and there is no express finding when the Defendants had knowledge of the decree. There are, however, findings, which go near to a conclusion that the Defendants must have known of the decree on or about the date on which it was passed: and if it were open to us to decide this appeal upon the merits, I should have felt a strong inclination to have some further evidence or some further enquiry upon that point inasmuch as the application to set aside the decree was not made until the 24th of June 1924 though the decree was made on the 15th April 1924.

Finally it was argued by the learned Advocate that the learned Judge's conclusion, that those who were acting on behalf of the Plaintiff in effecting service of the summons, had not used all reasonable and due diligence to find the Defendants was wrong. It was argued that the learned Judge based his conclusion upon a finding that the serving peon, after discovering that the Defendants, at the time when he attended at 12, Banstolla Gully, were not in the house, admittedly made no enquiries whatsoever of anybody as to their whereabouts.

That finding of the learned Judge was strenuously challenged: and, it seems to me on the evidence that there is considerable force in the argument which was presented to us in that respect.

I do not mean to detract in any way from the principle involved in the learned Judge's judgment. I agree that it is necessary for the Court to be satisfied on such an application as this that the provisions of the second part of r. 17 of Or. 5 have been really complied with. It is necessary in each case for the Court to see whether in fact the serving officer has used all due and reasonable diligence with a

view to finding the Defendant before the process of affixing the summons to the outer door or some conspicuous part of the house is resorted to.

It is not necessary, in my judgment, for me to say more as to the merits, in view of the fact that I have arrived at the conclusion that an appeal does not lie.

For these reasons, in my judgment, the appeal must be dismissed with costs.

BUCKLAND, J.—It is with regret that I concur in the conclusion that this appeal must be dismissed on the ground that the order is not appealable: for, upon the findings of fact of the learned Judge, apart from my own view of the evidence generally, I would come to the opposite conclusion. It is, however, some satisfaction to know that if justice requires that a decree should be made in favour of the Plaintiff he will have a further opportunity of obtaining it.

Before considering whether or not the order appealed against is a "judgment" within cl. 15 of the Letters Patent, I desire briefly to refer to one aspect of the question which was presented by the learned Counsel for the Appellant. He submitted that the order was appealable inasmuch as it could only have been made by way of review under Or. 47 of the Code of Civil Procedure, since as an application under Or. 9, r. 13 it obviously was barred by limitation.

I may say that, speaking for myself, I should have been willing to accede to this argument, had there been the faintest indication in the record that the learned Judge purported to make the order by way of review. We have been referred to the petition upon which the order was based and the statements which it contains setting out matters beyond what is necessary for the purpose of an application under Or. 9, r. 13. That may be and is

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no doubt the case, but it does not follow, particularly when the prolixity of petitions and pleadings in this Court is borne in mind, that the application was made by way of review or that the learned Judge so made the order. The Code of Civil Procedure provides that an application for review shall be made in a particular form. There is no pretence whatever that the petition in this case is in that form, but this is not a point of much cogency, as similar applications have been treated as applications for review on the Original Side of the Court. The learned Judge, however, says that the Defendant brings the application by reason of the provisions of Or. 9, r. 13 and had there been, I repeat, any indication upon the record that he was proceeding by way of review, the position might have been different. As it is, the order must be regarded as having been made exclusively under that order and rule.

The order provides in the first place that the *ex parte* decree shall be set aside and the suit restored, and further that certain attachment proceedings incidental thereto shall be set aside. These are two separate and distinct matters.

The order restoring the suit is not appealable under the Code of Civil Procedure. The intention of the Code would appear to be that in the circumstances to which Or. 9 is applicable—be it under r. 13 or under r. 9—where the result is that no further proceedings may take place, an appeal will lie, but where a party who has been deprived of his decree will have a further opportunity of obtaining it, if justice requires that he should do so, then no appeal lies. These principles would appear to be material in considering what is a “judgment,” which has been the subject of many decisions of this Court.

The order restoring the suit does not

affect the merits of the question between the parties by deciding some right or liability, for the right or liability is left open to be decided, and upon the further hearing, which necessarily follows from the order, it will be decided.

A further argument addressed to us is that the order restoring the suit is an order determining some right or liability because it also sets aside the attachment since obtained, and that, in consequence, the right of the Plaintiff to have a certain property attached and sold at and from the date of the attachment is a right which has been determined and of which he has been deprived.

This argument appears to me to be fallacious. I apprehend that the definition of a “judgment” which is from *The Oriental Gas Company’s* case (1) and has been cited in many decisions of this Court must be applicable in its entirety to the order actually appealed against, and that you cannot apply one part of it to the order under appeal and another part of it to some other order which is or may be affected if the order appealed against is reversed. It does not affect the matter that the order setting aside the attachment is also appealed against. If anything, that lessens the force of the argument, for the latter order may be dealt with separately.

No doubt the judgment states the views of the learned Judge, but every judicial exposition of a Judge’s opinion is not a “judgment” within the meaning of cl. 15 of the Letters Patent. There is also no doubt ^{where} ~~the~~ ^{decision} ~~is~~ ^{is} ~~that~~ ^{is} ~~the~~ ^{is} ~~es~~ ^{is} ~~in~~ ^{is} ~~qu~~ ^{is} ~~decree~~ ^{is} ~~should~~ ^{is} ~~be~~ ^{is} ~~set~~ ^{is} ~~aside~~ ^{is} ~~That~~ ^{is} ~~does~~ ^{is} ~~not~~ ^{is} ~~affect~~ ^{is} ~~the~~ ^{is} ~~merits~~ ^{is} ~~of~~ ^{is} ~~the~~ ^{is} ~~dispute~~ ^{is} ~~between~~ ^{is} ~~the~~ ^{is} ~~parties,~~ ^{is} ~~still~~ ^{is} ~~less,~~ ^{is} ~~apart~~ ^{is} ~~from~~ ^{is} ~~the~~ ^{is} ~~attachment,~~ ^{is} ~~does~~ ^{is} ~~it~~ ^{is} ~~decide~~ ^{is} ~~any~~ ^{is} ~~right~~ ^{is} ~~or~~ ^{is} ~~liability.~~ ^{is} ~~As~~ ^{is} ~~regards~~ ^{is} ~~the~~ ^{is} ~~proceedings~~ ^{is} ~~for~~ ^{is} ~~attachment~~ ^{is} ~~or~~ ^{is} ~~the~~ ^{is} ~~right~~ ^{is} ~~to~~ ^{is}

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have the attachment set aside, independently of the right to have the suit restored, there has been no adjudication and it is impossible to say that the decision embodied in the judgment of the learned Judge affects the merits of any question upon which the attachment or the right to attach depends, or that any such adjudication determines any right of the Plaintiff or liability of the Defendant. The order setting aside the attachment is, in my opinion, dependent upon the order restoring the suit and consequential thereupon, and because it is affected as a consequence of the order restoring the suit it is not open to the Appellant to contend that therefore the order restoring the suit, which is otherwise not appealable, becomes appealable. In my opinion, the order which we are asked to set aside is not appealable and the appeal will have to be dismissed upon that ground.

As regards the merits, I do not propose to examine the facts and circumstances in the manner which it would have been necessary to do were we allowing the appeal on that ground, but I have already generally stated my conclusion. It does, however, appear upon a perusal of the judgment that the learned Judge has not considered the effect of the presence of Madanlal as, to use his words, "the authorized agent of the Defendants to take charge of legal proceedings," with reference to Or. 5, r. 17. The learned Judge clearly accepted the evidence adduced on behalf of the Plaintiff in preference to that adduced on behalf of the Defendant, and on a scrutiny of the evidence he set aside require no great effort to hold that Madanlal, whether or not the learned Judge so meant by the words which I have quoted, was "an agent empowered to accept service of summons on behalf of the Defendant." I need not dwell upon this aspect

of the matter or the effect of such a conclusion in relation to the other findings of the learned Judge or the evidence generally, for the learned Judge has not considered it and moreover it is unnecessary in view of the order to be made on the appeal.

The learned Judge has on several occasions used the expression "substituted service" which indicates some slight degree of misapprehension in his mind. No doubt if the circumstances are such that eventually the writ is affixed on the outer door of the house there is a substitution in the sense that the document is not left in the hands of the person on whom service should be effected, if possible, but that is not "substituted service" as recognized by the Code of Civil Procedure. "Substituted service" is provided for by Or. 5, r. 20, but, as there is no question of the service being substituted service in this case, I need not refer to it further, beyond mentioning that before service may be so effected the Court has to be satisfied with regard to certain matters which do not arise where service is effected in the manner provided by Or. 5, r. 17.

Before concluding I desire to comment on certain general observations made by the learned Judge in the course of his judgment, as briefly as I may without referring to the evidence in detail. Or. 5, r. 17 provides that "where the serving officer after using all due and reasonable diligence, cannot find the Defendant he shall do certain things for the purpose of effecting service. The words "all due and reasonable diligence" are general, as necessarily they must be, for they are applicable to every case where service has to be effected.

In *Cohen v. Nursingdas Addy* (3), Petheram, C. J., sitting singly on the Original Side of the Court made certain obser-

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ventions with regard to this. He said: "It is true that you would go to a man's house and not find him, but that that is not attempting to find him. You should go to his house, make enquiries and if necessary follow him. You should make enquiries to find out when he is likely to be at home and go to the house at a time when he can be found." These observations have been quoted by the learned Judge in the order under appeal. In *Rajendra Nath Sanyal v. Syed Jan Meah* (4), Jenkins, J., delivered a judgment as to what is required to be proved as to service in undefended cases, and said: "For the purpose of establishing that the Defendant cannot be found, it must be shewn that proper efforts to find him were made, as for instance, that the serving officer went to the place or places and at the times at which it was reasonable to expect he would be found"—that is so far as I need quote, the remainder refers to other matters to be proved.

The words in these two judgments are in strong contrast, the earlier appears to prescribe a detailed procedure by way of a general rule as to what is "due and reasonable diligence," while the latter merely gives an instance.

It has been said more than once that each case must depend on its own circumstances, a proposition with which I fully agree, which makes it impossible by reference to details to say what is necessary by way of "reasonable and due diligence." What is due diligence in one case may not even be diligence in another case; and the words "due" and "reasonable" would be inapplicable to diligence which took the process-server repeatedly to the Defendant's residence at an hour when he might be expected to be at his business office. What further attempts should be

made to find the Defendant elsewhere, assuming he has not been found at the place where he may be expected to be at a particular hour, must in a large measure depend upon the information available to the process-server. If in fact the Defendant is absent from the locality it cannot be said to be necessary for the purpose of showing that he was reasonably and duly diligent for the process-server to go over and over again. This point was dealt with by Mookerjee and Carnduff, J.J., in *Sitaram Sivami v. Kalandi Patra* (5). In that case the serving peon when he went to the house of the Defendant was informed that the latter had gone to Vizagapatam. He thereupon affixed a copy of the notice on the outer door of the house and it appears that the Defendant did not return from Vizagapatam till three months later. The learned Judges said: "It was consequently impossible for the peon to retain the summons in his custody till the return of the Defendant, and as the Defendant had left the jurisdiction of the Court, it was not possible for the peon to effect service upon him personally outside the jurisdiction." If that is the proper course for the peon to pursue in such circumstances, does it follow that diligence, which would have been such as is required by the section if the process-server had known that the Defendant was absent, is no longer diligence if it so happens that he is not told that the Defendant is absent and that subsequently transpires, when the effectiveness of the service is in question, to have been the fact? In my opinion, provided the process-server goes to a place on a day and hour when he may expect to find the Defendant there and does all that is required under the section, if he cannot find the Defendant and he could not find him

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whatever further steps he took by reason of his absence, then the position is such as we find it in this case, and I cannot perceive that it is necessary for the process-server to repeat his attempts to effect personal service.

The learned Judge has used the word "perfunctory" but I find it quite impossible to take the view that what took place on the occasion when the summons eventually was affixed upon the outer door of the house and subsequently removed by Madanlal was perfunctory.

The practice of the Court as to proof of service and matters to be proved has obtained, possibly with modifications, for very many years and I have been led to make these observations lest by passing over the learned Judge's observations in silence I might be deemed to endorse his interpretation of the effect of the section. Where the fact of service is contested it will be a matter for detailed consideration as to how service purports to have been effected, and in each case it will be necessary to show that the process-server was reasonably and duly diligent in his attempts to effect personal service, due regard being had to the particular circumstances.

For reasons already given I agree that the appeal must be dismissed with costs.

Mr. N. C. Mondal, Solicitor for the Appellant.

Mr. C. C. Bose, Solicitor for the Respondents.

S. N. B.

[INSOLVENCY JURISDICTION.]

No. 88 of 1925.

PEARSON J.

1925,

23, June.

In the matter of
GOPAL DASS AURORA.

Insolvent not producing books before the Official Assignee on the ground that they are not in his possession—Refusal by the Registrar in insolvency to pass protection order—When does the Court interfere with such discretion of the Registrar.

Where the books of a joint family business were in possession of a Receiver appointed in a partition suit between the members, one of whom had been adjudicated an insolvent, and the Registrar in insolvency refused to pass protection order in favour of the insolvent on the ground that the insolvent had not yet produced the books before the Official Assignee:

Held—That in spite of sec. 36 of the Insolvency Act, which may be availed of by the Official Assignee or a creditor for the production of the books, the Court would not interfere with the discretion of the Registrar unless it was convinced that the insolvent had taken all possible steps for the production of the books before the Official Assignee.

The facts of the case will appear from the judgment.

Mr. S. N. Banerjee for the Insolvent.

No one for the other side.

The JUDGMENT OF THE COURT was as follows:—

PEARSON, J.—This is an appeal against an order made by the Registrar in insolvency, dated the 5th June 1925, by which he refused to pass a protection order in favour of the insolvent. He has set out the grounds on which he relies in his order, and the broad ground upon which his action has been taken is that the insolvent is a trader, carried on a joint family business of which family he was the *karta*, and

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that the books have not yet been produced before the Official Assignee. It appears that at the time the adjudication order was applied for, the Registrar in insolvency refused the application on the same ground. The order, however, was made by this Court on the 23rd April, and the schedule was filed. It appears from the order of the Registrar that the insolvent filed a list of the books at the time of his application for adjudication. It appears that they are in the possession of two Receivers who were appointed in a partition suit between the insolvent and the infant members of his family. It was instituted in December last year. An order of this Court has been made directing the Receivers to deal with the insolvent's share in the property. The list of books filed by the insolvent was signed by the Receivers and he asked that he might be exempted from producing the books stating that they would be produced by the Receivers. That statement has not been borne out by what has subsequently happened, and at the time of application for protection order before the Registrar it was stated by the Attorney of the insolvent that he intended to apply to the Court for an order on the Receivers to deliver the books to the Official Assignee.

The main ground argued in the present application before me is that it is not possible for the insolvent himself to take any further steps than he has done to obtain the production of these books because not only are they in the possession of the Receivers but the books themselves are not the books of the insolvent's own business but of the joint family business, of which he is one of the coparceners. It is urged that the Official Assignee himself could apply to this Court under the provisions of sec. 36 for an order that the books should be made over by the Receivers, or

if not the official Assignee, then a creditor might make the application. It is perfectly true that that procedure is open in this case. At the same time, *prima facie*, it is for the insolvent to produce his books, and before interfering with the discretion that has been exercised by the Registrar in this case I should require to be convinced that the insolvent had himself taken all steps that were in his power to effect the production of the books before the Official Assignee. Consequently I think I ought not to interfere with the order that has been made at present. I find it hard to believe that if the insolvent had taken proper steps even by approaching the Receivers unofficially or asking the Official Assignee for a letter on his behalf or by writing a letter of his own to the Receivers stating what the facts were, the Receivers as officers of this Court would have refused to assist the Official Assignee who is also an officer of this Court, by producing the books in his office. It may be that the terms of the order under which they are in possession of the books might technically prevent them from parting with the actual possession. If so, that is a matter which can easily be remedied by an application made to this Court. But so far as the actual production goes, I can see no reason to think that if proper steps had been taken they might not have been by now effective.

With these remarks I dismiss the application. It will, of course, be open to the insolvent to renew his application for protection order on obtaining the books to be produced to the satisfaction of the Official Assignee.

Mr. S. C. Palit, Solicitor for the Insolvent.

Mr. J. K. Dutt, Solicitor for the Adjudicating Creditor.

S. N. B.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 572 OF 1925.

GRAVES, J.
B. B. GHOSE, J.L. R. COUNSELL,
Petitioner,

v.

SM. SUKUMARI DEBI,
Opposite Party.1925,
25, June

Calcutta Rent Act (III, B. C., of 1920)—Standardisation of rent—Lease including property outside Calcutta—Jurisdiction of Rent Controller, where intention of parties was not really to create tenancy in respect of such property.

Where the lease creating the tenancy comprised property in Calcutta as also some to which the Calcutta Rent Act could not apply and the Rent Controller fixed a standard rent for the Calcutta property :

Held—That the real test to be applied was whether there was any genuine intention on the part of the lessor that the tenant should be put in possession of the property to which the Calcutta Rent Act could not apply; and it being evident in the circumstances of the case that there was really no such intention but that such property was put into the lease as an attempt to evade the provisions of the Rent Act, the Rent Controller had jurisdiction to fix a standard rent in respect of the Calcutta property.

This was a Rule granted on the 15th May 1925, against an order of the President of the Calcutta Improvement Tribunal (Mr. S. C. Banerji), dated the 4th April 1925.

The facts of the case will appear from the judgment.

Mr. A. N. Chaudhuri and Babu Hiralal Ganguly for the Petitioner.

Mr. B. Chakravarty, Sir P. C. Mitter and Babu Hiralal Chakravarty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

GRAVES, J.—This Rule was obtained

at the instance of the Petitioner L. R. Counsell against an order of the President of the Tribunal, dated the 4th April 1925, refusing to fix a standard rent in respect of the premises referred to in the petition on the ground that they were outside the provisions of the Calcutta Rent Act.

The facts are these : On the 30th November 1922, a lease was entered into between Sukumari Debi of the one part and Lionel Ross Counsell, the Petitioner, of the other part. By the lease the upper flat of No. 6, Rowdon Street and the out-offices thereof together with a piece and parcel of land for "pleasure garden" situate at Mudi Shahnagore within the jurisdiction of the Tollygunge Municipality were demised to the Petitioner for a term of five years from the 1st December 1922 to the 30th November 1927 at a clear monthly rent of Rs. 450. The other provisions of the lease are not material for the purposes of this application. The schedule to the lease sets out in detail the demised premises. The first item in the schedule is the flat at 6, Rowdon Street; the second item is a plot and parcel of land situate at Mudi Shahnagore within the limits of the Tollygunge Municipality lying in Division 6, Sub-Division S, being Holding No. 57, Dihi 55 grams, Police Station Tollygunge, measuring about 10 cottas, more or less, bounded on the north and west by land of Sadunandan Lala, on the east by land of Lakhi Bibi, and on the south by a common passage.

The dispute between the parties really arises with regard to the second item of land contained in the schedule. The landlord contends that there was a genuine demise not merely of the upper flat of No. 6, Rowdon Street, but also of the 10 cottas of land at Tollygunge and that consequently the Rent Controller has no jurisdiction to fix the standard rent of the

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premises. The Petitioner, on the other hand, contends that there was no genuine letting of the 10 cottas of land at Tollygunge and that the real tenancy is of the upper flat of the premises No. 6, Rowdon Street and that, consequently, the jurisdiction of the Rent Controller has not been ousted. The matter came before the Rent Controller in the month of August 1924 and no evidence was adduced before him on behalf of the landlord. Apparently, his legal adviser left the Court without cross-examining any of the witnesses called on behalf of the Petitioner. Some evidence, however, was called before the President of the Tribunal on behalf of the landlord. The evidence consisted of two persons employed by the husband of the Petitioner but their evidence has not been accepted by the President of the Tribunal and both the Rent Controller and the President of the Tribunal have accepted the evidence which was given on behalf of the Petitioner before us. The Rent Controller found that the relationship of landlord and tenant did not exist as regards the Tollygunge plot and he states that this had not been challenged, but he relies for this finding on a judgment of the Munsif in certain civil proceedings between the parties. I understand that judgment was put in evidence as an exhibit before the Rent Controller but we think that it is better that this judgment should not be relied on for the purposes of this case. The sister of the Petitioner gave evidence before the Rent Controller and she stated that the plot of land in Tollygunge could not be traced. In the result, the Rent Controller relying, I think, on the passage in the Munsif's judgment, to which I have referred, found that the letting merely extended to the upper flat of No. 6, Rowdon Street and, accordingly, he has fixed a standard rent for the premises of

Rs. 259 per month inclusive of taxes. If he had jurisdiction then no question arises so far as we are concerned with regard to the standard rent that has been fixed. The matter was taken before the President of the Tribunal at the instance of the landlord and he raises as the second issue this: "Does the tenancy of the Opposite Party include anything besides the upper flat of No. 6, Rowdon Street? Is the flat a premises within the meaning of cl. (e) of sec. 2 of the Rent Act? If not, can any standard rent be fixed for it?"

With regard to the second issue the President states that it is admitted that the lease under which the Petitioner holds the flat covers also some land in Tollygunge and he states that the case of the Petitioner was that although the land was mentioned in the lease he had never been put in possession of it. The President goes on to state that the Petitioner had sworn to that and that he accepts his testimony on this point. Then he goes on to state that the contention of the tenant, that is to say, the Petitioner was that as the lessor has not put him in possession of the plot of land it could not be said to have been let to him and he seems to have arrived at a conclusion in favour of the landlord on the ground that he finds comprised in the lease this plot of land in Tollygunge. He states that no ground was raised by the Petitioner other than that he had never been put in possession of this land. He then states that the Petitioner used the word "mythical" with reference to the land and that he also stated that he had obtained information about its location so that it could not be said that it was fictitious.

With all respect to the learned President of the Tribunal I do not think that these two reasons dispose of this case. The mere fact that we find comprised in

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agreement of tenancy a certain plot of land is not conclusive that there was a genuine letting of that plot or that it was the intention of the parties that that should be included in the demise and I also think that mere fact that the land itself existed is not sufficient to dispose of the case. Whether the land in fact existed or not is not a question which we can decide but I am prepared to assume for the purposes of this judgment that there is a plot of land corresponding in general particulars with that set out in the lease, but even so I do not think that this disposes of the matter. I think the real test to be applied is this, was there any genuine intention on the part of the lessor that the Petitioner should be in possession of this piece of land as part of the demise, that is to say, was it really his intention that the lease should extend as well to the land at Tollygunge as to the upper flat of No. 6, Rowdon Street. Turning to the evidence on behalf of the Petitioner which has been accepted by both the Rent Controller and the President of the Tribunal we find that again and again the Petitioner was asking both before the tenancy to be shown the land and after the tenancy to be shown the land and to be put in possession thereof and when we find that there is no attempt either to indicate the land or to put the Petitioner in possession of it, I think the conclusion is inevitable that it was not really the intention of the lessor to include this in the demise but that he merely put it into the lease as an attempt to evade the provisions of the Rent Act with regard to the upper flat of the premises No. 6, Rowdon Street.

For these reasons, therefore, I think that the judgment of the President of the Tribunal is not correct and that we ought to restore the judgment of the Rent Controller who, I think, rightly held that he

had jurisdiction in the circumstances to fix a standard rent in respect of the upper flat of No. 6, Rowdon Street.

The result is that we make the Rule absolute and the Petitioner will be entitled to his costs—hearing-fee five gold mohurs.

It appears that the President of the Tribunal having decided the question of jurisdiction against the Petitioner stated that the other issues need not be considered. The matter, therefore, will go back to the President of the Tribunal in order that he may deal with the issues other than the issue No. 2 which deals with the question of jurisdiction.

B. B. GHOSH, J.—I agree.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1085 OF 1925.

CUMING, J.

B. B. GHOSH, J.
1925,

Heard, 13 and
16, November.
Judgment,
16, November.

L. R. COUNSELL,
Petitioner,

v.

SM. SUKUMARI DEBI,
Opposite Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 18—Point not taken before Controller, if can be tried by the President of the Tribunal—Revision, meaning of—Sec. 24, scope and effect of—Section, if authorises President to start a new case irrespective of what took place before Controller.

When before the Rent Controller no question was raised as to whether the rent was unduly low or not on the 1st November 1918, the President of the Tribunal has no jurisdiction under sec. 18 or sec. 24 of the Rent Act to express his opinion on the point, in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point.

It is a wrong application of the word "revision" to say that although the deci-

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sion of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision.

The proper reading of sec. 24 of the Act is that the President of the Tribunal is to follow the procedure laid down in revising a decision of the Controller and not that he can treat the application for revision as a suit irrespective of what was done before the Rent Controller.

The section apparently lays down that where there is a decision of the Controller on a particular question, the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him.

This was a Rule granted on the 21st August 1925 against the order of the President of the Tribunal (Calcutta Improvement Trust), dated the 17th August 1925.

The facts of the case will appear from the judgment.

Dr. D. N. Mitter and Babu Hira Lal Ganguli for the Petitioner.

Sir Provas Chandra Mitra and Babu Hira Lal Chuckerbutty for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This case came before this Court once on a previous occasion from a decision of the President of the Tribunal. On that occasion the President had dismissed the application for fixing a standard rent on the ground that the demised premises did not fall within the provisions of the Calcutta Rent Act. The decision of the learned President of the Tribunal was set aside by this Court and the case was sent back to him

for trial of the other issues involved in the case.

The present Rule was obtained by the tenant for the revision of the judgment now pronounced by the President fixing the standard rent in revision of the standard rent fixed by the Rent Controller.

Before the Rent Controller the relevant question that was raised apparently was that the premises were let out on a higher rent than what was alleged by the tenant on the 1st of November 1918. The pleader for the landlady made an application before the Rent Controller to the effect that the hearing of the matter should be adjourned till the decision of an appeal arising out of a suit for rent brought in the Alipur Court was decided. This the Controller refused to do. Upon that the pleader appearing for the landlady did not choose to take any part in the proceedings and did not cross-examine any of the witnesses examined on behalf of the tenant who was the Petitioner before the Rent Controller. On the evidence the Rent Controller found that the premises were let out on a rent of Rs. 235 per month on the 1st of November 1918 and adding 10 per cent. to that amount he fixed Rs. 259 as the standard rent for the demised premises.

The landlady applied for revision of that order under sec. 18 of the Rent Act on various pleas. A large number of issues were framed by the President. The material finding with regard to the rent at which the premises were let on the 1st of November 1918 as found by the Controller was affirmed by the President of the Tribunal. The learned President then took up for his consideration what were the 5th and 6th issues before him. These had reference to the fact whether a standard rent had been previously fixed

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with regard to the premises between two persons, namely, Tuni Meerza and Wishart and to a previous order with regard to the fixing of standard rent of a portion of the building which is now in question which is said to have been 6/7ths of the disputed premises. The President while observing that fixing of standard rent is an order *in rem* did not accept the fixing of the standard rent between Tuni Meerza and Wishart as such on the ground that the order was passed on compromise between the parties. He, therefore, used the fact that the rent was standardized only as a piece of evidence in coming to his conclusion and he made the same use of the standard rent fixed for the portion of the premises. The argument which he used was that in fixing the rent for the portion (6/7ths of the demised premises) the Rent Controller took into account what he thought to be the proper standard rent of the entire premises. This finding he used for the purpose of coming to his conclusion, which is the vital question in this case, that the rent at which the premises were let on the 1st November 1918 was too low. There was another fact which he took into consideration in coming to his conclusion and it was that the premises were let out at Rs. 280 in November 1913.

The decision of the President turned upon the question involved in the 4th issue before him.

The point taken on behalf of the Petitioner before us may be shortly stated thus: Under sec. 15, sub-sec. (3), cl. (d) the Rent Controller may fix the standard rent at such amount as he deems just where the rent paid on the 1st day of November 1918 was in the opinion of the Controller unduly low and the discretion of the Controller is limited by the 1st portion of the proviso (i) where it is stated

that under cl. (d) the standard rent shall not be fixed at a higher amount than the highest rent actually paid for the premises at any time since the 1st day of November 1918. As I have already stated the procedure followed by the Opposite Party before the Rent Controller was such that the Rent Controller was not called upon to exercise his judgment and to give his opinion as to whether the rent which was paid on the 1st November 1918 was unduly low or not. The Rent Controller found the rent as it was on the specified date. There was a dispute as regards the amount of rent paid at the time which he decided in favour of the allegation made by the tenant and which has been found to be correct by the President of the Tribunal. Can the landlady under such circumstances by an application for revision of the order of the Rent Controller under sec. 18 of the Rent Act start a new point and allege that the rent at that time was unduly low and ask for the opinion of the President and get a standard rent fixed on that basis by the President?

It seems to me that the contention on behalf of the Petitioner is sound. I think that under the Act the Controller should first form his opinion whether the rent on the prescribed date was unduly low under cl. (d) of sec. 15 (3) of the Rent Act, and then he is to exercise his discretion in fixing the standard rent. When he does that it is open to the President of the Tribunal to revise that order on an application made by any of the parties. It seems to me a wrong application of the word "revision" to say that although the decision of the Rent Controller was not sought for on a particular point it was open to any of the parties by an application for revision to the President of the Tribunal to start a new point altogether and to have his decision—not revising a

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decision of the Rent Controller but a new decision of his own—for the first time.

It is contended on behalf of the Opposite Party that sec. 24 of the Rent Act, which lays down that in revising the decision of the Rent Controller the President of the Tribunal shall follow, as nearly as may be, the procedure laid down in the Code of Civil Procedure, for the regular trial of suits, implies that the President can treat the application for revision as a suit irrespective of what was done before the Rent Controller. It seems to me that that is not the proper reading of that section. Although it is difficult to understand what is really meant by that provision, it seems to be clear that the President of the Tribunal is to follow the procedure laid down in revising a decision of the Rent Controller. If there is no decision of the Rent Controller to revise there is nothing which the President of the Tribunal can revise. Apparently this section lays down that where there is a decision of the Controller on a particular question the President in revising that decision may take further evidence and come to his own conclusion having the decision of the Controller before him.

It seems to me therefore that the President of the Tribunal had no jurisdiction under sec. 18 or sec. 24 of the Rent Act to express his opinion as to whether the rent paid on the 1st of November 1918 was unduly low or not in the absence of anything to show that the Rent Controller was invited to express his opinion upon that point.

It has been further argued on behalf of the Opposite Party that assuming that the President had no jurisdiction to fix the standard rent on the basis that the rent paid on the 1st of November 1918 was unduly low he has fixed the standard rent after taking into consideration the two proceed-

ings before the Rent Controller to which I have already referred. But the judgment of the President of the Tribunal can hardly be construed in that way. It is quite clear that he treats the decisions in both the proceedings as evidence for the purpose of coming to the conclusion that the rent paid on the 1st November 1918 was too low.

An attempt was made to support the decision of the President of the Tribunal on the ground that the standard rent fixed in the case between Tuni Meerza and Wis-hart should be considered as a decision *in rem*, because although there is a recital of the decision having been arrived at on consent the Rent Controller was not authorized to fix a standard rent on consent of the parties. That may be so. But it is quite clear that the Rent Controller who had decided that case treated his decision as having been arrived at on consent of parties. If that is so the President of the Tribunal was quite right in his opinion that it could not operate as a judgment *in rem*. Nor could the decision fixing a standard rent of a portion of the premises be so considered, as the two premises are not identical.

In my opinion, therefore, the judgment of the President of the Tribunal cannot stand and must be reversed and the decision of the Rent Controller restored.

The Rule is made absolute with costs, the hearing fee will be five gold mohurs.

CUMING, J.—I agree.

S. C. M.

Now, the point for decision to my mind appears to be whether these certificates which undoubtedly the accused gave on the 5th and 9th January 1923, that the depositor Bhaba Sundari was alive and sane when she was already dead, are certificates which came within sec. 197. Under the Government Savings Banks Act (Act V of 1873) under which the Post Office Savings Bank is conducted the Governor-General in Council may make certain statutory rules. But these rules as to payment only apply in the case of non-

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ment of deposits to minors or guardians, in the case of payment of deposits belonging to lunatics and in the case of payment of deposits by or on behalf of married women. Bhaba Sundari comes under none of these three classes. She was a widow and the accused was her brother by adoption. The certificate given under the rule that in the case of female depositors withdrawing by their authorised agents under r. 18 the agent must sign a certificate on the application for withdrawal to the effect "Certified that the depositor is on this day alive and sane" does not appear to be a certificate either prescribed by the Government Savings Banks Act or by statutory rules made thereunder. The rule appears to be made for the general conduct of the Post Office business. Therefore it appears to me that the certificates given by Umananda cannot be certificates such as are covered by sec. 197, I. P. C. The question whether they can come under any other section of the Code which requires sanction under sec. 195, Cr. P. C., is not at present before us. This is purely a private prosecution and not on the complaint of any of the officers of the Post Office.

In this view I agree with the finding of the Deputy Magistrate and the District Magistrate that sec. 197 does not apply. Therefore this Rule must in my opinion be discharged.

SUHWARDY, J.—I agree with the interpretation put by my learned brother on the rule or rather the note to the rule framed under the Government Savings Banks Act. I should, however, like to base my opinion on the general policy which should guide us in interfering with the order of the trial Court when discharging an accused under sec. 253, Cr. P. C. This is a private prosecution by a person who has been found by both the

Courts below to have no interest in the money which was withdrawn by the accused. It has been found that the accused was the person who was entitled to this money. He is the heir to the deceased and the money would have come to him as heir. In the circumstances it is not desirable that this prosecution should proceed.

With regard to sec. 197, I have great doubt if it applies to certificates contemplated by note 2 to sec. 25 of general rules and orders framed under Government Savings Banks Act (Act V of 1873). That note says: "In the case of withdrawals made from the account of female depositors by their authorised agents under r. 18 the agent must sign the following certificate on the application for withdrawal "Certified that the depositor is on this day alive and sane." My learned brother has pointed out that this rule is not one of the rules which the Governor-General in Council is authorised to make under sec. 14 of Act V of 1873. But assuming that such a rule was framed under legal authority I am afraid that sec. 197 is not applicable to a certificate granted under such rule. The use of the word "certificate" in the rule has no doubt led to this confusion. In the note the word "certificate" might have been replaced by the word "declaration" or "statement." The certificate contemplated by sec. 197 to my mind, as at present advised, is a certificate which is required by law to be given or signed for the purpose of being used in evidence in the course of administration of justice. That section is one of the sections in the chapter headed "Of False Evidence and Offences against Public Justice." Sec. 198 which follows it makes its meaning clear. Sec. 198 runs thus: "Whoever corruptly uses or attempts to use any such certi-

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ificate (namely, certificate contemplated by sec. 197) as a true certificate knowing the same to be false in any material point shall be punished in the same manner as if he gave false evidence." This section indicates that the offence of issuing or signing a false certificate is one which is intimately connected with the administration of justice. The only thing which goes against the view is that it is not a section which requires any special sanction of a Court of justice or of a public officer for the initiation of the proceedings. It is, however, unnecessary to go into greater details in this matter as I think that on the other grounds this Rule ought to be discharged.

S. C. M.

PRIVY COUNCIL.

APPEAL FROM THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

LORD SHAW.

LORD BLANESBURGH.

SIR JOHN EDGE

MR. AMEER ALI.

1925,

Heard, 6, 9 and

10, March

Judgment,

25, May.

MIR SUBHAN ALI,

Appellant,

v.

IMAMI BEGUM and

ors., Respondents.

Inam Grant Rules, Rule No. V—Conditions specified in rules, if may be varied—Decree declaring Plaintiffs' share in property and awarding share, if res judicata in subsequent partition suit, when partition might have been refused in previous suit—Civil Procedure Code (Act V of 1908), sec. 11.

The Inam rules lay down the conditions which are usually to accompany an Inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant.

Where such a grant, expressly made

heritable to male descendants of the grantee to the exclusion of all females, was, in a suit by certain female descendants against the certificate-holder for a share of the profits, erroneously declared to belong in part to the Plaintiffs and they were given a decree for the share of profits claimed:

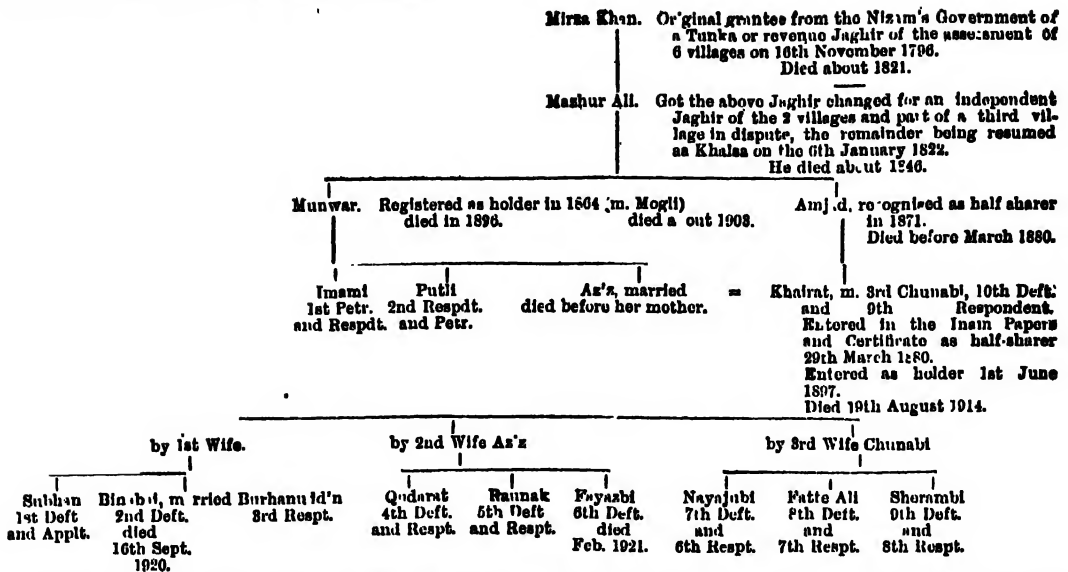
Held—That as there were grounds on which a decree for partition, if claimed, might have been refused to the Plaintiffs in that suit, and such a claim was not raised or decided, a claim by the same Plaintiffs for a partition of the property in a subsequent suit was not res judicata and should be refused, but the previous decree being binding upon the parties, the certificate-holder was to hold the property subject to the obligation to pay to the Plaintiffs the share of the profits declared by the decree.

This was a consolidated appeal and cross-appeal—the latter by special leave—from a decree of the Court of the Judicial Commissioner, Central Provinces, dated the 5th April 1921, modifying a decree of the District Court of Akola, dated the 2nd April 1918.

The suit in which the above decrees were passed was brought by Imami Begum for partition and separate possession of a Jaghir, which was granted by the Nizam to a common ancestor of the parties in 1796, and continued by the British Government in 1866 to the person who then held it and his male heirs in perpetuity. Subhan Ali, the Appellant, was the present certificate-holder and was the principal Defendant.

The following is a pedigree showing the descent of the parties from the original grantee and the intermediate holders:—

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The original grant was a personal grant for maintenance. A fresh arrangement was made with Mazhur Ali, part of the Jaghir being resumed by the Nizam, and subsequently the new Jaghir was granted to Munwar under a new sanad. In 1871 Amjad Ali was recorded as half sharer with Munwar, and on Amjad's death his son Khairat was similarly entered on the certificate as a sharer. Munwar died in 1896 leaving him surviving a widow and three daughters but no son and after Munwar's death the Inam certificate was granted to Khairat in respect of the whole Jaghir.

Shortly after the death of Munwar Ali as the result of litigation Khairat agreed to pay half the income of the estate to Munwar Ali's widow, the mother of the present Respondents.

In 1904 the present Respondents and their mother, who died *pendente lite*, sued to enforce this agreement, and eventually obtained decrees for arrears of profits. The judgment of the Judicial Commissioners in this litigation contained a finding that the entry in the Inam certificate regulated the duration of the grant but not

the enjoyment of it as between the heirs of the grantee and that the inheritance devolved according to the ordinary Shia law of inheritance by which the family was governed.

Khairat died in 1914, and his representatives were similarly sued for a share of profits and decrees were made against them. On the death of Khairat the revenue authorities decided that the Jaghir should be entered in the name of his eldest son Subhan Ali and the suit now under appeal was instituted against him by Munwar's daughters.

They claimed possession by partition of their share of the Inam lands and arrears of its income.

The District Judge held that the Inam Jaghir was governed by R. V of the Inam Rules, and had not been enfranchised, that although a Jaghir was an estate for life, yet its partition among co-sharers was not prohibited and that the Plaintiffs were entitled to 109/288th share and to separate possession and enjoyment thereof.

On appeal the Judicial Commissioners decided that only males took any interest in the Inam lands, but held that the decree

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for profits in the earlier litigation was *res judicata* in favour of the Plaintiffs' claim to income.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.—The decisions in the earlier litigation were erroneous in awarding the Respondents any share of profits.

The original grant was meant to be a grant only for life but the effect of the Government order was to create a perpetual entail.

Here what is claimed is not maintenance but a specific share in the grant.

The earlier decrees against Khairat for a share of profits are not binding against the Appellant. Khairat had merely a life interest and the Appellant does not claim through him.

Krishnaji v. Munwar Ali (1), *Krishnaji v. Nilkanth* (2), *Gulabdas Jugjivandas v. Collector of Surat* (3) and *Ram Narayan Singh v. Ram Saran Lall* (4).

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.—For the duration of the grant the beneficial interest in the Inam lands devolved according to the Shia law of inheritance and the Plaintiffs are entitled to possession of definite shares.

The word "Jaghir" has no special implication. The grant in fact became an Inam grant and must be construed according to its definite terms.

Dosibai v. Ishwardas (5).

An Inam grant is partible, and that is evidenced by the fact that in this case there were two sharers from the start.

The grant was an absolute one and the

grantee could alienate the estate. It was not merely a grant for life.

Bodhrao Hunmont v. Nursing Rao (6) and *Krishnarao Ganesh v. Rangrao* (7).

The Inam rules cannot be incorporated into the grant. They have no statutory authority and are merely directory to Inam officers as to the manner in which grants should be dealt with.

Vinayak Waman Joshi v. Gopal Hari Joshi (8) and *Adrishappa v. Gurushidappa* (9).

The words "and to the male descendants" are not words of purchase.

Compare the similar words in a Babuana grant.

Pratap Singh Shiv Singh v. Agarsingji Raisinghji (10), *Vasudev v. Ramkrishna* (11) and *Bulaji v. Dattu* (12).

The decisions in the former suits operate as *res judicata*. There it was decided that the Plaintiffs were entitled to "share in the estate," i.e., to share in the corpus of the grant and a specific share in the property was granted to them.

Messrs. DeGruyther, K. C. and Parikh on cross-appeal and in reply.—The Plaintiffs being females can have no share in property granted to male descendants only.

Were this an ordinary Mahomedan estate it might be argued that no condition could be attached to it contrary to Mahomedan law, but no such consideration applies to a grant from the Crown.

See Crown Grants Act, XV of 1895.

(1) 6 Nagpur L. R. 72 (1908).

(2) 12 Nagpur L. R. 150 (1916).

(3) L. R. 6 I. A. 54; s. c. I. L. R. 3 Bom. 186 (1878).

(4) L. R. 46 I. A. 88; s. c. I. L. R. 46 Cal. 683; 23 C. W. N. 866 (1918).

(5) L. R. 18 I. A. 32, 25; s. c. I. L. R. 15 Bom. 322 (1890).

(6) 6 M. I. A. 426 (1856).

(7) 4 Bom. H. C. (A. C. J.) 1 (1867).

(8) L. R. 30 I. A. 77; s. c. I. L. R. 27 Bom. 353; 7 C. W. N. 409 (1903).

(9) L. R. 7 I. A. 163; s. c. I. L. R. 4 Bom. 494 (1880).

(10) L. R. 46 I. A. 97, 106; s. c. 24 C. W. N. 57 (1918).

(11) I. L. R. 2 Bom. 529 (1878).

(12) 4 Bom. L. R. 762, 706 (1902).

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Raj Indar Bahadur Singh v. Raghubans Kuer (13) and *Rajindra v. Raghubans* (14).

The Inam Rules, however, contain an express prohibition against alienation and they must be read as part of the grant.

Krishnaji v. Munwar Ali (1) and *Krishnaji v. Nilkanth* (2).

Sir G. Lowndes, K. C., replied on the cross-appeal.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—The suit out of which these appeals arise was brought by the Plaintiffs for partition and separate possession of their shares in an Inam estate or Jaghir in Berar, and for payment of their due proportions of the income for the three years immediately preceding the institution of the suit in February 1916. The estate now comprises the whole of the two villages of Barmi and Dhotra, and three fields in the village of Ganuhpur in the Murtizapur Taluq of the Akola District. The original Appellant, Mir Subhan Ali, the present certificate-holder and in sole possession of the Inam, was the principal Defendant.

The trial took place before the Additional District Judge at Akola. He, by his decree, dated the 2nd April 1918, allowed the Plaintiffs' claims in full. On appeal, the Court of the Judicial Commissioner, Central Provinces, Berar Jurisdiction, by a decree of the 5th April 1921, dismissed the suit so far as it was one for partition and separate possession of the Inam, but approved the judgment of the Court below in respect of the Plaintiffs' claim to income. With the decree of the Judicial

(1) 6 Nagpur L. R. 72 (1908).

(2) 12 Nagpur L. R. 150 (1916).

(3) L. R. 32 I. A. 203; s. c. 9 C. W. N. 1009 (1905).

(14) L. R. 45 I. A. 134; s. c. 23 C. W. N. 101 (1918).

Commissioners both parties are dissatisfied, and in the present appeal and cross-appeal, now consolidated, the Plaintiffs, who were cross-Appellants, ask that the decree of the Additional District Judge should be restored, while the Defendant, Mir Subhan Ali, the original Appellant, asks that the Plaintiffs' entire claim should be rejected and their suit dismissed.

The fundamental question at issue is one of construction, namely, whether the beneficial interest in the Inam granted to a common ancestor of the parties and continued by the British Government in 1866 passes under the terms of the grant then made to all the heirs of the grantees according to Shia Mahomedan law or whether that interest devolves upon male descendants only. There is, however, a further question, namely, how far the rights of the parties, whatever otherwise on construction they might have been held to be, are now regulated by a decree said to be binding upon the Defendant, Mir Subhan Ali, and made by the Judicial Commissioners in a suit brought by the Plaintiffs against, *inter alios*, the father and predecessor in estate of that Defendant.

The facts of the case are not free from complexity, but they have been set forth at length and with perfect accuracy in the judgment of the Additional Judicial Commissioners. Their Lordships accordingly will re-state them only so far as is necessary to explain the conclusions at which, on the whole matter, they have themselves arrived.

Lands now represented by the estate in question had, from the end of the eighteenth century, been held under sunnuds from the Government of H.H. the Nizam by a succession of holders in direct male descent in a Shia Mahomedan family to which all the parties to these

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proceedings belong. The Extra-Assistant Commissioner who, in 1864, inquired into the origin of the grant and the claims of the then holders reported that the grant was valid and that its enjoyment had been long and uninterrupted.

"It is not hereditary according to the terms of the sunnuds, but practically the grant has been enjoyed by four successive incumbents during the space of more than 70 years and has assumed that right in a liberal point of view. I think the grant should be confirmed and continued to the present claimant and his descendants male."

These proposals of the Extra-Assistant Commissioner were supported both by the Deputy Commissioner and by the Commissioner, and to give effect to them the Resident recommended that the estate should

"be continued to the present holder and his male descendants in perpetuity."

On the 3rd December 1866, this recommendation of the Resident was sanctioned by the Government of India, and an Inam certificate was issued, stating that the grant—one for personal maintenance—was

"to be continued rent free in perpetuity to present holder and his male descendants."

The "claimant" and "present holder" so referred to was one Munwar Ali, the father of the Plaintiffs. To him the Inam certificate was issued, and the fundamental question between the parties already referred to depends upon the true construction of these words in it.

And yet not quite so. For if, as has apparently been assumed in the copious stream of litigation which the grant has originated, an agnatic line of male descent is for one purpose or another thereby prescribed, then on a strict interpretation the grant has long since determined, inasmuch as Munwar Ali died in July 1896, leaving three daughters only—the Plaintiffs and another—and no son.

But, as might well be supposed, none

of the parties contend for this result. Nor has it, in fact, eventuated. It had been brought to the notice of the Extra-Assistant Commissioner in the course of his inquiry that Amjad Ali, the second son of the previous holder, Muzhar Ali, and a half-brother of Munwar Ali, was in receipt of half the income of the estate by a title which Munwar Ali, the "claimant" or "holder," made no effort to displace. In the original certificate his position was ignored, possibly by inadvertence. In 1871, however, the omission was recognised and rectified, and in that year Amjad Ali's name was, by Government, entered in the certificate as sharer in the estate with Munwar Ali. The effect, it has been assumed, is that the grant must be construed as if made to Munwar Ali and Amjad Ali and their male descendants in perpetuity, or, as a more compendious statement leading in the state of his family to the same result, as if made at an earlier date to Muzhar Ali and his male descendants in perpetuity. The true meaning of these words or their equivalent, therefore, is the fundamental question in the suit.

Amjad Ali died in 1880, and his son, Khairat Ali, was, without objection, shown in his place on the certificate as a sharer along with Munwar Ali. The latter, as has already been said, died in 1896, in the life-time of Khairat Ali. Of the three daughters whom he left, two are the present Plaintiffs. The third, Aziz Begum, married Khairat Ali as his second wife. As Munwar Ali left no son, Khairat Ali was entered as the sole certificate-holder in respect of the whole estate. This was objected to by the present Plaintiffs and by their mother, Mogli Begum, Munwar Ali's widow, who survived him. They appealed to the Commissioner against the order that

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Khairat Ali was to be sole certificate-holder. Their claim was, that while the grant according to its terms was only to endure so long as the grantee's male line survived, the estate during the subsistence of the grant was to be enjoyed beneficially by all the heirs of the grantee, including females, according to Shia Mahomedan law. The Commissioner refused to take this view of the grant, and he dismissed the ladies' appeal on the ground that women could not succeed to the Inam, which was to be continued to male descendants only. Khairat Ali died in 1914, and his eldest son by his first wife, Subhan Ali, the present Defendant, was, in due course, entered in the register as certificate-holder. His appointment as such was once more opposed, as Khairat's had been, by Imami Begum, one of the present Plaintiffs. Her opposition was again overruled. The Inam was to be continued to male descendants only.

The construction placed by the Revenue Courts upon the grant has therefore been uniform. But the Plaintiffs in the present suit contend that it is erroneous, and they rely both as a *res judicata* and on their merits upon decisions of the Civil Courts in which their own view of the grant has been accepted. Their Lordships may here so far anticipate as to announce that the plea of *res judicata* will not avail the Plaintiffs to the full extent of their claims in these proceedings. This fundamental question of construction must therefore be decided. It is convenient to proceed at once to its consideration.

Upon it their Lordships feel no doubt that the meaning attributed to the words in question by the Revenue Courts and by the learned Additional Judicial Commissioners in the present suit is correct.

As it seemed to the Judicial Commissioners, so it seems to them, impossible to hold that an order that an estate shall "be continued to the male descendants" of a certain person means that it shall be continued to the male and female descendants of that person so long as there is no failure of male descendants. It was sought in argument before the Board to treat the estate conferred as being analogous to a base fee in English law. Such analogies are rarely helpful and very frequently they are misleading. But here the suggested analogy is non-existent. A base fee is a grant in terms general, its limitation in point of duration being due only to the fact that the grantor was possessed of no estate enabling him to extend the grant, however general its terms, for any period subsequent to the extinction of his own issue. But here there is no grant at all in general terms. The only grant is to the male descendants themselves—a very limited expression—and the word "to" can have no other than its ordinary meaning attributed to it. It cannot be treated as meaning "during the existence of" or "pending the failure of," and even if the word were capable of being so extended, their Lordships would still have difficulty in seeing how, from the words, a general grant could anywhere be evolved in terms sufficiently wide to include female descendants within its scope.

The learned trial Judge found such a grant by holding that the certificate here was governed by what are known as the Berar Inam Rules, and particularly by No. V of these rules, and that the grant must within that rule be treated as having been made in favour of "direct lineal heirs and undivided brothers"—an expression which would include females. Their Lordships agree with the Additional Judi-

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cial Commissioners in thinking that the learned Additional District Judge erred in attributing to these rules an operation universal and unqualified. The rules, it is true, lay down the conditions which are usually to accompany an Inam grant, but they contain nothing to prevent Government from altering or modifying any of the conditions in the case of any particular grant. And where, as in the present case, the right of inheritance is by the certificate confined to a particular class of descendants which in its exclusion of all females from enjoyment is in terms unambiguous, there is no reason known to their Lordships why the grant in these terms should not have effect. As regards decisions upon the meaning of other grants cited in argument, their Lordships need only say that no authority was brought to their notice which leads them to qualify the effect which they attribute to the words of grant in the present case.

So far, therefore, the claim of the Plaintiffs, whether for partition or for a share of the profits of the estate, is not established. But the bearing and effect upon these claims of decrees in previous suits brought by the Plaintiffs in the Civil Court remains to be considered. These are four in number. It will, however, suffice to deal in any detail with one of them only—namely, the Civil Suit No. 137 of 1904, filed in the Court of the Civil Judge of Amraoti by the present Plaintiffs against Khairat Ali, and his three children by Aziz Begum. The claim there made was for a share of profits of the estate for 1903-4 and for

“a declaration that as heirs of Munawar and his widow, Moghli Begum, they got a half share in the Jagir, and that they are entitled to the use of fruit and fodder from the villages.”

The judgment awarded the Plaintiffs a

decree for the share of the profits claimed, and declared that “the Plaintiffs have 109/144 of half-share of the Jagir villages in dispute.” This decree was affirmed in appeal and second appeal.

“The entry,” says the Additional Judicial Commissioner in his judgment on the second appeal,

“regulates the duration of the grant but not the enjoyment of it as between the heirs of the grantee, and the inheritance devolves under the ordinary law in force in the family. No authorities to the contrary have been cited.”

In the later suits this view was also taken. In the second and third the Plaintiffs' share of profits for the years 1904-5 to 1909-10 were claimed and awarded against Khairat Ali: in the fourth and last suit, brought against all the children and widow of Khairat Ali after his death in 1914, the claim was for a share of the income of 1911-12, and a decree for such share was made against the Defendants to the extent of the assets of Khairat Ali in their hands.

Now it was not disputed by the Defendant before the Board that the decision in Civil Suit No. 137 of 1904 was binding as between the parties to it and their representatives in interest to the extent that the Plaintiffs are entitled during life to the there defined share of annual income, but it was contended that the Defendant, Subhan Ali, does not claim through Khairat Ali, so that the decree is not binding upon him. Their Lordships concur with the learned Additional Judicial Commissioners in rejecting this contention. The succession of the Defendant to the Inam did not involve a re-grant by Government. It was merely a continuance of the grant to him in accordance with its originally declared terms. He holds the estate burdened with the obligation of recognising the rights of the Plain-

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tiffs to the share of income declared by the decree in the suit of 1904.

But no further. In that suit partition was not asked for, and their Lordships prefer in these appeals to deal with the question of partition as one which was not there decided because it was not raised. There are grounds on which a decree of partition might have been refused to the Plaintiffs even by a Court which interpreted the grant as did the Additional Judicial Commissioners in that suit. In their judgment accordingly there can be no question of *res judicata* in the Plaintiffs' favour so far as their claim to partition is concerned, and on the view which their Lordships take of the grant that claim cannot, as has already been stated, be maintained.

Their Lordships in the circumstances can feel no surprise that Khairat Ali resisted all claims of the Plaintiffs to a share of the income of the estate and was unwilling to accept for subsequent years the principle of the decree in the suit of 1904. But it is right that that position should now, without further question, be accepted, and that the Plaintiffs should not have imposed upon them the burden of instituting successive suits to establish a claim which, as between the parties, is no longer open to discussion.

Their Lordships accordingly think that there should be added to the decree appealed from a declaration that by virtue of the decree in the Civil Suit No. 137 of 1904, each of the Plaintiffs is during her life and as against the Defendant and his successors-in-interest in the property in dispute entitled to 109/288th of half-share of the income thereof, and liberty should be reserved after each year to apply to have the amount of such income determined by further proceedings in the suit and declared in a further decree.

With that addition to the decree, inserted to spare the parties unnecessary expense, their Lordships are of opinion that the decree appealed from should be affirmed and both appeals dismissed.

Their Lordships will humbly advise His Majesty accordingly.

There will be no order as to the costs of these appeals except that in accordance with the Order in Council of the 20th May 1924, granting to the Plaintiffs special leave to cross-appeal, the costs of the Defendant of that application must be paid by those cross-Appellants.

Solicitor: *Mr. E. Delgado* for the Appellant (Defendant No. 1).

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents (Plaintiffs).

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 5 OF 1923.

WALMSLEY, J.	KARIMANISSA BIBI,
MUKERJI, J.	Claimant No. 4,
1925,	Appellant,
Heard, 7, 8 and	v.
9, April.	HAMEDULLA alias RAJA,
Judgment,	Claimant No. 1, and
15, May.	ors., Respondents.

Mahomedan law—Marz-ul-mout, wakf executed in, operation of—Tests of death illness—The subjective test of apprehension of death—Capacity to pursue ordinary avocations and to stand up for prayers—The one year rule—Possession of senses and faculties.

T, a very old man and a Mahomedan, was attacked by paralysis of the lower limbs in February 1895; he at once became a helpless invalid, permanently confined to his bed and could not perform the ordinary offices of nature without assistance and could not even leave his bed for religious exercises. On 20th March 1895, he made a wakf of his properties. He lingered on in the same condition till

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his death in November 1895 from the same illness :

Held—That the wakf having been made in death illness operated only to the extent of a third of his properties.

Per WALMSLEY, J.—That the wakf having been made when T was under an immediate apprehension of death, the months of lingering before actual death did not take the case out of the doctrine.

Per MUKERJI, J.—That the crucial test as settled by the authorities was whether there was an apprehension of death in the mind of the donor as distinguished from apprehension caused in the minds of others. The possession of one's senses and mental faculties is no index of this apprehension.

There is no hard and fast rule that continuance of the illness without change for one year must necessarily take the case out of the operation of the doctrine.

Quære.—Whether inability to attend to ordinary avocations is a sine qua non to the application of the doctrine.

This was an appeal preferred on the 21st of November 1922 against the decree of S. C. Banerjee, Esq., President of the Calcutta Improvement Tribunal, Calcutta, dated the 12th of August 1922.

The facts of the case will appear from the judgment.

Dr. D. N. Mitra and Babu Narain Chandra Kar for the Appellant.

Messrs. Naruddin Ahmed and A. S. M. Akram for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—This appeal is directed against a decision of the President of the Calcutta Improvement Trust Tribunal in a dispute about the apportionment of some compensation money.

Premises No. 32, Durga Road have been acquired by the Trust. The Collector's valuation has not been accepted by those who appear to be the owners, and before making the valuation the President has decided the principles on which the compensation when it is fixed will be apportioned.

The former owner was Mohammd Tayeb : he had a wife named Sarifannessa ; he died in November 1895, leaving a widow, five sons and three daughters. The claimant No. 4 is the Appellant, and she is one of the daughters. Her claim as to the share that would ordinarily be hers is resisted on the ground that Mohammad Tayeb made a wakf of the property a few months before his death. The question therefore that the President had to decide was whether the wakf was valid or not. He held that it was valid, and it is against that decision that the appeal is directed.

The first ground on which the Appellant assails the wakf is that it offends against the doctrine of Mushaa. The reason for this assertion is two-fold. First, it is said that the wife Sarifannessa was owner of a portion, and secondly, that one Azimannessa also had a share in the property covered by the wakf. Neither of these assertions can be supported. Sarifannessa's plot of land was not an undivided share, but specific land with Tayeb's land forming the boundary on one side. It may be an open question whether the husband or the wife is the owner of the portion standing in Sarifannessa's name, but for my present purpose it is enough to point out that the premises are divided into specific plots. As for Azimannessa's portion, her name appears with that of the lady who sold to Sarifannessa, and with that of a third person in Billon's Register of 1893. In

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1911 she asked for the holding to be subdivided, and for permission to redeem her share of the rent. This was done without any objection. The circumstances indicate that the sub-division consisted of recognizing her possession of a specific plot, and not of carving out from an undivided whole a plot equivalent to her interest. Further if the areas are considered, it appears that there were specific plots with ascertained areas, together amounting approximately to the area of the whole. I therefore agree with the learned President's finding that the doctrine of Mushaa does not render the *wakf* invalid.

The second objection to the *wakf* is that it is really a disposition for the benefit of the grantor's family. The question is whether there is a substantial dedication of the property to charitable uses. The income from the property is not large, and a very considerable part of it must be spent for the benefit of members of the grantor's family. There are, however, specific sums to be paid for the maintenance of worship in a mosque established by the *wakif's* father, and directions are also given for using the income for the benefit of the travellers and students. The terms of the disposition are such that without scrupulous honesty on the part of the *mutwalli*, little, if anything, is likely to be left for the student and the traveller, but there may be a little and in the ordinary course of nature there should be more. I think the instrument lies very near the border line, and my own inclination would be to hold against its validity, but in deference to the opinion expressed by Greaves, J., in another suit, an opinion which is of course not binding but is entitled to consideration, and to the view taken by my learned brother on this Bench, I have come to the conclu-

sion that I ought to regard the *wakf* as valid, so far as this objection is concerned.

The third objection is based upon the difficult doctrine of Marz-ul-mout, or death-bed illness. In Sir Roland Wilson's book on Anglo-Mahommadan law this doctrine is set out as follows:— "A gift made in mortal sickness is so far regarded as a bequest that it cannot operate on more than a third of the testator's net assets unless with the consent of all the heirs, nor in favour of one heir without the consent of all the others. Explanation 1—A gift is said to have been made in mortal sickness only if it was at the time, and seemed to the donor himself highly probable that the malady would soon end fatally, and if in fact it did so end. The donor's state of mind, which is the real ground of the rule, may be, but is not necessarily, to be presumed from the gravity of the symptoms. On the other hand, no evidence of actual apprehensions of death will suffice in the absence of external indicia of danger, chief among which is inability to attend to ordinary avocations." There have been numerous decisions on the subject since those words were first written but I think that they set out the doctrine correctly.

The facts which appear to be proved in the present case are that Mohammad Tayeb, then a very old man, was attacked by paralysis of the lower limbs in February 1895; he at once became a helpless invalid, permanently confined to his bed: he could not perform the ordinary offices of nature without assistance, and, more important, he could not leave his bed for religious exercises. He continued in this state until he died in the following November. The *wakfnama* which we are considering was executed in March.

The fact that Mohammad Tayeb was

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ill or at any rate bed-ridden for nine months has given scope for the suggestion that the saving principle established for those who suffer from a malady of long continuance will make this *wakf* valid. Sir Roland Wilson, quoting from Baillie's Digest, has this note: "The lame, the paralytic, the consumptive and a person having a withered or a palsied hand, when the malady is of long continuance, and there is no immediate apprehension of death, may make gifts of the whole of their property," and adds "the Hedaya fixes the period of long continuance at one year, but this is not taken as a hard and fast rule." In this case it is argued that the illness lasted for nine months, and that is almost a year, and therefore under this principle Mohammad Tayeb was competent to make a gift of the whole of his property.

I do not think it is necessary to consider whether this rule is to be construed elastically or not, for the reason that, I have no doubt that in March 1895, Mohammad Tayeb was expecting to die very soon. Not only was the immediate apprehension present to his own mind, there were also external signs which those about him would naturally interpret as indicating that death was at hand. It is true that as a fact he lingered for seven or eight months, and that no fresh illness supervened, and therefore it may be said that his own fears and his relative's expectations were mistaken, and that the malady did not soon end in death. It was from that malady however that Tayeb died: he never got any better, and from February to November there was never a time when the malady became a mere disability; throughout it threatened an early end, and at the last it did prove fatal without any fresh illness supervening. I think therefore that the months of

lingering before actual death do not take the case out of the doctrine. My conclusion therefore is that the *wakf* is valid only to the extent of one-third of the *wakif's* assets.

The Appellant succeeds in part, and the President is directed to apportion the compensation when determined in accordance with this view.

The Appellant will be entitled to recover her costs from the contesting Respondents in both Courts: hearing fee in this Court is fixed at three gold mohurs.

MUKERJI, J.—The only question that has been raised in this appeal is as to the validity of the *wakf* executed by one Mohammad Tayeb in respect of certain properties, one of which, namely, premises No. 32, Durga Road comprising an area of 1 bigha 13 cottas 7 chattaks 25 sq. ft., has been acquired under the Land Acquisition Act. The validity of the *wakf* is questioned upon three grounds:—*First*, that the *wakf* offends against the doctrine of Mushaa as the premises in question were the joint property of Mohammad Tayeb and his wife Sarifannessa and also because one Azimannessa was a co-sharer in the holdings of which the said premises formed a part; *second*, that the *wakf* is illusory and contains directions which are vague and incapable of execution; and *third*, that the *wakf* is invalid under the law of Marz-ul-mout.

As regards the first of these grounds what appears upon the evidence is this. The premises aforesaid are comprised within revenue holding No. 318. This holding consists of two distinct plots of lands carved out of old holdings Nos. 64, 64A, 66, 66A and 67. The total area of all these holdings was more or less 2 big. 8 c. 9 ch. By a *kobala*, Ext. G., dated the 20th March 1889, Sarifannessa Bibi, wife of Mohammad Tayeb, purchased a plot of

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land 10 cottas in area, and it was recited in the document that previously her husband had acquired by several purchases 1 bigha 5 cottas 14 chattaks of land, and in the schedule to the document this land was stated as forming one of the boundaries on the east. On the 20th March 1895 Mohammad Tayeb executed a *wakf-nama* in respect of various properties, including the aforesaid lands which were purchased by him as well as that purchased by his wife. The plots of land being distinct, neither Mohammad Tayeb nor Sarifannessa Bibi can be said to have had an undivided share in the lands in respect of which the *wakf* was made. As regards Azimannessa, all that appears upon the evidence is that in Billon's Register of 1893-94 one Aziman Bibi and one Meher Bibi and two others were recorded as tenants in respect of the aforesaid holdings. Meher Bibi sold the 10 cottas of land to Sarifannessa in 1889. Azimannessa applied in 1911 for sub-division of the holdings and for redemption of the holdings to be allotted to her, and the said application was granted. The holdings allotted to her appear from the order-sheet in that case to have consisted of an area of less than 5 cottas. The total area of the lands of the above-mentioned old holdings as stated in the *kobala*, Ext. G., was 2 bighas 8 cottas 9 chattaks, of which according to Billon's Register the portion in which Aziman Bibi was a joint tenant with Meher Bibi and others was 1 big. 19 c. and 6½ chs. The purchases by Mohammad Tayeb and Sarifannessa did not extend to the whole of the said 1 bigha 19 c. 6½ chs. but only to 1 big. 15 c. 14 chs. as stated in the Ext. G. The evidence of Khoda Bux, witness No. 2, for the claimant No. 4, was that Aziman had 3½ cottas of land in the holdings, and this seems to be the quantity

left to her after the purchases made by Mohammad Tayeb and Sarifannessa. There is nothing to show that the land of Azimannessa was not a separate plot of land such as Meher's was, and it has not been proved that she was a co-sharer in the premises covered by the *wakf*. The doctrine of Mushaa therefore has no application to the case.

The second ground may be disposed of in a few words. The object set out in the *wakf-nama* was to make arrangements and provisions for the due performance of religious services in the mosque which had been erected by the father of Mohammad Tayeb at No. 26, Collinga Bazar Street. The inalienability of the properties and the usual limitations and restrictions as to the powers of the *mutwalli* to deal with the *wakf* properties were laid down. It was provided that if any land or building included in the *wakf* estate were acquired by the Government for public purposes, the compensation money would be utilised for purchasing some other property for the purposes of the *wakf*. In para. 6 directions were given for the yearly repair of the mosque, and the daily lighting thereof, and for arranging for the five prayers that are to be held daily, and also the Jumma prayer, the Azan and Namaz, and the Id and Bakhr-Id prayers, and for the employment of Khatib and Moazzan, the distribution of Iftari during Ramzan, the reading of Tarabi prayer by a Hafez, and for providing for such accessories as are ordinarily necessary for the purpose. The remuneration of the Hafez was fixed at Rs. 25 a year, the Khatib was to get Rs. 2 per month and his food, and the Moazzan Re. 1 a month and his food. Directions were given for the maintenance of students, and the entertainment of the travellers and mendicants. Provision was

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also made for the accommodation and maintenance of a sister of the *wakif* and her daughter, and also of the daughter of the *wakif* in certain circumstances. The five sons were appointed *mutwallis*, each for a year, and it was directed that the *mutwalli* in office will get his food and a salary of Rs. 5 and shall be bound to provide for the food of the four future *mutwallis*. The other directions need not be referred to. The income of the property was small, being about Rs. 100 or Rs. 125; and though a substantial part of it, under the directions contained in the *wakfnama*, would go to the relations of the *wakif*, it is manifest that the primary object of the endowment was to support a mosque, to make arrangement for the performance of religious services therein, to carry on works of charity connected therewith, to feed travellers and to educate poor students. The provisions made for the relations can hardly be said to be such from which it may be deduced that the main purpose of the settlement was the aggrandisement of a private family. The directions given to the future *mutwallis* left a good deal of discretion in them as to how the work was to be carried on, but it was stated that they were to keep to the standard followed by the *wakif*. The directions therefore cannot be said to have been vague or unascertainable, and the *wakf* must be taken to have been a valid one. It is perhaps true that the *wakf* has been administered by the *mutwallis* in a manner not altogether satisfactory and some of them appear to have dealt with the properties as if they were proprietors. Malfeasance or misfeasance on the part of the *mutwallis*, however, cannot invalidate a *wakf* which at its creation was a valid one.

The third ground raises one of the difficult questions which the Mohamadan

law abounds in, namely, as to whether the *wakf* was invalid under the law of Marz-ul-mout. The law of Marz-ul-mout is not the same amongst all the schools; and moreover the reason of the rule as well as its essentials have been differently enunciated by different jurists. Lawyers who may be said to belong to the orthodox school expound the doctrine on the basis of certain principles, modern jurists seek to rest the law upon what they consider to be more in consonance with rational ideas, and judicial decisions have served to break the rigidity of it in no small measure, by interpreting it in a broad and liberal spirit.

A reference to the translations of some of the texts relating to this branch of the law, which are to be found in books of undoubted authority or have been relied upon in judicial decisions may not be unprofitable. In some cases the translations do not agree, and in others it is not easy to appreciate the exact meaning, the passages being darkened by parenthesis or obscured by the translator's gloss. In the case of *Labbi Bibi v. Bibbun Bibi* (1), the following texts were referred to:—

Futawa-i-Alumgiri, Vol. 4, Ch. XI.—“ Now they speak of the definitions of ‘fatal disease.’ What has been adopted in futwas is that a disease from which death may probably result is a fatal disease, irrespective of whether the patient keeps to his bed or not ” (page 552). “ He who is affected with paralysis, partial or total, and he who has lost the use of any limb, or is affected with phthisis, and the disease is prolonged, and there is no fear of death, may make a gift of his whole property ” (page 562).

Futawa-i-Fusul-Amadi.—“ They have explained prolongation to mean one year, so that if the disposition has been made

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after one year from the attack of the malady it is like a disposition made in the enjoyment of health" (page 414, M. S.).

Futawa-i-Alumgiri, Vol. I, Book of Divorce, page 640.—"Our learned Doctors have explained the duration of sickness to be of one year, so that if the same sickness lasts for one year the acts of the sick person after one year would have the same effect as if he had done them in a state of health." There is no reason to suppose that the law of Marz-ul-mout is not the same in regard to Talaq as it is in the case of *wakf*.

Futawa-i-Shami, Vol. II, page 521.—"If the sickness becomes old, that is to say, if one year elapses from its commencement, and no increase or decrease occurs in it, the sick person shall be deemed a healthy person; but if the sickness increases, whether before or after one year, and during the continuance of such increase the person dies of the same, he shall be deemed a sick person." Other futwas also to the same effect appear to have been produced before the Court. Another translation of the passage last quoted will be found in the case of *Fatima Bibi v. Ahmed Bukhsh* (2) and runs in these words:—"If the disease becomes old in this way, that it extends beyond a year, and no increase occurs within that (period), then he (the sick person) is (to be deemed) in health, but if he dies in a state of increase whether the increase takes place before the year's prolongation of it, he is (to be deemed to be) sick."

A passage from *Jamai-ool-Rumooz* was also produced before the Court which, while admitting that some authorities doubt the prescription of the period of one year, gave, as supported by the better

(X) 1, L. R. 31, Cal. 319 at p. 325 (1903).

opinion, the rule that "gifts by paralytics are valid if the sickness lasts for a long time, so that a year elapses from the time when it first commenced."

Mr. Ameer Ali in his book on Mahomedan law, Vol. 1, page 56, quotes with approval the observations of *Radd-ul-Muhhtar* and says:—"It is not merely the fact that the disease is ordinarily fatal that requires consideration but the effect it is likely to have on the mind of the sufferer, which is the chief determining element. A malady of such a nature is called Marz-ul-mout or the illness of death. But where a person has suffered from an illness for a long time so that it has become, as it were, 'a part of his constitution,' or where the progress of the disease is so imperceptible as to cause no apprehension to him, it does not come within the definition of Marz-ul-mout."

At page 57 is quoted the following passage from the *Durr-ul-Mukhtar*: "The gift of a person suffering from paralysis, palsy and phthisis is invalid as to the whole when the disease has lasted over a year, and there is no fear of death from it, but if it has not extended for a year and there is no fear of death (on his part) the gift will take effect in respect of a third." The learned author states that the reason is there said to be that if a person suffers from a malady which is ordinarily mortal, for over a year, it ceases to have any appreciable influence on his mind as it has become a part of his nature.

At page 58, *Futawa Kosi Khan* is quoted in support of the proposition that "one struck with paralysis, phthisis or palsy is accounted sick whilst the disease is on the increase; but when the illness has lasted a long time and is not becoming worse, the sufferer is as one in health." Then the following passage of

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the text is quoted: "Some lawyers have laid down that if a disease, however mortal, lasts for over a year, it should not be regarded as such, because the man becomes so accustomed to it as to lose all apprehension as to his own condition."

At page 59 *Durr-ul-Mukhtar* is quoted where it says on the authority of the *Balazia*, that "when a person is in imminent fear of death whether from disease or any other cause, so that in the case of an illness the man is so broken or weakened by it as to be incapacitated from conducting his ordinary avocations outside his house, for example, a *Faki* (jurist) from going to the mosque, a tradesman to his shop, a woman from attending to her indoor occupations," it is *Marz-ul-mout*; and also on the authority of the *Mujtaba* that "where the illness has become so severe as to make it permissible for the sufferer to offer his prayer without standing up (lit. : in a sitting posture) it must be regarded as an illness of death."

The above doctrine, however, is different from that of *Futawa-i-Alumgiri* which was accepted in the case of *Fatima Bibi v. Ahmed Bukhsh* (2) and where the proposition was laid down in these words:—"A death illness is one which it is highly probable will end fatally whether the sick person has taken to his bed or not or whether in the case of a man it disables him from rising up for necessary avocations out of his house or not. Such as, for instance, where he is *Faki* or lawyer, from going to the *Musjid* or place of worship and when he is a merchant from going to his shop; or whether in the case of a woman it does or does not disable her from necessary avocation within doors. But the illness is to be considered death illness when a man

cannot pray standing." This extract with the exception of the last sentence seems to be the translation of a passage from the *Futawa-i-Alumgiri*.

Mr. Tyabji in his *Principles of Mahomedan law* quotes Baillie's Digest, Vol. 1, p. 543, Grady's edition of Hamilton's Hedaya, p. 684, in support of the proposition that "pains of child birth are considered by the Muslim authors as *prima facie* a death illness, whereas lameness, gout, paralysis, consumption or withered or palsied hand, after they have continued for a long time and have no immediate danger of death do not constitute death illness."

It is not very easy to reconcile this mass of conflicting dicta which, as they stand, present numerous points of diversity. Some jurists contend that every command of the *Sharah* was characterised by its *illut* or reason or principle which is a mental idea and its *subub* or the cause or the way leading to it, which has an external and physical existence, and that one must adopt the *subub* in order to reach the obligation which the *illut* creates. According to them the reason of the rule is that when all hope of life is lost and there is every fear of likelihood of death taking place the right of the heirs to the property is created, just in the same manner as it is created on the death of the owner who ceases by death to have any need for property. Hence it is, they say, that the law has set out in detail the manifestations, indications and signs, and these should be adhered to, whatever might be the doctor's opinion as to the character of the disease. According to them the limit of one year is conclusive, and lays down a hard and fast rule which is to be preferred to a doubtful one depending upon such an uncertain thing as a mental condition

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like fear. Some others contend that in the case of a disease like paralysis, gout, consumption, etc., a year was required to ascertain whether the illness was a death illness or not, that if the same illness continued uninterruptedly and death takes place on account of it within a year, the illness is a death illness and a gift made within the year is invalid; but if the illness is a lingering one and death does not take place before the end of the year reckoned from the time it commenced, the illness during the year or subsequent to it is not to be considered as death-illness, and any gift made within or after the year is valid. According to some, a subjective apprehension on the part of the patient himself is hardly of any importance because though the reason or motive underlying the law is that illness weakens a man's physical and mental powers and he is therefore likely to act under such circumstances to the detriment of his spiritual interest by disappointing his heirs in their just expectations, according to the principles of Mahomedan jurisprudence that has not to be proved as a fact in each particular case, but the law itself lays down hard and fast rules and criteria by which the validity of a sick person's act has to be determined. The efforts of modern jurists have been directed towards removing the conflict, and judicial decisions have tended to dis-entangle this mass of complications and lay down some principles which may be of easy application.

In the case of *Labbi Bibi v. Bibbun Bibi* (1), Pearson and Turner, JJ., relying upon the authority of certain passages in *Futwa-i-Alumgiri*, *Futwa-i-Fusul-Amadi*, and *Futwa-i-Shami*, quoted above, held that under the Mahomedan law the term *Marz-ul-mout* is ap-

plicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue; so as to engender in the person afflicted with the disease an apprehension of death; that a person labouring under such a disease cannot make a valid gift of the whole of his property until a year has elapsed from the time he was attacked by it. Some of the texts referred to in that case dealt with paralysis "partial or total," characterized it as "a fatal disease" and laid down the doctrine that when the sickness becomes old, that is to say, if one year elapses from its commencement and no increase or decrease occurs and the same sickness continues, the sick person should be deemed a healthy person, and a disposition made after a year from the attack of the malady was to be treated as a disposition made in the enjoyment of health. In that case the learned Judges overruled the contention that in the case of a disease like paralysis, etc., a year was required to ascertain whether the illness was a death illness or not; that if the same illness continued uninterruptedly and death took place on account of it within a year, the illness was a death illness, and a gift made within the year was invalid; but if the illness was a lingering illness and death did not take place before the end of one year reckoned from the time it commenced, the illness during the year or subsequent to it, was not considered a death illness, and any gift made within or after the year was valid. They went on to observe:—"The Mahomedan law, as it would seem, in order to guard against acts done by a person afflicted with a disease which may disturb his calm judgment, has provided that the person afflicted with the disease shall be deemed incompetent to pro-

(1) 6 N. W. P. H. C. R. 159 (1874).

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nounce a divorce or make a gift of his property until after the expiration of a year from the date on which he was attacked with the disease." This decision was followed in the case of *Muhammad Gulshere Khan v. Marriam Begum* (3) and the principle was laid down in these words: "According to the Mahomedan law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance. i.e., has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death." The doctrine as to the validity of the gift when the disease has lasted over a year is considered not to have been correctly appreciated in these decisions (Ameer Ali's Mahomedan Law, Vol. I, page 57, Foot-note). In the case of *Hasarat Bibi v. Golam Jaffar* (4), Ameer Ali and Pratt, JJ., observed as follows:—"A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to Marz-ul-mout gifts, several questions have to be considered, viz., (1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death? (2) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death? (4) Had the illness continued for such a length of time as to

remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness." In the case of *Fatima Bibi v. Ahmed Bukhsh* (2), it was laid down (Rampini and Pargiter, JJ.), that ordinarily a malady should be considered to be of long continuance, if it has lasted a year, but agreeing with the observations made in the case of *Hasarat Bibi v. Golam Jaffar* (4) it was held the limit of one year does not constitute a hard and fast rule and that it may mean a period of about a year. In this case it was laid down that the texts mentioned three matters:—(i) illness, (ii) expectation of a fatal issue and (iii) certain physical incapacities which indicate the degree of illness, and the following observations appear in the judgment:—"The learned vakil for the Defendants contends that the meaning of this is if the 1st and 3rd exist then the 2nd must necessarily be presumed, namely, that there is an expectation of death. The learned vakil for the Plaintiff contends on the other hand that there is no such necessary presumption that the matters of the 3rd class are only evidence and that the Court must decide from that and the other evidence whether the second actually exists, that is, whether there is expectation of death. The latter appears to us to be the correct view; for the passage from *Futawa-i-Alumgiri* distinctly states twice that the definition of death illness is illness in which death is highly probable

(3) I. L. R. 3 All. 731 (1881).

(4) 3 O. W. N. 57. (1898).

(2) I. L. R. 31 Cal. 319 (1903).

(4) 3 O. W. N. 57 (1898).

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whether the incapacities mentioned exist or not. These incapacities therefore are not infallible signs of death illness. At the time when this law was laid down, little medical knowledge existed. It was necessary therefore to decide when an illness was a death illness, and that could only be done by simple rules dealing with certain symptoms which all persons could notice and comprehend. Yet it appears from these passages that even while the lawyers suggested that certain physical incapacities indicated dangerous illness, they did not lay down positively that these incapacities are conclusive for it was no part of their definition of death illness whether the incapacities mentioned existed or not. It is only with regard to the extreme case where a man cannot stand up to perform the primary and simple obligations of saying his prayers that they declared the illness should be deemed a death illness." The learned Judges upon the evidence held that there was nothing in the symptoms of the patient which should necessarily have excited in him an apprehension of death. This case was carried in appeal to the Privy Council and the Judicial Committee in *Fatima Bibi v. Ahmed Baksh* (5) dismissed the appeal, holding that the test which was treated as decisive on the point of the validity of the gift, namely, whether the deed of gift was executed by the donor under apprehension of death, was the right question in the case. The case of *Ibrahim Golam Ariff v. Saiboo* (6) went up to the Privy Council from a judgment of Chitty, J., then a Judge of the Burma Chief Court, which had been affirmed on appeal by Thirkell White, C. J. and Bigge, J. In that case the Courts appear to have proceeded upon the test

which they considered to be the crucial test in the case, namely, whether there was an apprehension of death in the mind of the donor at the time of the execution of the deed of gift which formed the subject-matter of that case, and concurrently found that question in the negative. Their Lordships of the Judicial Committee on those findings refused to interfere holding that "the law applicable was not in controversy: the invalidity arises where the gift is made under pressure of sense of imminence of death."

These cases must be taken to have set at rest the controversy relating to the rigidity of the one year rule. In view of these cases it is also impossible to contend any longer that the subjective apprehension of death in the mind of the donor as distinguished from the apprehension caused in the mind of others, does not count in the law of Marz-ul-mout. The existence of this subjective element as an ingredient in the law of Marz-ul-mout, was doubted by Woodroffe, J., in the case of *Kulsom Bibee v. Golam Hossein Cassim Ariff* (7) and Sir Abdur Rahim in his Principles of Mohamadan Jurisprudence, page 256, says that it is not a test at all in such matters.

The law of Marz-ul-mout was considered in the case of *Sarabai v. Rabia Bai* (8) in which Batchelor, J., laid down that, in order to establish Marz-ul-mout, there must be present at least three conditions:—(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life; (2) there must be some degree of subjective apprehension of death in the mind of the sick person; and (3) there must be

(5) I. L. R. 35 Cal. 271 (P. O.) (1907).

(6) I. L. R. 25 Cal. 1 (P. O.) (1907).

(7) 10 C. W. N. 449 at p. 478 (1905).

(8) I. L. R. 30 Bom. 537 (1905).

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some external indicia, chief amongst which would be the inability to attend to ordinary avocations." These principles were adopted in a later decision of the same Court, *Rasheed v. Sherabanoo* (9).

In view of the decision of the Judicial Committee referred to above, it may perhaps be doubted as to whether the third condition mentioned in the Bombay cases is really a *sine qua non*.

As regards the investigation into the nature of the illness in the present case we are to some extent relieved by reason of the fact that the malady that Mohammad Tayeb was suffering from was a specific one, and was definitely diagnosed as paralysis of the lower limbs. There is hardly any divergence amongst the witnesses as to the chief characteristics and features of the illness, except perhaps as to minor details as regards which very little preference may be given to one witness more than to another, in view of the fact that the evidence of each witness is coloured by his or her conception of what would or would not constitute Marz-ul-mout. The evidence or such of it as may be safely taken to be reliable points to the first attack of the illness having come in the month of February 1895, the *wakfnama* was executed, as I have said, on the 20th March 1895. It was presented for registration on the 21st March 1895, and actually registered on the 23rd. Mohammad Tayeb died in November 1895. There is no reliable evidence, one way or the other, as to whether the intensity of the affliction went on or the increase or whether it varied at any time during the period he suffered from it. The trend of the evidence is to the effect that from the first attack medicines began to be administered and he was kept on liquid diet. The lower

limbs having been paralysed he would always remain in bed and had to be helped or raised to a sitting posture. On the other hand, we have it that he was taken on a chair into a palanquin on which he was carried to the office of the Registrar where he personally admitted the execution of the document. There is therefore no reason to hold that his brain was affected about the time that the document was executed or at any time, and the evidence of the witnesses who want to make out that his mental faculties had been in any way impaired cannot possibly be believed. The evidence relating to the part that he took in connection with the preparation of the drafts for the *wakfnama*, and the instructions that he gave in connection with the transaction clearly show that he was in full possession of all his faculties. There is nothing suggestive of senile decay, and he was fairly well with all his powers, but for the paralysis of the lower limbs, for the ripe old age of 94 or 95 that he is said to have been of at the time. These findings are substantially the same at which the learned President has arrived on the evidence in the case, and with his findings in this respect I entirely agree.

The question, however, is not what the testamentary capacity of Mohammad Tayeb was at the time the document was executed, but to quote the words of the Judicial Committee in the case of *Fatima Bibi v. Ahmed Baksh* (5), "whether the deed was executed under an apprehension of death" or in the words of their Lordships as used in the case of *Ibrahim Golam Ariff v. Saiboo* (6), whether the *wakf* was made "under pressure of a sense of imminence of death." The possession of one's senses and mental

(5) I. L. R. 35 Cal. 371 (P. C.) (1907).

(6) I. L. R. 35 Cal. 1 (P. C.) (1907).

(9) I. L. R. 31 Bom. 264 (1907).

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faculties is no index of this apprehension; in fact the proportion of the one to the other would, if anything, vary in the inverse ratio. We have the fact that from the day that he was struck by the disease he was kept on liquid diet, the fact that he was an old man of 94 or 95, the fact that there was nothing before him suggesting that the disease had taken a favourable turn, the fact that the illness continued till the 21st March 1895 on which date the document was executed and the fact that steps were taken the very next day to get the document registered—these facts to my mind suggest unmistakably that Mohammad Tayeb apprehended that he would not survive the illness, and that his end was approaching. Apart from the texts to which I have already referred, the one thing which was held in the case of *Hasarat Bibi v. Golam Jaffar* (4) as likely to create in the mind of Mohammad Tayeb an apprehension of death, and which dictum was approved in the case of *Fatima Bibi v. Ahmed Bukhsh* (2) exists in the present case. It has been found by the learned President and rightly so upon the evidence, and in fact that finding has not been challenged before us, that Mohammad Tayeb from the time that the disease came upon him was unable to stand up for prayer. There is a rational foundation for the rule as to why this inability is regarded in Mahomedan law as creating such apprehension. It is only in a case of utter and absolute disability that one would say his prayers without standing; and when one finds this disability attending him during prayers, it is bound to fill his mind with an apprehension that the end is not far off. At the date of execution of the deed the disease was a little over a month old,

and in no sense had continued for a sufficient length of time so as to be a part of his nature. I think all the circumstances point to his having apprehended at the time he executed the deed that it was highly probable that the malady would soon end fatally. At that point of time there was a preponderance of apprehension that death was more probable than life though he lingered on for seven or eight months more and then expired. The *wakf* in my opinion was made under a sense of impending death which he feared was coming on as a result of the illness he was suffering from. The learned President has relied upon a passage in Ballie's Digest, p. 543, which runs thus:—"The lame, the paralytic, the consumptive, when the malady was of long continuance and there is no immediate apprehension of death, may make gifts of the whole of the property." In my opinion the facts indicate that the apprehension of death was immediate, and that the deed was executed under an apprehension that death was imminent in the sense that there was nothing to stand between the illness and the death, or, in other words, that the latter would follow inevitably as a necessary result of the former and at no distant date. More than that is not necessary under the law of Marz-ul-mout.

There is on the record a judgment of my learned brother Greaves, J., dealing with the question of the validity of this *wakf*. That judgment is undoubtedly entitled to every respect but as the learned President has held it cannot operate as *res judicata* in the present case. It may also be remarked that Greaves, J., was able to find upon the evidence that was before him that Mohammad Tayeb suffered for more than a year from his illness before his death, a finding which the

(2) I. L. R. 31 Cal. 319 (1903).

(4) 3 C. W. N. 57 (1896).

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evidence before us does not support.

For the above reasons I am unable to agree in the view taken by the learned President on the question of the validity of the *wakf*. I am of opinion that the *wakf* was invalid except to the extent of a third of the properties covered by it, which belonged to the *wakif*.

The appeal will be allowed and apportionment of the compensation in respect of the premises, when it is made, will be made on the basis indicated above.

The Appellant will be entitled to her costs from the contesting Respondents both in this Court and of the Court below.

N. G.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 11 OF 1925.

<p>SUHRWARDY, J. PANTON, J. 1925, 24, June.</p>	<p>BHAGIRATHI CHOW- DHURY and ors., Appellants, v. THE KING-EMPEROR, Respondent.</p>
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Criminal Procedure Code (Act V of 1898), sec. 162, scope of—Evidence of investigating Police Officer that he had examined certain witnesses for the defence who stated that they were not present at the occurrence, if admissible—Map prepared by Police Officer with statements of witnesses made to him noted thereon—Inadmissibility of such maps—Jury, misdirection to.

Where in a Sessions trial the investigating Police Officer was asked if he had examined witnesses for the defence in the course of the investigation and deposed that he had examined two such persons who stated that they were not present at the occurrence :

Held—That the statement by the Police Officer was not admissible. Sec. 162, Cr. P. C. is clear enough to exclude any state-

ment made by any person and directs that such statement shall not be used for any purpose.

The manner in which the statement was brought out, commented on.

A map prepared in a criminal case should not have thereon any statement made by a witness to the person preparing the map noted thereon.

Such statements in a map prepared by a Police Officer are inadmissible under sec. 162, Cr. P. C. and as hearsay evidence :

Held—That the trial was vitiated by the inadmissible evidence of the investigating Police Officer and the improperly prepared map being placed before the jury.

This was an appeal preferred on the 25th February 1925 against an order of the Sessions Judge of Rajshahi (Mr. B. K. Bosu), dated the 6th December 1924, by which he convicted the Appellants of an offence punishable under secs. 147 and 325, I. P. C., and sentenced them to five and three years' rigorous imprisonment respectively.

The facts of the case will appear from the judgment.

Babus Debendra Narain Bhattacharjee and Lalit Mohan Sanyal for the Appellants.

Mr. Khondkar (Deputy Legal Remembrancer) for the Crown.

Babu Khirode Lal Sen for the Complainant.

The JUDGMENT OF THE COURT was as follows :—

SUHRWARDY, J.—This appeal is by Bhagirathi Chowdhury and four others who have been convicted in accordance with the majority verdict of the jury by the Sessions Judge of Rajshahi. The first accused has been convicted under secs. 147 and 325, I. P. C., and sentenced under sec. 325 to five years' rigorous im-

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prisonment, no separate sentence having been passed under sec. 147. The other four accused persons have been convicted under secs. 325/149, I. P. C., and sentenced to three years' rigorous imprisonment.

The riot alleged to have taken place was over a piece of land, in course of which, it is said, one Mir Panchu was beaten to death. Several objections have been taken on behalf of the accused to the address by the Judge to the jury; but it is sufficient to refer to two of these, as in our opinion the others are not important.

The first objection is that certain statements have been admitted by the learned Sessions Judge which are inadmissible in evidence. In the course of the examination of Ananta Prosad Das (Sub-Inspector of Police) he was asked in examination-in-chief whether he examined during the course of the investigation any witness on behalf of the accused and he said that he had examined only two witnesses Bartu Chowdhury and Daulot Ghose who were produced before him and both of them stated that they were not present at the occurrence. This, it is said, is in contravention of the provisions of sec. 162, Cr. P. C. That section says that no statement made by any person to a Police Officer in the course of an investigation . . . shall be used for any purpose at any enquiry or trial . . . It is not clear why the witness was made to make this statement; but it is suggested that one of the persons named by him at least, namely, Daulot Ghose, was a witness, cited by the defence and therefore in anticipation of the evidence which might be given by Daulot Ghose, this statement was made by the Inspector. In my opinion this statement by the Sub-Inspector is not admissible. Sec. 162, Cr. P. C. is

clear enough to exclude any statement made by any person and directs that such statement shall not be used for any purpose. The way in which this evidence has been brought out is objectionable in more ways than one. It is in direct contravention of the above provision of law and it is not justified by any other provision of law which makes evidence contradicting possible evidence of a possible witness admissible against the accused. The mere fact that one of the persons so named by the Sub-Inspector was cited by the defence did not justify the prosecution in getting out a statement made by him in anticipation of what he might say. This statement by the Sub-Inspector in the hearing of the jury must have apparently prejudiced the case for the defence and left an impression in the mind of the jury that the accused produced witnesses in support of their case before the Sub-Inspector and both of them denied any knowledge of the occurrence. This statement is not therefore admissible.

The second ground on which the legality of the trial is assailed is that the map prepared by the Sub-Inspector and placed before the jury contains statements of witnesses and hence the map should not have been placed before the jury with those statements thereon. There are two very important endorsements on the map. The first is against the point marked with an arrow and runs thus: "The deceased and Luddi Sheikh Peadas stood here and the deceased received *lathi* blow from Bhagirathi Chowkidar accused while standing here." In another part of the map certain dotted lines were put and the remark against them is, "showing the route taken by the deceased on being chased by the accused persons." These statements were not of the Sub-Inspector from his personal knowledge but from what he

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had heard from other people at the time of the investigation. Such statements are therefore inadmissible under sec. 162, Cr. P. C., and as hearsay evidence. The impropriety of placing maps before the jury containing statements of witnesses or of information received by the person preparing the map from other persons has been recently pointed out in several cases. In *King-Emperor v. Abinash Chandra Bose* (1) the learned Chief Justice has fully dealt with this matter and it has been laid down that "a person who makes a map in a Criminal case ought not to put upon it anything more than what he sees himself. Particulars derived from witnesses examined on the spot should not be noted on the body of the map but on a separate sheet of paper annexed to the map as an index thereto." The direction given here may be inconvenient but the law seems to be clear. The learned Chief Justice in a very recent case to which my learned brother was party (Jury Reference No. 6 of 1925 decided on the 1st May 1925) referred to a map like the one in the present case and remarked that the map placed before the jury was a clear instance of what should not be done, and observed as follows :—"In my judgment the map in its present state ought not to be allowed to be placed before the jury. If it was necessary for the map to be placed before the jury the proper thing to be done was to have a clean copy made with these entries omitted, so that the jury would have a map before them which could not have prejudiced their mind in any way." In my judgment apart from the instruction in the Police Regulations and the High Court Circular Orders, it is highly prejudicial in the interest of justice to allow statements which may or may not

be admissible in evidence to be introduced in a case by indirect means. For instance, the map prepared by the Sub-Inspector from certain information received from another person introduces a statement made by that person and it is possible that the person who gave the information to the Sub-Inspector was not himself competent to make the statement his information having been derived from others not before the Court. Apart from sec. 162, Cr. P. C., such statements under the general law ought not to be made to go in in the shape of entries in maps. The trial accordingly has been vitiated by the introduction of these pieces of evidence and in my opinion, the conviction cannot stand.

In the result the conviction of and the sentences passed upon the Appellants should be set aside and a retrial ordered. The Appellants Nos. 2 to 5 will remain on bail and the Appellant No. 1 in custody until further orders by the Magistrate.

PANTON, J.—I agree.

S. C. M.

(1) I. L. R. 53 Cal. 472; s. c. 28 C. W. N. 995 (1924).

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD SUMNER.

SIR JOHN EDGE.

MR. AMEEB ALI.

1925,

Heard, 22 and

25, May.

Judgment,

18, June.

BURN & Co., LD.,

Appellants,

THAKUR SAHIB SHREE

LUKHDIRJI OF MORVI

STATE, Respondent.

Contract—Breach—Time, if of essence of contract—Party entitled to rescind after expiry of time but continuing to treat contract as subsisting, if commits a breach by treating contract later on as rescinded on ground of the other party's default.

Shortly after the war broke out, the Defendant Company agreed to supply to the Plaintiff 50 railway wagons for an agreed price, the terms of payment being that the Plaintiff should pay a third of the price on the order being given, another third when the underframes of the wagons should be wheeled and the balance on delivery. The Plaintiff did not pay the second instalment when, the underframes having been wheeled, the Defendant Company asked for its payment; nevertheless the Defendant Company delivered 8 wagons and these were received by the Plaintiff. The Defendant Company thereafter asked for but failed to obtain from the Plaintiff the second instalment of the contract price and the price of the 8 wagons delivered, and then refused to perform the rest of the contract unless the balance of the contract price was first paid to them. Thereafter the Plaintiff sent to the Defendant Company a cheque to cover the second instalment and asked for the delivery of the remaining 42 wagons, the third instalment of payment to be made upon such delivery:

Held—That in the circumstances of the case, the intention of the parties when the contract was made was that time should be of the essence of the contract,

as to the time when the three instalments of the contract price were to be paid; and therefore when the second instalment was not paid by the Plaintiff, the Defendant Company might rescind the contract; but by delivering 8 of the wagons after the default they treated the contract as subsisting. The Defendant Company could not insist on the payment on delivery of the price of the 8 wagons only, and they committed a breach of the contract in refusing to deliver the remaining wagons without payment of the balance of the contract price.

This was an appeal (No. 134 of 1924) from a decree, dated the 27th June 1923, of the High Court in Bengal, which affirmed a decree, dated the 30th August 1922, of the said Court in its Original Jurisdiction.

The Thakur Sahib of Morvi brought the suit against the Appellant Company for damages for an alleged breach of contract to supply wagons.

The Plaintiff was the owner of the Morvi State Railway and the contract in suit was contained in letters which passed between the parties from October 1914 to January 1915. The contract provided for the supply of 50 wagons by the Appellant Company within 6 months of the receipt of order. Payment was to be made one-third with order, one-third when the underframes were wheeled, and one-third on receipt of the wagons. The first instalment was paid when the order was given. Thereafter considerable delay took place in securing necessary parts for the wagons but on the 25th October 1916 the Appellant Company gave notice to the Respondent that the underframes were wheeled, and demanded the second instalment.

No payment was made in reply to this demand.

On the 20th February 1917, 8 wagons

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were delivered and accepted and further demands were made from time to time for the second instalment. On the 18th July 1917 the Appellant Company gave notice of cancellation of the contract and sold the remaining wagons.

On the 22nd September 1917 the Respondent tendered the amount of the second instalment.

The main question for decision was as to whether the provision in the contract that the second instalment should be paid when the underframes were wheeled was a provision in which time was of the essence of the contract.

The facts and correspondence are set out at length in the judgment of the Judicial Committee.

The trial Judge (Rankin, J.) held that in the circumstances time was not of the essence of the contract but that the Appellant Company was entitled to cancel on giving notice limiting a reasonable time for payment.

That no such notice was given by them, and that, inasmuch as a tender of the second instalment was eventually made by the Respondent, the contract was broken by the Appellant Company against whom he made a decree.

The High Court (Sanderson, C. J. and Richardson, J.) were of the same opinion and dismissed an appeal by the Company.

Messrs. Dunne, K. C. and Aske for the Appellant Company.

Sir Geo. Lowndes, K. C. and Mr. O'Connor for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—The suit in which this appeal has arisen was brought on the Original Civil Jurisdiction side of the High Court at Calcutta on the 27th August 1918 by His Highness the then

Thakur Sahib of Morvi against Burn and Company, Limited, to recover damages for the alleged conversion of 42 railway wagons, and for an alleged breach of contract to make and deliver the same wagons. The property in the wagons had never vested in His Highness of Morvi, who had never been, constructively or otherwise, in possession of them. The claim for conversion has been dropped. The original Plaintiff died and his son, who succeeded him as the Thakur Sahib of Morvi, was on the 19th July 1922, brought on the record as the Plaintiff. The original Plaintiff was, and his successor, the present Plaintiff, is the proprietor of the Morvi State Railway.

The contract was made between His Highness the then Thakur Sahib of Morvi through the manager of the Morvi State Railway, his agent, and Burn and Company, Limited, of Howrah and Calcutta, in British India. The contract was for the manufacture of 50 railway wagons by the Defendant Company at the Company's works at Howrah and their delivery to the Morvi State Railway upon certain terms which will be later more fully mentioned. The contract was made by correspondence between the manager of the Morvi State Railway, who lived at Morvi, and the Defendant Company at Calcutta. The suit has throughout been treated as a suit upon a contract to which the Indian Contract Act, 1872 (Act IX of 1872), applies.

The correspondence began on the 29th October 1914 by a letter to the Defendant Company from the manager for the Morvi State Railway, asking the Company to quote rates for 25 covered wagons and 25 open wagons as per specifications and drawings which he enclosed. The specifications showed that the wagons were to be metre gauge railway wagons. Bet-

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ween the 29th October 1914, and the 23rd January 1915, several letters passed between His Highness's agent and the Defendant Company, the result of which was the contract in suit. By the contract which was agreed upon the Defendant Company agreed to manufacture and to deliver to the Morvi State Railway, upon terms as to payment which will be mentioned, 25 covered and 25 open goods wagons, 50 railway wagons in all, at the price of Rs. 1,825 for each covered wagon and at the price of Rs. 1,875 for each open wagon, the wagons to be in accordance with certain specifications and drawings, and the 50 wagons to be delivered in six months from the date of the receipt by the Defendant Company of an order for the wagons. The terms of payment were that His Highness of Morvi should pay to the Defendant Company one-third of the contract price on the order for the wagons being given, and one-third of the contract price when the underframes of the wagons should be wheeled, and the remaining one-third when the wagons should be delivered. One-third of the total contract price amounted to Rs. 30,833. The contract contained no provision that the contract time for the delivery of the wagons should be extended in case the Defendant Company should be delayed in completing the wagons owing to the war or any other cause beyond the company's control.

On the 23rd January 1915, His Highness of Morvi, through his agent, sent to the Defendant Company his final order for the 50 wagons and said "we have no more drawings to send than we have already sent. From the specifications and drawings sent, you will kindly prepare working drawings in detail and send them for our approval."

After the receipt by the Defendant

Company of the order of the 23rd January 1915, for the wagons, the Defendant Company was much delayed in performing the contract by the difficulties, owing to the war, of obtaining some of the necessary parts of the wagons and the wagons were not ready for delivery at the time specified by the contract. His Highness of Morvi did not at any time exercise such right, if any, as he may have had under the Indian Contract Act, 1872, of determining the contract because the Defendants had failed to deliver the wagons in accordance with it.

The agreement that the second instalment of the contract price should be paid by His Highness to the Defendant Company when the underframes of the wagons should be wheeled, of course meant that the second instalment should be promptly paid when the Defendants had given His Highness of Morvi, through his agent, notice that the Company had fixed the wheels to the under-frames of the 50 wagons. On the 25th October 1916, the Defendants sent by post to the manager of the Morvi State Railway an account, dated the 24th October 1916, for Rs. 30,833, for the second instalment, being one-third of the contract price due when the "underframes are wheeled," and stated in the letter in which the account was enclosed, that it was submitted by them "for favour of payment at your convenience." That letter and the account which was enclosed in it were notice to His Highness's agent, when in the course of the post they were received at Morvi, that the Defendant Company had fixed the wheels to the underframes of the 50 wagons. It was found by Mr. Justice Rankin, who tried the suit, and it has not been disputed, that at the date of that account, the 24th October 1916, the underframes had been wheeled. On the 19th

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November 1916, the manager of the Morvi State Railway acknowledged the receipt of the Company's letter of the 25th October 1916, and enquired "when the wagons will be completed and despatched," but did not send any payment of the second instalment.

The position which His Highness, through his agent, then took up and maintained for months is illustrated by the following extract from the manager's letter of the 19th November 1916 :—

"It is now more than a year and a half and yet, as we understand from your letter, you have come as far as the wheeling of underframes, and at the rate you have gone on, there is no knowing when you will finish the work. When we placed the order, you certainly knew the condition of the market, because the war had then been on some months already. Till June even you talked of delay of a few weeks, but it is now several months which may perhaps run into years. In addition to loss of interest on the money locked up with you and trouble and inconvenience we had to pay hire to other Railways and even on payment of hire we could not get timely and sufficient supply and suffered in traffic. In consulting your convenience it was only fair and reasonable that you should have consulted ours. From your opening correspondence, we expected, beside solid and substantial work, that timely execution of this order might lead to future orders.

"We fear the payment of 2nd instalment will remain locked up as the 1st and shall therefore be glad to know definitely when the wagons will be completed and despatched."

In reply to that letter of the 19th November 1916, the Defendant Company wrote to the manager of the Morvi State Railway on the 23rd November 1916, as follows :—

"Your favour No. 4906 of 1916 dated 19-11-16. We regret very much that you should write to us in this way as we can assure you we have done all possible to expedite and complete your work, the delay is entirely due to conditions brought about by the war.

"You ask when delivery will be made and we regret we cannot at present inform you, for instance the springs for your buffers although all ready in England cannot be despatched because the Munitions Board have so far not granted the necessary permit for them to be shipped. To help us will you kindly

address the Railway Board stating that these springs are urgently wanted (i.e., 200 buffing springs) and should be supplied, send their reply to us and we can then enable our London Office to obtain shipping sanction.

"Your contract has been considered in every possible way and we trust that this trouble regarding one item alone, the buffing springs, will give you an example of the unprecedented and extraordinary conditions that have been in existence for the last 18 months and which grow more onerous and difficult every day."

The springs for the buffers referred to in that letter of the 23rd November 1916 were apparently Ibbetson springs, which are patent springs and are made only in England. Their Lordships think it only fair to the parties to this suit that some of the difficulties of the situation should be illustrated by the passages which they have quoted.

On the 14th December 1916, the 4th January 1917, and the 25th January 1917, the Defendant Company wrote to the manager of the Morvi State Railway asking for payment of the second instalment and received no reply. On the 14th February 1917, the Defendant Company telegraphed to the manager of the Morvi State Railway: "Kindly wire when may expect settlement bill rupees 30,833 account wagons." That was the account for the second instalment. In reply the Company received from the manager by telegraph the following reply on the 19th February 1917: "No. 87. Your telegram of 14th, matter is referred to proprietor of this railway." The proprietor was His Highness of Morvi. The reference to His Highness of Morvi did not result in the payment of the second instalment. In their Lordships' opinion His Highness of Morvi had then decided not to perform his contract to pay the second instalment until some future time, and the Defendant Company was then entitled under the Indian Con-

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tract Act, 1872, to rescind the contract, but the company did not rescind the contract.

By the 20th February 1917, the Defendant Company had completed eight of the contract wagons and on that date forwarded them to the Morvi State Railway, and thereby treated the contract as subsisting. On the 27th February 1917, the Defendant Company wrote to the manager of the Morvi State Railway enclosing an account, dated the 26th February 1917, for Rs. 5,000 in respect of the eight wagons, and in their letter said ". . . we have wired you to-day as follows: kindly wire why bill Rs. 30,833 account wagons not paid . . . we shall be obliged if you will arrange to remit the amount as well as the amount of the enclosed bill No. 8456 W. for Rs. 5,000 with as little delay as possible. . . ." His Highness of Morvi was not bound to accept in part performance of the contract eight wagons, but he did receive them. To the telegram of the 27th February 1917, the manager of the Morvi State Railway replied by telegram on the 28th February as follows: "No. 88. Your wire. Refer to this office wire 87 dated 18. Matter referred proprietor." The Defendant Company received no other reply to their telegram of the 27th February or to their letter of that date.

On the 5th March 1917, the Defendant Company wrote to the manager of the Morvi State Railway with reference to their account for the second instalment and his telegrams of the 19th and 28th February, and said that the Company had "decided not to despatch any more wagons till your proprietor has paid the bill before mentioned and also that for Rs. 5,000 sent you with our letter of the 27th ultimo." On the 11th April 1917, the Defendant Company wrote to the

manager of the Morvi State Railway as follows:—

"Dear Sir,

"*Re Wagons.*

"As we have neither received a cheque for the money due to us nor any reply to our letter dated the 5th March we find it necessary to address you again upon this matter and we desire to point out to you that by not paying our bills when they became due for payment you have broken the contract and we shall therefore take whatever action appears to us to be necessary for our own interests if we do not receive a satisfactory reply to this letter before the date specified below.

"The wagons could be delivered as soon as we could obtain trucks from the Railway to carry them, but we regret we cannot now permit another of your wagons to leave our works until you pay us in full for the whole order.

"Your action has put us to very considerable expense and very great inconvenience and at the present time your wagons are occupying much valuable space in our works. . . ."

The date specified in that letter was the 20th April 1917. The letter of the 11th April 1917 was, their Lordships consider, a notice to His Highness of Morvi that the remaining 42 wagons were completed ready for delivery to him on payment of the balance of the contract price which would then be due. On the 21st April 1917, the manager of the Morvi State Railway telegraphed to the Defendant Company as follows: "Your letter though dated eleventh reached here yesterday. Matter referred to proprietor who now in Bombay." No other reply to the Defendant Company's letter of the 11th April having been received, the Defendant Company wrote to the manager of the Morvi State Railway on the 7th May 1917, as follows:—

"*Re Wagons.*

"We desire to call your special attention to our letter dated the 11th ultimo and to inform you that it is now imperative that we receive a satisfactory reply to this letter at once otherwise we shall have no option but to settle the matter without further reference to you. Kindly favour us with a reply by return."

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To which the Defendant Company received the following reply, dated the 19th May 1917 :—

"Re WAGONS.

"With reference to your special reminder No. OM231/H., dated the 7th instant, I have to inform you that His Highness the Thakore, proprietor of this Railway, is not here at present but he has gone to Matheran, a hilly station for the hot weather, and so I have forwarded your letter to him and I will let you know on hearing from him."

No other reply to the Defendant Company's letter of the 7th May having been received, the solicitors of the Defendant Company, on the 4th July 1917, wrote to the manager of the Morvi State Railway as follows :—

"Sir,

"Supply of Wagons from Messrs. Burn and Co., Ltd.

"Our clients, Messrs. Burn and Co., Ltd., have instructed us to address you with reference to the contract for the purchase by your Railway of 50 goods wagons from them. The terms of the contract were: Payment as to 1/3rd with the order, 1/3rd when the underframe was wheeled and the balance on delivery. The first instalment was duly paid but the second instalment has not yet been paid, in spite of repeated demands, and in spite of the fact that our clients have actually delivered 8 wagons. In the existing circumstances of the trade, it is obvious that our clients cannot keep the undelivered balance of the wagons locked up indefinitely and, as you have failed to carry out your part of the contract, the only course now open to them is to dispose of the wagons elsewhere as best they can but before doing so they are prepared to give you the opportunity of purchasing these wagons outright by paying the total amount of the original contract price outstanding and we are accordingly instructed to give you notice, as we hereby do, that unless the full amount of the original contract price is paid to our clients or to us as their agents within 10 days from the date hereof the undelivered wagons will be disposed of by our clients as they may think fit.

"Yours faithfully,

"Orr, Dignam and Co."

On the 18th July 1917, the Defendant Company's solicitors wrote to the manager of the Morvi State Railway as follows :—

"Sir,

"As neither our clients nor ourselves have received any reply to our letter to you of the 4th instant our

clients have now taken steps to dispose of the undelivered wagons elsewhere and have made up an account the balance due to the Railway [after deducting the costs of the wagons delivered from the deposit made to be Rs. 15,833. We enclose you herewith copy of this account together with our cheque for Rs. 15,833 and shall be obliged if you will let us have a formal receipt for this amount by return.

"Yours faithfully,

"Orr, Dignam and Co."

After the 18th July 1917, the Defendant Company sold the 42 wagons to the Mysore State Railway. On the 22nd September 1917, Messrs. Sanderson and Co., the solicitors of His Highness of Morvi, wrote to the Defendant Company's solicitors saying that they were instructed to ask for the delivery of the 42 wagons still undelivered, enclosing a cheque for Rs. 30,833, the amount of the second instalment, and stating that their clients would pay the third instalment, immediately on the receipt and erection of the wagons in accordance with the terms of the contract. It may be assumed that the cheque was returned. The rest of the correspondence is not material.

As has been mentioned, the suit was tried by Mr. Justice Rankin. It was contended on behalf of the Defendant Company that the payments of the instalments of the contract price at the times specified for them were of the essence of the contract. In support of that contention it was urged that the terms as to the payment of the first and second instalments showed that time was of the essence of the contract; that the performance by the Company of the contract involved the expenditure of very considerable sums of money and the occupation of the Company's workshops by a large number of bulky articles; that metre gauge railways did not form a market where such wagons could be easily disposed of; that the wagons had to be made in accord-

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ance with special specifications; and that Plaintiff was a person who could not be sued as of right. Mr. Justice Rankin observed in his judgment that the case depended entirely upon the correspondence, the correct appreciation of the general circumstances of the case, and of the rules of law to be applied, and he said :—

“On the whole and with some difficulty, I have come to the conclusion, looking at the circumstances and the letters, that in this case time was not of the essence of the contract.”

The letters to which the learned Judge referred were letters of the 28th December 1914, the 10th January 1915, the 16th January 1915, and the 23rd January 1915, which, in their Lordships' opinion, do not support the conclusion at which he arrived.

Mr. Justice Rankin, having observed that the Defendant Company had, on the 18th July 1917, sent to the Plaintiff's solicitors the letter of that date enclosing a cheque for the balance due, on the footing that the contract was cancelled, held that the Defendant Company had broken the contract, and gave His Highness of Morvi, the present Plaintiff, a decree for damages, which, in their Lordships' opinion, were not excessive. The balance for which the cheque was sent was the balance due of the first instalment, which had been paid, after deducting the price of the 8 wagons.

From that decree the Defendant Company appealed under the Letters Patent. The appeal was heard by Sir Lancelot Sanderson, C. J., and Mr. Justice Richardson. The Chief Justice in his judgment said :—

“But for the conduct of the Defendants, I should have thought that with regard to the payment of the second instalment time was of the essence of the contract. The Defendants were under contract to build 80 wagons. In my judgment they were not bound to proceed with the work, after the wheels were attached to the underframes, until the Plaintiff paid the second instalment. They surely could not

be expected to keep the wagons, partly built, standing in their works, for an indefinite time, or for so long as the Plaintiff chose to keep them waiting for the second instalment. Having regard to the terms of the contract and the nature of the work to be done by the Defendants, in my opinion, *prima facie*, time would be of the essence of the contract.

“The Defendants, however, for some reason known to themselves, did not treat it as of the essence of the contract.

“They actually delivered 8 wagons in February 1917, although the second instalment, which had been demanded in October 1917 (1916), had not been paid, and although as far as could be seen in February 1917, there was no immediate prospect of the second instalment being paid.”

The Chief Justice and Mr. Justice Richardson agreeing that the Defendant Company broke the contract on the 18th July 1917, the appeal was by their decree dismissed. From that decree this appeal has been brought.

Their Lordships, having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the 50 wagons would involve considerable expenditure by the Defendant Company in providing materials for their construction, and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce in a British Court or in a Court of the State of Morvi payment by His Highness of Morvi of the contract price, are of opinion that it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid. When His Highness of Morvi had, after he had notice that the underframes of the wagons had been wheeled, made default in payment of the second instalment of the contract, which was, in effect, a refusal by him to perform the contract in its entirety, the

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Defendant Company was entitled to treat the contract as void and to rescind it, but the Defendant Company did not rescind it; on the contrary, the Defendant Company, by delivering 8 of the wagons in February 1917, to the Morvi State Railway, treated the contract as a subsisting contract. The Defendant Company was not on that delivery of the 8 wagons entitled to insist on a then payment for them. The contract price was not payable until the 50 wagons had been delivered.

In the view of the facts of this case which their Lordships take, and of the law which they consider is to be applied to those facts, they find that the Defendant Company finally broke the contract in July 1917. The 18th of that month may be taken as the date when Defendant Company finally broke the contract.

Their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors: Messrs. Waltons & Co. for the Appellants.

Solicitors: Messrs. Watkins & Hunter for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 197 OF 1924.

SANDERSON, C. J.)	W. & T. AVERY, LD.
BUCKLAND, J.)	v.
1925,	KESSORAM PODDER.
10, July.	

Calcutta Rent Act (III, B. C., of 1920), sec. 2, cl. (f), sub-sec. (i), sec. 11, sub-sec. (5), and sec. 15—Standard rent, what is—Tenant, when entitled to the benefit of the Act—Fair and reasonable compensation for use and occupation, basis of.

The standard rent as defined by sec. 2,

cl. (f), sub-cl. (i) of the Calcutta Rent Act should be taken to be the rent at which the premises were let out on the 1st of November 1918 with the addition of ten per cent. as provided in the section, in the absence of any application by the landlord to fix it at a higher rent under sec. 15. This is fixed by statute and does not depend upon any action taken before the Rent Controller.

JETHA BHULCHAND v. GRACE (1) referred to.

A tenant claiming the benefit of sec. 11 of the Act is entitled to it only if he has complied with the two following conditions of sub-sec. (5), viz., firstly, if he has paid all arrears of rent that might be due at the time of the passing of the Act and, secondly, he must pay the rent to the full extent allowable by the Act, within the time fixed by the contract, if any, or within the 15th day of the month next following that for which the rent is payable. He does not get three months to pay the rents of the first three months after the commencement of the Act, the second condition applying to them.

When the position of a tenant has been reduced to that of a trespasser, he is no longer entitled to the benefit conferred by the Act.

This was an appeal preferred on the 22nd December 1924 against an order of Mr. Justice Chotzner dated the 1st December 1924, passed in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. W. W. K. Page for the Appellants.

Mr. S. R. Das (Advocate-General) for the Respondent.

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The JUDGMENT OF THE COURT was as follows :—

SANDESON, C. J.—This is an appeal by the Defendants against the judgment of my learned brother Mr. Justice Chotzner.

It is necessary for me to state certain facts : The Appellants were in occupation of one room on the ground floor of premises No. 1, Hastings Street, as monthly tenants from the end of 1911 or the beginning of 1912. The rental was Rs. 150 per month. That rental remained the same until the year 1919. In 1911 the landlords were the Mullicks. In 1919 Messrs. Solomon & Co. took a lease from the Mullicks of the premises No. 1, Hastings Street, for a term of twenty years. The Appellants continued to be tenants under Messrs. Solomon & Co.

On the 5th of September 1919, an agreement was made between the Appellants and Messrs. Solomon & Co. to pay Rs. 500 rent per month : there were negotiations for a lease, which were never brought to completion. In December of the same year the Plaintiff, Kessoram Podder, bought the lease from Messrs. Solomon & Co. and the premises from Messrs. Mullicks for a total of 11 lacs, paying 2 lacs for the lease and 9 lacs for the premises.

The Plaintiff accepted the Appellants as monthly tenants at the same rate of rent, namely, Rs. 500. The Appellants paid the rent at the rate of Rs. 500 up to the end of April 1920. On the 5th of May 1920, the Calcutta Rent Act came into operation. In June the Plaintiff demanded the rent for May : the Appellants then said that they were liable to pay standard rent only, which was the rent payable on the first of November 1918, plus ten per cent., namely, Rs. 165.

Apparently, no reply was sent to that

statement and, on the 21st of July 1920, the Appellants tendered the rent based upon the rate of Rs. 500 up to the 5th of May, when the Rent Act came into force, and at the rate of Rs. 165, which the Appellants declared to be the standard rent, for the subsequent period. This was refused : and, on the 23rd of July 1920, the amount was paid to the Rent Controller, and after that date the Appellants continued to pay what, they contended, was the standard rent to the Rent Controller.

The Plaintiff gave notice to the Appellants that he was intending to pull down and re-build the premises : and, he gave them notice to vacate the premises : no action was taken on the first notice and apparently the Plaintiff abandoned his intention to re-build the premises, when he failed to get possession from the Appellants and entered into an agreement to sell the premises to the Imperial Bank. That purchase was completed subsequently, *viz.*, on the 7th of December 1921.

The Plaintiff, on the 29th of December 1920, gave notice to the Defendants to vacate the premises at the end of January 1921. That is the notice to quit, upon which reliance is placed in this suit.

This suit was brought on the 10th of January 1922, and the claim was for rent from and including May 1920 to the end of January 1921 at the rate of Rs. 500 per month, and for damages for wrongful use and occupation of the premises from the 1st of February 1921 up to the 7th of December 1921, which, as I have said, was the date on which the Plaintiff sold the premises to the Imperial Bank and after which he had no interest in the premises.

The first point, which was urged by the learned Advocate on behalf of the Ap-

pellants, was that the Plaintiff was not en-

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titled to recover rent in respect of the first period, namely, from 5th May 1920 to January 1921, both months inclusive, at a rate higher than the standard rent in respect of these premises.

The learned Judge rejected that contention on the ground that the standard rent had not been fixed by the Rent Controller, and that there was a fallacy underlying the argument, because it proceeded upon the assumption that a tenant could standardize his own rent. The learned Judge held that the Appellants ought to have applied to the Rent Controller for the standardisation of the rent and as they did not do so, they could not be heard in this suit to allege that they were not liable for more than the standard rent.

The question is whether the conclusion, at which the learned Judge arrived, is correct.

I am not surprised at the conclusion at which the learned Judge arrived, because it has been pointed out on many occasions that the provisions of the Calcutta Rent Act are difficult to construe. With great respect, however, to the learned Judge I am unable to agree with the conclusion at which he arrived.

The question depends upon certain sections of the Rent Act.

Sec. 2 (1) provides that "standard rent" in relation to any premises means, "(i) the rent at which the premises were let on the first day of November 1918, or, where they were not let on that date, the rent at which they were last let before that date and after the first day of November 1915, with the addition in either case of ten per cent. on such rent [I need not read No. (ii) in connection with this case inasmuch as the premises in question were let on the 1st of November 1918];

"(iii) in the case specified in sec. 15, the rent fixed by the Controller."

The word "or" does not appear between these sub-sections, but I think that it must have been intended that the sub-sections or clauses should be read disjunctively. Consequently "standard rent" may be as described in (i), (ii) or (iii) in sec. 2, cl. (f).

The learned Advocate who appeared for the Appellants submitted that the learned Judge was wrong in holding that the tenant had standardised his own rent. He argued that the rent was standardised by the Act; and he pointed out that the first sub-clause of sub-sec. (f), if it stood alone, would clearly indicate that the standard rent was the rent at which the premises were let on the 1st of November 1918 with the addition of ten per cent. on such rent.

But the learned Advocate who appeared for the Plaintiff argued that the first sub-section of cl. (f) does not stand alone and sub-sec. (iii) must be considered.

Now, turning to sec. 15, which is the section mentioned in sub-sec. (iii), sec. 2, cl. (f) it is found that "the Controller shall, on an application made to him by any landlord or tenant, grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant, as the case may be," and that "in any of the following cases the Controller may fix the standard rent at such amount, as having regard to the provisions of this Act and the circumstances of the case he deems just.

Sub-sec. (d) is one of the following cases and refers to the case "where the rent paid on the first day of November 1918 (or, where the premises were not let on that date, the rent at which the premises were last let before that date)

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was in the opinion of the Controller unduly low."

Sec. 15 therefore gives the landlord an opportunity of applying to the Controller and alleging that the rent paid in respect of these premises on the 1st of November 1918 was unduly low, and if he can prove that, it will be in the discretion of the Controller to fix the standard rent at an amount higher than the rent which was actually paid on the 1st of November 1918, subject to the proviso contained in the section that he cannot fix it at a higher amount than the highest rent actually paid for the premises at any time since the first day of November 1913. In this case the highest rent paid for the premises since the first day of November 1918 was Rs. 500 per month, so that if the landlord had applied to the Controller and alleged that the rent which had been paid in November 1918 was unduly low, the Controller might have fixed it at a higher amount. If he had been satisfied that the rent in November 1918 was unduly low, the Controller might have fixed it at a higher amount, but he could not fix it at a higher amount than Rs. 500 per month.

Consequently, the learned Advocate for the Plaintiff-Respondent argued that on the 1st November 1918 rent *plus* ten per cent. should not be adopted as the standard rent in this case, because the Controller might upon an application by the landlord have fixed a higher rent.

In my opinion, that view ought not to be accepted. I think it was intended by the Act that *prima facie* the standard rent which was mentioned in sub-sec. (i) of cl. (f) of sec. 2 should be the standard rent, and in the absence of any application by the landlord to fix it at a higher rate, under sec. 15, the "standard rent" should be taken to be the rent at which

the premises were let on the 1st of November 1918 with the addition of ten per cent. as provided by sub-sec. (i).

It was not necessary in my opinion for the Defendants in this case to show that they had made an application to the Controller and that he had fixed the standard rent at Rs. 165 before taking the point in this suit. In other words, in my opinion, it was open to the Defendants-Appellants to urge and rely upon the fact that the standard rent as fixed by the Act was Rs. 165 per month. Consequently, in my judgment, by reason of the provisions of sec. 4 of the Act, the Plaintiff was not entitled to recover any amount which exceeded the standard rent for the period from May 1920 to January 1921.

The result, therefore, is that, in my judgment, that part of the decree of the learned Judge which deals with the amount of rent recoverable should be varied.

I understand that the standard rent had been deposited with the Controller and has in fact been withdrawn by the Plaintiff.

The remainder of the case relates to the question whether the notice in December 1920 was a valid notice. That depends upon the construction to be placed upon sec. 11, sub-sec. (5). That sub-section provides: "No tenant shall be entitled to the benefit of this section in respect of any premises, unless within three months of the date of the commencement of this Act he has paid all arrears of rent due by him in respect of the said premises, and also unless he pays the rent due by him to the full extent allowable by this Act within the time fixed in the contract with his landlord, or, in the absence of any such contract, by the fifteenth day of the month next following that for which the rent is payable."

It is to be noticed that this section deals

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with the granting of an order or a decree for recovery of possession only.

The point arises in this way : As I have already mentioned, the amount of the standard rent for May and June was not tendered to the landlord until the 21st July 1920 and was not paid to the Rent Controller until the 23rd of July 1920, and it is not denied that that was not paid within the time specified by the Act. But the learned Advocate for the Appellants presented an ingenious argument based upon sub-sec. (5) of sec. 11 which was to this effect. He argued that sub-sec. (5) was intended to give a tenant three months within which he might pay the arrears of rent, and that such arrears would include not only any arrears of rent, which might be due at the time the Act came into force, but also any arrears of standard rent which might become due after the Act came into force.

In my judgment this argument ought not to be accepted. Having regard to the words used in the sub-section and to the framing of the sub-section, I think it is clear that the intention was to give the tenant the benefit of the section, if he complied with two conditions : in the first place he must have paid any arrears of rent which might be due at the time of the passing of the Act within three months of the commencement of the Act ; and, secondly, he must pay the rent to the full extent allowable by the Act within the time fixed by the contract with his landlord and in the absence of any such contract by the 15th day of the month next following that for which the rent is payable.

In this case the Appellants did not pay the rent within the time fixed in the contract or by the 15th day of the month, which followed the months of May and June for which the rent was payable :

and, consequently, in my opinion, the Appellants were in default.

It is true that the Plaintiff did not act upon the default until the end of the year ; but he was within his rights in giving the notice in December 1920 which expired at the end of January 1921.

Consequently, after January 1921 the Appellants were trespassers and were no longer tenants, and they are liable to the Plaintiff for compensation for the wrongful use and occupation of the premises from the 1st of February 1921 to the 7th of December 1921.

The learned Judge awarded compensation at the rate of Rs. 500 per month. He based his judgment to a large extent upon the evidence given by Mr. Shrosbree.

It was argued on behalf of the Appellants that the Plaintiff's case was that he wanted the premises in order that he might pull them down and re-build ; that he abandoned that intention of his own accord and sold the premises ; that although he alleged that he had suffered loss, he gave no proof of the alleged loss and therefore that the most the Plaintiff could recover would be such rent as the Plaintiff could have recovered from a tenant during those months ; that having regard to the provisions of the Calcutta Rent Act the Plaintiff could not have recovered from any tenant more than the standard rent in respect of the premises and that as the Appellants had in fact paid to the Controller the standard rent for this period and the Plaintiff had received the same, the Plaintiff was not entitled to any damages at all.

On the other hand, it was argued on behalf of the Plaintiff that the learned Judge was right in awarding damages at the rate of Rs. 500 per month.

I agree with the learned Judge's deci-

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sion as to the amount of the damages although I base my judgment on grounds somewhat different to those stated by the learned Judge.

The Plaintiff can only recover such damages as flow naturally from the breach of duty or breach of contract in the ordinary and usual course of things.

The evidence was that the Appellants had willingly agreed to pay Rs. 500 a month for the premises in 1919. Further they desired to take a lease for three years at the rate of Rs. 500 per month. The evidence further shows that the Appellants tried to find other premises but they could not get any other suitable premises at a lower rent than Rs. 500 a month.

Now, after January 1921, as I have already said, they were no longer tenants and they were not in a position to take advantage of the Calcutta Rent Act—they were wrong-doers.

In these circumstances it is not unreasonable to hold that Rs. 500 a month was a fair compensation for the use and occupation of the premises by the Defendants after January 1921.

It was not for the Plaintiff to prove what would have been the standard rent if an application had been made to the Controller.

The premises are in an important quarter of the town and the Defendants, before the Rent Act came into operation, were willing to pay Rs. 500 per month. *Prima facie* therefore it is not open to the Defendants to allege that such amount was not a fair rent for a tenant to pay. If an application had been made to the Rent Controller he might have fixed the standard rent at less than Rs. 500 per month. On the other hand, he might have fixed it at Rs. 500 a month.

No application was made and that question was never decided.

It has therefore not been proved what the standard rent would have been if the matter had come before the Controller.

In the absence of any such decision and upon the evidence in the case, I am not satisfied that the learned Judge was wrong in holding that the damages for the wrongful use and occupation of the premises by the Defendants should be assessed on the basis of Rs. 500 a month.

The result is that the sum of Rs. 4,500 decreed as rent will be reduced to Rs. 1,485 making the total amount of the decree Rs. 6,601-10-6.

As regards costs, we are of opinion that the Appellants should have the general costs of the appeal and the costs of one day's hearing. We do not interfere with the order of the learned Judge as regards costs.

The money received from the Rent Controller by the Respondents will be taken as part satisfaction of the decree and satisfaction will be entered to that extent.

BUCKLAND, J.—I will first deal with the point whether the notice to quit was a valid notice. For this purpose, though I shall give my reasons later, I may say at once that, in my opinion, the amount of rent which the Appellant Company had to pay was the amount which they actually deposited with the Rent Controller month by month and it is on this basis that I will deal with the question as to the notice to quit. The Appellant Company therefore were entitled to the benefit of sec. 11 of the Act provided they paid that amount either to the landlord by the fifteenth day of the month next following that for which it was payable, or, if refused by the landlord, deposited it with the Rent Controller under sub-sec. (4). The difficulty in which the Appel-

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lant Company find themselves is that as regards the rent for May 1920 they deposited it out of time and by reason of that they are precluded from claiming the benefit of the section.

The argument that the "arrears" referred to in sub-sec. (5) includes rent in arrear during the first three months after the Act came into force, and payable in respect of those months leads to the difficulty that in regard to those three months, if that construction were adopted, there would be two inconsistent provisions as to the payment of rent, namely, that provided in the first part of sub-sec. (5) that the tenant shall have three months within which to pay such rent and that provided by the latter part that he must pay or deposit his rent month by month.

The correct construction of this sub-section, in my opinion, is that the "arrears" referred to are arrears due at the time when the Act comes into force and that the first part has nothing to do with rent which accrues due month by month after that date.

The next question is as to the amount of rent to which the Plaintiff was entitled for the period between the 1st of May 1920 and the 31st of January 1921. This involves consideration of various sections of the Calcutta Rent Act, an Act of faulty construction which renders it difficult of interpretation.

The contention of the Plaintiff, stated briefly, is that unless the standard rent has been fixed by the Controller the tenant is not entitled to take advantage of the provisions of the Act, for, in fact no rent has been fixed by the Controller as standard rent of the premises in suit.

For the Defendant Company, on the other hand, it has been argued that, though not necessarily in all cases but probably in the majority of cases and cer-

tainly in this case, there is a standard rent which, so to speak, attached to property from the moment that the Calcutta Rent Act came into force irrespective of any application made to or order passed by the Rent Controller under the Act, and that, subject to what I shall have to say presently, that is the amount which the tenant must pay or deposit.

"Standard rent" is defined in sec. 2 (f) as the rent at which the premises were let on the first day of November 1918, or, where they were not let on that date, the rent at which they were last let between the first day of November 1915 and the first day of November 1918, *plus* ten per cent. on such rent in either case.

The sub-section furnishes two more definitions of which the second may be ignored. It has no application to the present case.

The third definition involves reference to sec. 15 and provides that in the cases specified in sec. 15 the "standard rent" is the rent fixed by the Controller. Now, in order to ascertain what those cases are, for it is in those cases alone that rent fixed by the Controller is "standard rent" according to the definition, one must look at sec. 15 (3). The first two sub-sections have nothing to do with this matter, sub-sec. (3) is sub-divided into five cases each involving different sets of circumstances, none of which has any application to the present case. If it had been intended that standard rent should only be such rent as the Rent Controller has fixed, and that in the circumstances contemplated by sec. 2 (f) (1) all that the Rent Controller would have to do would be to ascertain the rent on the date material thereunder and add ten per cent., it would have been more correct to have included such a case among the cases under sec. 15 (3) and eliminated sec. 2 (f) (1) altogether. But,

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inasmuch as the case with which we have to deal is not one of those mentioned in sec. 15 (3) and consequently is not one in which the Rent Controller may fix the standard rent thereunder, it follows that under the definition clause the action of the Rent Controller in fixing the standard rent should be excluded.

I do not, however, altogether exclude the operation of sec. 15 (1) under which the Controller may certify the standard rent, though he fixes it in appropriate cases under sec. 15 (3). It may be that in a case to which sec. 2 (f) (1) applies it is open to a party to apply to the Controller for a certificate. This point does not arise in this case but I mention it lest the juxtaposition of these two sub-sections should lead to the suggestion that in a case to which sec. 2 (f) (1) applies it is the duty of the party interested in having it done to make an application to the Rent Controller under sec. 15 (1), even if sec. 15 (3) has no application.

In my opinion, the contention of learned Counsel for the Appellant Company is the correct one and where the conditions contemplated by sub-sec. 2 (f) (1) exist, the standard rent follows as a matter of course, subject, however, to this that it is always open to a landlord or a tenant to make an application to the Rent Controller under sec. 15 (3) if he can bring the matter within its several provisions. Upon the Rent Controller so fixing the rent then there is another standard rent for the premises as defined by the Act. This leads to the curious result that there may be a standard rent as defined by sec. 2 (f) (1) and a standard rent as defined by sec. 2 (f) (3), both simultaneously applicable to the same premises. There is, however, no practical difficulty because when you come to apply other provisions of the Act and, in

particular, sec. 4 (1) or sec. 11 (5), the landlord would be entitled to the benefit of whichever standard rent might be the higher. In this view, the amount which the Plaintiff was entitled to recover from the Defendant Company was the amount for which the premises were let on the 1st of November 1918 plus ten per cent. There is no question as to what that amount was and, in my opinion, the judgment and decree of the learned Judge should to this extent be modified.

The learned Judge has relied upon an earlier judgment of mine in *Jetha Bhulchand v. Grace* (1). That is not an authority for the proposition that if standard rent has not been fixed by the Controller, the tenant must pay the agreed rent to the landlord or deposit it with the Controller. In that case according to my recollection, which the report confirms, there was no competition as between the standard rent and the agreed rent. The only question was whether the tenant had paid or deposited his rent in time. I am not sure that the learned Judge referred to the case on the question of amount, but without explanation it might be so interpreted and deemed to conflict with the opinion now expressed.

The last question is that of damages. I agree with the opinion expressed by the learned Chief Justice and have nothing to add.

I concur in the order to be made.

Messrs. Eggar & Co., Solicitors for the Appellants.

Messrs. Morgan & Co., Solicitors for the Respondent.

S. N. B.

(1) 26 C. W. N. 678 (1922).

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
No. 282 OF 1923.

CUMING, J.
CHAKRAVARTI, J. UMASASI DEBI,
1925, Plaintiff, Appellant,
Heard, 9, 10 and v.
13, July. AKHUR CHANDRA
Judgment, MAZUMDAR, Defendant,
21, July. Respondent.

*Civil Procedure Code (Act V of 1908), sec. 66—
Civil Procedure Code (Act XIV of 1882), sec. 317—
Suit against certificated purchaser for confirmation
of possession upon declaration that purchase was
benami, if lies.*

*A suit for confirmation of possession,
equally with one for recovery of possession,
comes within the prohibition of sec. 317
of the Civil Procedure Code of 1882 (sec.
66 of the present Code) when the Plain-
tiff's case is that the Defendant certi-
ficated purchaser at a Court sale purchas-
ed on the Plaintiff's behalf as the latter's
benamdar.*

SASTI CHARAN v. ANNAPURNA (1) *dis-
sented from.*

This was an appeal preferred on the
14th of December 1922 against the decree
of Babu Bamandas Mukherji, Subordinate
Judge, 2nd Court of Zillah Hooghly,
dated the 11th of September 1922, modi-
fying the decree of Moulvi Lutfar Raha-
man, Munsif, 3rd Court at Serampore,
dated the 26th of April, 1921.

The facts of the case will appear from
the judgment.

*Sir Provas Chandra Mitter, Kt. and
Babu Hira Lal Chakravarti for the Appel-
lant.*

*Babu Rupendra Kumar Mitter (for Dr.
Bijan Kumar Mukherjee) and Babu
Amulya Dhan Mukherjee for the Respon-
dent.*

The JUDGMENT OF THE COURT was as
follows:—

CUMING, J.—In the suit out of which

(1) I. L. R. 23 Cal. 699 (1895).

this appeal has arisen the Plaintiff who is
the Appellant before this Court sued for
a declaration that she had *lakheraj* and
jamai right purchased at auction sale in
respect of some 3 annas odd share left by
her husband and that she was entitled to
the 16 annas rent of the land in question
and the Defendant had no right in res-
pect of the land. She also asked for a
perpetual injunction to restrain the De-
fendant from obstructing her in the re-
alisation of the rents of this land. If it
should be found that the Plaintiff was not
in possession of the land then she sued to
recover possession. Her case, as a peru-
sal of the plaint will make quite clear, is
that her husband bought the *lakheraj* right
in the land in his own name and with his
own money. Subsequent to this he pur-
chased the tenants' right in the land on
the 24th of February at a sale in execution
of a decree in the name of the Defendant
No. 1, obtained a certificate of sale and in
virtue of this sale certificate obtained pos-
session of the property. Some of the
land he kept in his own possession and the
rest was let out to tenants. The *kabuli-
yats* were in the name of the Defendant
No. 1, because the sale certificate stood in
his name. Umesh Chandra Mukherjee,
the husband of the present Plaintiff, died
leaving no son and the Defendant No. 1
taking advantage of this circumstance has
persuaded the tenants not to pay rent to
the Plaintiff. From this the Plaintiff
realises that the Defendant intends to
take possession of the property left by her
husband and hence she has brought this
suit asking that the Court will declare that
she has *lakheraj* and *jamai* title purchased
at auction sale of the 3 annas odd share
left by her husband and also a declaration
that she is entitled to the 16 annas share
of the rent, that the Defendant has no
title to the property and that her posses-
sion may be confirmed. If by any cir-

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cumstance it be found that she is not in possession then she may recover possession. She also asked for an account from the Defendant of any rent that the Defendant might have realised from the tenants. The case of the Defendant No. 1 who alone has contested this case is that he is the real owner of the property and that sec. 66 (old sec. 317 of the Civil Procedure Code) is a bar to the suit.

The trial Court found that Defendant No. 1 was the *benamdar* of the husband of the Plaintiff, that the Plaintiff had been in possession from the date of purchase up to the institution of the suit, and that the Defendant was liable to render accounts to the Plaintiff. He found that the Plaintiff's suit was not barred by the provisions of sec. 66 and ordered that her *jamai* title and *nishkar* title to the lands in suit should be declared. The Defendant was restrained from interfering with her possession. He was also to render her accounts.

Defendant No. 1 appealed to the District Court. The learned Subordinate Judge held that the Plaintiff had been dispossessed from the land before the suit and was not now in possession, that the Defendant was the *benamdar* of the Plaintiff's husband, that sec. 66 was a bar to the suit and ordered that the suit of the Plaintiff so far as it related to *jamai* right of the Plaintiff would be dismissed.

The Plaintiff has appealed to this Court.

Her case, if I have understood it rightly, is as follows :—

1. That the lower Court has wrongly found that she is not in possession and as she is in possession she is entitled to maintain a suit for confirmation of possession. In support of this contention she relies on the case of *Sasti Charan v. Annapurna* (1).

2. That by payment of rent to the land-

lord a new tenancy has been created in her favour and that she has a title independent of the purchase by her husband in the name of the Defendant and to this title the provisions of sec. 66 are not a bar.

3. That the purchases made by the Defendant of the tenancy rights in 1915-16 were made by the Defendant as her agent and hence she is entitled to a declaration of her tenancy under these purchases.

Now it seems to me on the facts as found by the learned Subordinate Judge the Plaintiff's case must fail and that sec. 66 is a bar to her suit.

This suit is governed by the old Code and sec. 317 of that Code, which corresponds to sec. 66 of the present Code, is as follows :—

“ No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims.”

Now the case of the Plaintiff as made in her plaint is clearly this, that the property was purchased by her husband in the *benami* of the Defendant No. 1. It is nothing else, although the learned Advocate for the Appellant has spent a day and a half in trying to persuade us that the case of the Plaintiff was that she had an independent title by paying rent to the zemindar. Reading the section as it stands it is quite immaterial whether the Plaintiff was or was not in possession at the time of the suit. It seems to me that a declaratory suit equally with a suit to recover possession comes within the mischief of the section.

The Plaintiff has relied on the case of *Sasti Charan v. Annapurna* (1) and asks us to hold that if she is in possession then sec. 66 (317) is no bar to her suit. With

(1) 1. L. R. 23 Cal. 699 (1895).

(1) 1. L. R. 23 Cal. 699 (1895).

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due respect to the learned Judges it is very difficult to reconcile this decision with the plain words of the statute. The learned Judges remark: "Sec. 317 does not make all *benami* transactions invalid; nor read with sec. 316 does it confer upon the ostensible purchaser a title as against the real purchaser. It merely declares that a suit shall not be maintained against the certified purchaser on the ground that he was only the ostensible purchaser. The ostensible purchaser could not insist on his certified title to recover from the real owner in possession. If therefore the Defendant sets up the sale certificate as an answer to the Plaintiff's case, there is nothing to prevent the Court from going into the question whether that sale certificate did or did not confer a valid title upon the Defendant as against the Plaintiff. It is not a case in which the Plaintiff relying on a sale certificate seeks to obtain a decree for possession against the ostensible purchaser. Resting as it does on an existing possession, we do not think that it is a suit of the nature prohibited by sec. 317 (present sec. 66)."

If I understand the learned Judges aright they would seem to hold that in a suit for confirmation of possession the Plaintiff has not to prove his title, for obviously sec. 66 would be a bar to his maintaining a title based on a *benami* purchase. Neither do I understand what is meant by a title resting on existing possession. Surely it is not sufficient for a person asking for confirmation of possession to say: "I am in possession; prove that I have no title." As far as I am aware this case stands alone. It has never been followed but has been dissented from. See the case of *Hanuman Prosad Thakur v. Jadunandan* (2), where Coxe, J., points out that if accepted as good (2) 20 C. W. N. 147 (1915).

law it would practically repeal the whole section. See also the case of *Bishan Dayal v. Ghaziuddin* (3). The learned Judge, Strachey, C. J., in considering the case of *Sasti Charan v. Annapurna* (1) remarks that if that case holds that sec. 317 only applies when the Plaintiff being out of possession seeks to recover possession and can never apply to a suit by a Plaintiff in possession for a declaration that the certified purchaser out of possession is not the real purchaser, he cannot agree with that. I am myself of opinion that it is immaterial whether the Plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession. In either case sec. 66 applies.

The Appellant seems also to have attempted somewhat faintly to make out that the property was conveyed to her husband by his being put in possession after the purchase. How this could give the Plaintiff any title in the absence of a conveyance as required by the Transfer of Property Act, I admit I do not understand.

(2) The next argument advanced by the Appellant is that she or rather her husband acquired a title independent of her purchase by paying rent to the zemindar. I must admit that this argument was put forward in a somewhat shadowy form. I presume that the learned Advocate meant that she or rather her husband had been recognised by the zemindar. Otherwise I do not understand how any title could be acquired by the mere payment of rent. In order to establish or to attempt to establish this part of his case the learned Advocate was obliged to take us through a large portion of the evidence of the case. The mere necessity for

(1) I. L. R. 23 Cal. 689 (1895).

(3) I. L. R. 23 All. 175 (1901).

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doing this made it at once evident that this had never formed any part of the case of the Appellant in either of the Courts below.

It was perfectly obvious that this had never formed any part of the case of the Appellant in the lower Courts and it is somewhat difficult to imagine how the learned Advocate for the Appellant could have thought that he would be allowed for the first time in second appeal to make out a case which depended on findings of facts which had never been even suggested in the lower Courts.

(3) The Appellant lastly attempted to argue that the purchases made by the Defendant of certain tenancies as the result of certain decrees obtained in 1915 and 1916 were made by the Defendant as the agent of the Plaintiff.

Here again the same difficulty confronts us, viz., that this case that these purchases were made by the Defendant as the agent of the Plaintiff finds no place in the case of the Plaintiff either in her plaint or in the case as presented to the lower Courts. It is obviously a question of fact and cannot be raised for the first time in second appeal. In para. 7 of the plaint the Plaintiff distinctly sets out that after the death of her husband her son-in-law managed her properties. It is not sufficient to say that a person is an agent. It is necessary to set out what is the scope of the agency in order to determine whether any particular act was done by the person as an agent or not and for this purpose a definite case would have to be made out. The only suggestion in the plaint is that the Defendant looked after the suits of the Plaintiff. There is no suggestion that it was any part of his duty to purchase properties on behalf of the Plaintiff. The case of *Ganga Buksh v.*

Rudar Singh (4) may be referred to in this connexion.

The result is that the appeal must fail and is dismissed with costs.

CHAKRAVARTI, J.—I agree with the order proposed by my learned brother.

The plaint in this case was framed in open disregard of the provisions of sec. 66, C. P. C. The only ground upon which the bar might have been avoided was not taken in either of the Courts below and in the result the Defendant retains and enjoys the fruits of his fraud which has been so clearly established. It is only to be hoped that this case will serve as an example for dissuading people from indulgence in the pernicious habit of creating *benami* title and in some measure further the object with which sec. 66, C. P. C., was enacted.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

NOS. 56, 57 AND 58 OF 1924.

SUHRAWADY, J.

DUVAL, J.

1925,

6, April.

AMBIGA CHARAN
BAKTA and ors.,

Defendants,
Appellants,

v.

RAM PROSAD CHAT-
TERJEE and ors.,
Plaintiffs,
Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 100, 101, 103—Alleged dispossession by auction-purchaser—Order of Court restoring possession—Suit by auction-purchaser—Limitation—Nature of suit which properly comes within r. 103—Suit must be brought in the capacity of auction-purchaser to come under Art. 11A, Limitation Act (IX of 1908).

The Plaintiffs landlords as decree-holders auction-purchasers took possession of a holding which they purchased in execution of a decree for rent but were dispos-

(4) I. L. R. 22 All. 434 at p. 437 (1900).

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essed therefrom by order of Court by the Defendants claiming to possess the property on their own account and not on behalf of the judgment-debtor. The Plaintiffs, on coming to know that their tenants had wrongfully parted with the holding, brought a suit for ejectment more than one year after the order under Or. 21, r. 101, raising the question whether the tenants had a transferable or a non-transferable interest in the holding:

Held—That the suit was not barred under Art. 11A of the Limitation Act.

That the suit contemplated by r. 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction-purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the Defendant. If a suit is not brought under r. 103 within the statutory period the right to bring a suit to establish the claim of the Plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the opposite party it cannot be said that this provision in the chapter relating to execution of decrees bars his suit based on such cause of action.

These were appeals against the orders of Babu Atul Chandra Banerjee, Subordinate Judge of Howrah in Zillah Hooghly, dated the 5th of July 1923, reversing the orders of Babu Jotindra Nath Mukherjee, Munsif, 1st Court at Uluberia, dated the 28th of June 1921, and remanding the suit to his Court for trial on the merits.

The facts of the case will appear from the judgment.

Dr. Bijan Kumar Mukherjee for the Appellants.

Dr. Sarat Chandra Basak and *Babu*

Radhikaranjan Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This case raises an interesting question which does not seem to have come up for consideration before. The facts are that the Plaintiffs-Respondents obtained a rent decree against the heirs of the tenant Gaganeswar Mondal and in execution of that decree purchased and took possession of the holding in suit. The Defendants thereupon alleging dispossession made an application under Or. 21, r. 100, C. P. C., for restoration of possession. On the 26th June 1917 order was passed in their favour under Or. 21, r. 101. The Plaintiffs instituted the present suit in May 1920. It is accordingly maintained by the Appellants that the suit is barred under Art. 11A of the Limitation Act, having been brought more than a year after the order under Or. 21, r. 101 was passed. The trial Court gave effect to this contention but the learned District Judge (*sic*) held that the Plaintiffs' suit is not barred under the above article of the Limitation Act. In this appeal the Appellant argues on the same line as adopted by the learned Munsif. What happened was this : The Plaintiffs as decree-holders auction-purchasers took possession of the holding which they purchased in execution of the decree but were dispossessed therefrom by order of Court by the Defendants claiming to possess the property on their own account and not on behalf of the judgment-debtor. The Plaintiffs thereupon became aware that their tenants had parted with the holding wrongfully and brought the present suit for ejectment. The question raised in the suit is whether the tenants had a transferable or a non-transferable interest in the holding.

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Or. 21, r. 100 contemplates a case where a person has been dispossessed by an auction-purchaser taking possession of the property through the help of the Court. He then complains to the Court of such dispossession and the Court after making a summary investigation, if it holds that the applicant was in possession of the property on his own account and not on account of the judgment-debtor, directs under r. 101 that possession be given back to the applicant. The party against whom this order is passed may then institute a suit under Or. 21, r. 103 to establish the right which he claims to the present possession of the property. Reading these sections together it cannot be questioned that the suit contemplated by r. 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction-purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the Defendant. If a suit is not brought under r. 103 within the statutory period the right to bring a suit to establish the claim of the Plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the Opposite Party, it cannot be said that this provision in the chapter relating to execution of decrees bars his suit based on such cause of action. In the present case the suit is brought by the Plaintiffs not in their character as auction-purchasers but as landlords. In the plaint, the cause of action in the suit is based not on the adverse decision against them in proceedings under r. 100, but on the transfer by the tenants of their non-transferable occupancy holding, the information of which he got during the course of the execution proceedings. The causes

of action of the two suits, one under r. 103 and another as brought by the Plaintiffs, must therefore be different. In a suit under r. 103, the cause of action must be the adverse decision passed under r. 101. But the present suit is based upon a different state of facts. The cause of action is not the loss of possession by the Defendants from the Plaintiffs in connection with the execution proceedings but the fact that the tenants had unlawfully transferred a non-transferable occupancy holding to the Defendants and hence the holding is treated as abandoned under the Bengal Tenancy Act and the landlords are therefore entitled to possession of the holding which the Defendants are in possession of as trespassers. But it is argued by the learned vakil for the Appellants that under sec. 22, Bengal Tenancy Act, the landlords having purchased the holding in execution of the rent decree the tenancy got merged in the landlords' superior interest and therefore the only remedy the landlords now have is to proceed as auction-purchasers under Or. 21, r. 103, their character as landlords having been lost by virtue of the purchase of the holding. We do not think that this contention is right. It is the case of the Defendants that the tenants had a transferable occupancy holding. It further appears that the Defendants are in possession of the land for more than 12 years. He accordingly contends that the Plaintiffs are not entitled to possession because the tenants had a transferable interest in the holding and that the Defendants have acquired the rights of a tenant in it. The present suit brought by the Plaintiffs is totally unconnected with the execution proceedings. It seems that the Plaintiffs have abandoned all their right in the execution sale, it having been found against them that the Defendants are entitled to

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immediate possession. In these circumstances we do not think that the present suit is barred under Art. 11A of the Limitation Act.

The appeals accordingly fail and are dismissed with costs—two gold mohurs in each case.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

REF. NO. 14 AND APP. NO. 621 OF 1924.

NEWBOULD, J.

MUKERJI, J.

1924,

ARSHED ALI

Heard,

v.

21, November. THE KING-EMPEROR.

Judgment,

25, November.

Criminal Procedure Code (Act V of 1898), sec. 374—Reference to High Court for confirmation of death sentence—Duty of High Court to be satisfied on evidence as to the correctness of the finding of the jury—Identification test, held during trial, propriety of.

In a reference under sec. 374 of the Code of Criminal Procedure for confirmation of a sentence of death passed by a Sessions Judge, the High Court must be satisfied that the finding of fact arrived at by the jury is justified on the evidence on the record.

The High Court came to a contrary view on the examination of the evidence and acquitted the accused.

Propriety of identification test held during trial commented on by MUKERJI, J.

This was a reference under sec. 374, Cr. P. C., by the Additional Sessions Judge of Backerganj (W. H. Carter, Esq.), dated the 27th September 1924, for confirmation of the sentence of death passed by him on the accused.

The accused also preferred an appeal from the said sentence.

The facts of the case will appear from the judgment.

Babu Debendra Narain Bhattacharja for the Accused.

Mr. Khundkar for the Crown.

The JUDGMENT OF THE COURT was as follows :—

NEWBOULD, J.—Arshed Ali has been found guilty by the unanimous verdict of the jury on the charge of abetment of murder. He has been sentenced by the Additional Sessions Judge of Backerganj to death under sec. 302 read with sec. 109 of the Indian Penal Code. Under sec. 374 of the Code of Criminal Procedure, the proceedings have been submitted to this Court for confirmation and the accused has also preferred an appeal against his conviction.

The facts according to the case for the prosecution are as follows :—

Lalsom Bibi, the principal witness in this case, has lived as the wife of five men. To how many of them she was legally married is not clear, but her marriage to the Appellant Arshed Ali who was the fourth of her so-called husbands was certainly bigamous as it took place during the life-time of the third Abdul Hussain who had not divorced her. After living with the Appellant for a few months she left him and went to live in her father's *bari*. She was then one month pregnant. In Magh last she went through a form of *nika* marriage with the deceased Sher Ali. This enraged Arshed Ali and twice in the months of Falgoon and Chaitra, Javed Ali who is Arshed Ali's *dharma-bhai* asked Lalsom to return to Arshed Ali and threatened her when she refused to do so. On the night of the 10th April (28th Chaitra) Sher Ali, Lalsom and her three children were sleeping in her hut. At a little before midnight

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Lalsom woke up hearing the noise of a scuffle. She heard Javed Ali, whose voice she recognised, say "Let me go." She got up to light a lamp and then heard Arshed Ali saying "Javed Ali, is the deed done." By the light of the lamp she saw that Sher Ali's viscera were protruding from a wound in his stomach and another wound on the left side of his chest. Her cries brought several neighbours to the scene and both Sher Ali and Lalsom told them that they had recognised Javed Ali and Arshed Ali by their voices.

Sher Ali was taken by boat to Patuakhali, the Sub-Divisional headquarter, where he arrived at about 11 A.M. He was taken to the hospital and there his statement was recorded by an Honorary Magistrate from 3-30 to 4-10 P.M. He said that he had been wounded by Javed Ali and Arshed Ali and that Javed Ali inflicted the wound with a *dao*. He also stated that he was wounded because he married Arshed Ali's wife. He died before sunset that afternoon. The doctor who held the post mortem examination found three incised wounds on the body, of which two were homicidal. In his opinion death was due to shock and hæmorrhage from these two wounds.

That Sher Ali was murdered on the night of the 10th April has been clearly proved. Whether the Appellant before us was guilty of abetting this murder depends on the credibility of the evidence that he was recognised by his voice. Though the jury have unanimously convicted him, this being a reference under sec. 374, Cr. P. C., we must be satisfied that their finding of fact is justified by the evidence on the record. After full consideration we are compelled to hold that there are several points in the case which make it unsafe to rely on this evidence. We also find that there has been positive

misdirection on one important piece of evidence in the case in addition to non-direction by reason of the learned Judge having omitted to draw the attention of the jury to several points which throw doubt on the truth of the case for the prosecution.

In his charge to the jury the learned Sessions Judge has said: "On Wednesday, the 27th Chaitra (9th April) Arshed Ali was seen in Kalagachia village which adjoins Kewalumia walking towards the *bari* of Javed Ali." But the evidence is that Arshed Ali was seen in the neighbourhood not on the Wednesday but on the Thursday afternoon. The fact of the case for the prosecution rests on a statement alleged to have been made by Sher Gazi and is supported by the evidence of his brother Mahomed Gazi who deposed that Sher Gazi said he had seen Arshed Ali on the previous afternoon. That the expression "the previous afternoon" cannot mean the afternoon of the previous day is clear from the statement of Lalsom Bibi in the first information to the effect that her husband had told her in the afternoon of the day of occurrence that when he returned after noon of that day he saw Arshed Ali and Javed Ali. This is a very serious misdirection since it was proved by witnesses who were examined by the Court to test the accused's plea of alibi, that he was present at Patuakhali as an accused in a case which was the last heard on the 10th April. Though this might not have prevented him being present at the murder he could not possibly have been at Kalagachia at the time that is Sher Ali said that he saw him.

The case against this accused depends solely on the recognition of his voice by Sher Ali and Lalsom Bibi. It is certainly suspicious that no mention of this

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fact was made to anyone outside the village before the 18th of April when Lalsom Bibi's first information was recorded. Though the chowkidar Adam Ali went to the Amtali Police Station the morning after the occurrence, nothing was recorded there. The explanation given is that it was thought that information would be taken at Patuakhali. We think it unlikely that no entry would have been made even in the station diary if the chowkidar had then asserted that the accused had been recognised by their voices at the time of occurrence. The statement of Sher Ali recorded by the Honorary Magistrate contains no mention of how Javed Ali and Arshed Ali were recognised, though both are named.

It is difficult to rely absolutely on the statements of the deceased and his wife since they are clearly untruthful on one important point, the period that elapsed between Lalsom Bibi leaving Arshed Ali and her marriage to Sher Ali. Lalsom Bibi's evidence is that she married Arshed Ali 4 years ago and after living with him 4 months she went to live at her father's house. Sher Ali stated to the Honorary Magistrate that she was at her father's *bari* for about 4 years. But the age of the child of which Lalsom Bibi says the accused is the father, is inconsistent with her having lived apart from the accused for as long as two years. If the accused had raised no objection to Lalsom Bibi leaving him for even two years there is no reason why he should have committed this murder. Whatever the truth may be we have no doubt that there was good reason to suspect the accused and that the true story of the ill-feeling between the parties has been concealed.

There are other reasons besides the delay in informing the authorities which

make us suspect the truth of the story of recognition, apart from the question as to how far such recognition can support the conviction. It is most improbable that when a murder is being committed the murderer's companion should call to him by name. This suggests that the actual words that may have been heard, have been altered to strengthen the case against Javed Ali who is absconding.

Lalsom Bibi's evidence is contradictory on some material points. She said she had no talk with her husband before he made the statement to the neighbours and that when she lit the lamp her husband was senseless and he came to after the neighbours came. Then in cross-examination she said: "It is a fact that before any neighbours came up my husband told me he recognised Javed Ali and Arshed Ali, he told me this while I was lighting the lamp." Also in her deposition she said that her husband said "*o ma*" before any statements were made by the assailants, but when questioned by a juror as to the order of events she places this cry of "*o ma*" last of all. The evidence of the neighbours who came afterwards is not free from discrepancies. It is noticeable that when Ibrahim called to the chowkidar he spoke of some one unknown having committed the murder though according to the evidence he had then heard the story of recognition. There are also important discrepancies as to whether Lalsom Bibi said anything that night. The deceased's brother's account of a conversation with the deceased is very significant. He says that the deceased gave three reasons for accusing Javed Ali and Arshed Ali, (i) that he had no other enemies, (ii) that he saw Arshed Ali in the afternoon, (iii) that he had recognised their voices.

We think that the real reason for the

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accusation of these men was the first and that the third reason on which the case now rests is as unreliable as the second has been proved to be.

For these reasons we must hold that the guilt of the accused Arshed Ali has not been proved. We refuse to confirm the sentence of death passed on him. We allow his appeal and set aside his conviction and sentence and acquit him of the charge on which he was tried and direct that he be released.

MUKERJI, J.—I entirely agree. I only wish to add a few words as regards the identification test that was held in the course of the trial in this case. The matter, however, is not of much importance in the present case, inasmuch as the witness who was subjected to this test was for sometime the wife of the accused, who was sought to be identified. It is not reasonable to expect that she would have failed to identify the accused in any case. What happened in this case was this:—Lalsom Bibi was examined as a witness on behalf of the prosecution; and after her examination was over, with the permission of the accused and his pleader, the identification test of the accused's voice was held, the accused being mixed up with 7 other men. The accused was actually numbered six on the file, and his voice was correctly identified by Lalsom Bibi as the 6th voice. Personally I have always entertained grave doubts as to the propriety of such a test being adopted during the trial. It makes no difference that in the present case it was held with the permission of the accused and his pleader; for a request in a matter of this description is always very embarrassing to the detence. There is no warrant for this procedure in the statute and it is likely to lend spurious weight to the testi-

mony which should be available for the purposes of a criminal trial.

S. C. M.

PRIVY COUNCIL.**[APPEAL FROM PATNA]**

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

MR. AMERR ALI.

1925,

Heard, 17, 19 and

23, March

Judgment,

13, May.

RAJA RAJENDRA

NARAIN DHANJ DEO,

substituted for J. C.

Aguilar, Appellant,

v.

KUMAR GANGANANDA

SINGH and ors.,

Respondents.

Alluvion and diluvion—Reg. XI of 1825, sec. 2—Customary boundary between estates proved to be channel of river—Shifting of course of river through overflow into it of another river—Custom, if applies in such a case—Hearsay evidence, when admissible to prove custom.

After the existence of a custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence and it is for this reason that such evidence is allowable as an exception to the general rule.

Where it was proved that by custom the channel of the intervening river was to be the constant boundary of two estates, whatever changes might take place in the course of the river by encroachment on one side and accession on the other:

Held—That the fact that the shifting of the course of the river was due to the overflow of another river into it did not make any difference in the applicability of the custom.

This was an appeal (No. 126 of 1922) from a judgment and decree, dated the 21st March 1919, of the High Court at Patna, which affirmed a decree, dated the 23rd December 1913, of the Subordinate Judge of Monghyr.

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The suit was brought by the Respondents for possession of about 700 bighas of alluvial land which was in the possession of Raja Rajendra Narain Dhanj Deo.

The lands in question were claimed by the Plaintiff as being reformatations *in situ* of their village Mansi.

The Defendant-Appellant was the owner of Rahimpur. This village lies to the south of the river Gandak while Mansi lies to the north.

The river Ganges which flows to the south of the Gandak and some distance from it encroached upon that river in the year 1899 but receded in the following year.

The disputed lands appeared to the south of the Gandak between 1899 and 1903 and were taken possession of by the Appellant who contended that according to immemorial usage the Gandak had been the boundary between the parties, and claimed the right to remain in possession according to the mid-stream rule and the provision of sec. 2 of Reg. XI of 1825.

The Subordinate Judge found that the disputed lands lay to the south of the Gandak but negatived the custom alleged by the Defendant and made a decree for the Plaintiff. The High Court found in favour of the custom but held that the disputed lands were the result of the alluvion and diluvion of the Ganges to which the local custom was inapplicable.

Messrs. DeGruyther, K. C. and S. Hyam for the Appellant.

Mr. Kentworthy Brown for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by:-

LORD CARSON.—The Defendant-Appellant is the owner of Mauza Rahimpur and the Plaintiffs-Respondents are the owners of Mauza Mansi in Pergana Farkia. The

river Gandak or Bari Gandak flows between the two villages, Mauza Mansi being situated on its northern side, and Mauza Rahimpur on its southern side. The river Ganges flows at some distance to the south of the Gandak. In 1899 the Ganges began its encroachment northwards and ultimately joined with the Gandak, and by the combined action of the two rivers certain of the lands which had formed part of the Mauza Mansi were "diluviated," i.e., the surface soil (the cultivable soil) was wholly washed away. In course of time, however, the waters receded and about 589 bighas of the land, including the lands in question in this action, gradually re-appeared towards the south in 1906, and by degrees the land became hard and firm soil, capable of being cultivated in the usual manner. The Appellant took possession of the said lands on the ground that by immemorial custom the middle line of the bed of the Gandak formed the boundary line between Mansi and Rahimpur, and that owing to the change in the course of the Gandak the land which had re-appeared was now on the southern side of the bed of the said river and belonged to the Appellant as owner of the Mauza of Rahimpur. Magisterial proceedings ensued, and the possession taken by the Appellant was protected by an order made on the 14th December 1908 under the Criminal Procedure Code, sec. 145. An appeal against the said order was rejected on the 21st May 1909. The present action was then brought by the Plaintiffs against the Appellant and others who were in possession of the said lands, asking for a declaration that they belonged to Mauza Mansi and were the property of the Plaintiffs. The contention raised by the Appellant-Defendant is very clearly stated by the Subordinate Judge before whom the suit came for trial:-

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"The Defendant's contention," says the learned Judge, "is that whatever alterations may take place in the course of the Gandak and whatever shiftings may occur therein the main channel of the Gandak forms the constant boundary of Mausas to its north and south by virtue of a clear, and definite and immemorial usage, custom or usage. So the disputed land which is just to the south of the present flowing Gandak forms a part and parcel of Rahimpur and becomes the property of the Rahimpur Malik, the Defendant No. 1."

The learned Subordinate Judge found as a fact and his finding has not been challenged that—

"the stream to the north of the disputed land is the stream of the Bari Gandak and it is a continuation of the Bari Gandak, which is just to the west of Mansi, and it has fallen into the Ganges near about Gogri after taking a wandering course near the disputed land."

The Subordinate Judge, however, decided upon the evidence, which will be dealt with later, against the Appellant-Defendant upon the question of the custom alleged holding—

"that the flowing Gandak is not the constant boundary of Mansi and Rahimpur and that no such custom has been proved to exist."

In the result he entered judgment for the Plaintiffs for recovery of the said lands.

From this judgment the Defendant-Appellant appealed to the High Court of Judicature at Patna, who, in the result, affirmed the judgment of the Subordinate Judge, making certain modifications and directions with a view to ascertaining the exact area to be delivered up.

The judgment, however, of the High Court was based on entirely different considerations from those put forward by the Subordinate Judge. The learned Judges of the High Court did not agree with the Subordinate Judge that no custom or usage had been proved. As some argument has been addressed to the Board to show that the High Court had not found the custom proved, it is necessary to set out the words upon this point used by Mr. Justice Roe,

who delivered the judgment of the Court:—

"On a consideration of the Revenue Survey maps of 1827 and 1846, the Gangetic survey of 1865, and the Cadastral survey of 1887, it appears to me to be certain that there is, if not a custom of Pargana Farkia, at any rate a general usage whereby in lands reformed by a gradual accretion on one bank of the Gandak and cut away from the other bank by diluvion the ownership of the land so accreted goes with the ownership of the bank. . . . Now we may concede for the purpose of the argument in his case that the custom is precisely stated by Mr. Aguilar, and I myself would go further and say that upon the whole of the evidence of the Plaintiff's witnesses it is certain that where lands are washed away and reform gradually there is a general usage upon the banks of the Gandak in this region whereby the inhabitants of one village do not cross the river to cultivate lands upon the other side, etc."

The learned Judges, however, held that the establishment of such a custom was no defence to the present suit:—

"The lands," they said, "have not been diluviated by the Gandak and they have not been recovered from the Gandak. They were washed away by the Ganges, and have been recovered from the Ganges, and this is clearly stated in paras. 4, 5 and 6 of the plaint, I cannot see that a custom which regulates only questions of alluvion and diluvion by the Gandak can be applied to alluvion and diluvion by the Ganges."

The defence of the Appellant-Defendant under the custom was based upon sec. 2 of Reg. XI of 1825, which is in the following terms:—

"Whenever any clear and definite usage of shekust pywast respecting the disjunction and junction of land by the encroachment or recess of a river may have been immemorially established, for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage."

Assuming as the High Court did that the custom alleged was proved, their Lordships can see no reason for refusing to give

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effect to this rule because the conditions which arose in the present case were brought about by the overflow of the Ganges into the Gandak. Whatever may have been the cause of the river Gandak becoming so swollen as to bring about the results already referred to, whether by floods or by the overflow of the Ganges into the Gandak, their Lordships cannot see anything in the regulation quoted which prevents the main stream of the Gandak continuing to be the boundary after the lands had been diluviated, nor do they think that such diluviation can be dissociated from the action of the Gandak.

The real question therefore remains: Was the custom proved? was the Subordinate Judge right in his finding that there was no such custom? or, was the High Court right in coming to the opposite conclusion, as in their Lordships' opinion they did? Their Lordships, having carefully considered the evidence, have come to the conclusion that the finding of the High Court in this respect was right. It is unnecessary again to refer to the surveys and other documentary evidence already quoted for the judgment of the High Court. As regards the verbal evidence, which consisted of a vast array of witnesses upon both sides, whilst as the High Court points out, upon the whole, even the Plaintiffs' witnesses support the alleged custom, their Lordships are of opinion that the evidence called for the Appellant-Defendant establishes it beyond any reasonable doubt.

The Subordinate Judge, who has analysed all the evidence most carefully, quotes the witnesses for the defence who had deposed to changes of land in very many cases, and on both banks of the river, by reason of a change in the course of the bed of the river when alluvial and diluvial

occurrences similar to those in the present case had occurred. He then says:—

"The instances referred to above no doubt afford cogent evidence in proof of the usage. But there is no guarantee that the gaining and the losing proprietors have acquiesced in or recognised the changes, nor is there evidence that such a state of things has continued from time immemorial. The Defendant's witnesses have personal knowledge of the custom not extending over 20 years at the most, the rest is based on hearsay evidence."

Their Lordships are of opinion that the Subordinate Judge did not sufficiently consider the fact that if the changes deposed to had not been acquiesced in such want of acquiescence or recognition of the changes deposed to could easily have been tested, but in reality there was no serious challenge of the accuracy of the vast number of instances which were deposed to. It is also to be noted that the Subordinate Judge entirely omits to deal with the admission made as to the custom by the Plaintiffs' own witnesses. As to the date from which the custom is said to have prevailed, after the existence of the custom for some years has been proved by direct evidence, it can only, as a rule, be shown to be immemorial by hearsay evidence, and it is for this reason that such evidence is allowable as an exception to the general rule. It has already been pointed out, and indeed, the contrary has not been urged before the Board, that the Subordinate Judge has found that the lands in question are formed through the changes which have taken place to the south of the river Gandak, and that being so, and the custom having been proved, it follows that the claim of the Respondents to possession of the lands cannot be sustained. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, with costs, the decrees of both Courts set aside, and that the suit should be dismissed with costs.

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Solicitors : Messrs. Barrow, Rogers & Nevill for the Appellant.

Solicitor : Mr. H. S. L. Polak for the Respondents.

G. D. M.

[INSOLVENCY JURISDICTION.]

No. 88 OF 1925.

BUCKLAND, J.
1925,
23, April.

Re : GOPALDAS AURORA,
ex parte, the Debtor.

Presidency Towns Insolvency Act (III of 1909), sec. 15—R. 74 of the Calcutta Insolvency Rules, 1910—Order of adjudication, whether discretionary—Account books of the debtor, if to be deposited with the Official Assignee before the adjudication order—"May" in sec. 15, if mandatory.

When the conditions laid down in the Presidency Towns Insolvency Act, 1909, are satisfied, a debtor upon his own petition is entitled to an order of adjudication as a matter of course. It is not the settled practice to hand over the account books of a debtor to the Official Assignee before the adjudication order is made. Such practice is not sanctioned by the rules.

CHHATRAPAT SINGH DUGAR v. KHARAG SINGH LACHMIRAM (1) followed.

SAT NARAIN v. BEHARI LAL (2) referred to.

RE BHURAMULL BANKA (3) and RE JOSEPH PERRY (4) distinguished.

This was an appeal against the order of Mr. S. C. Mitter, the Registrar in Insolvency, refusing the adjudication of the Petitioner insolvent.

The debtor Gopaldas Aurora carrying on a business in co-partnership under the

(1) L. R. 41 I. A. 11; s. c. I. L. R. 44 Cal. 535; 21 C. W. N. 497 (1916).

(2) L. R. 52 I. A. 22; s. c. 29 C. W. N. 797 (1924).

(3) No. 89 of 1919, dated the 16th May 1919. Unreported.

(4) No. 82 of 1919, dated the 28th May 1919. Unreported.

name of Gopinath Pursottamdas presented a petition to the Registrar in Insolvency on 1st April 1925 for his adjudication through his attorney, with an affidavit saying that the books of account are not in his possession as the same were with a Receiver appointed in a partition suit. The petition was returned for alteration and addition and the Registrar also directed the Petitioner to file an affidavit setting out a list of books of account of the firm of Gopinath Pursottamdas that were in the possession of the Receiver appointed in suit No. 2910 of 1924 (being a suit for partition of the joint family properties and the assets of the joint business of Messrs. Gopinath Pursottamdas) which was pending before the High Court.

As directed as aforesaid a fresh petition was presented to the Registrar on 3rd April 1925 with the affidavit when the Registrar refused to pass any order either way unless the books of account were made over to the Official Assignee. On 6th April 1925 the said petition was presented to the Court and Buckland, J., ordered that the Registrar should deal with the application and should make out a statement of his reasons for refusal. On the same day the said petition was again presented by his attorney to the Registrar who again refused to entertain the application. The petition was again presented through Counsel to the Registrar. The Registrar still refused to entertain the petition and stated his reasons for refusal, the material portion of which is as follows :—

* * * * *

" I did not see my way to make the order on the application as the account books of the firm were not made over to the Official Assignee. It has been the invariable practice of this Court since the year 1915 to insist upon the books of an

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insolvent, who is a trader, to be made over to the Official Assignee, before the adjudication order is passed [see judgment of Rankin, J., in *Re Bhuramull Banka* (3) and *Re Joseph Perry* (4)]. The reason for requiring the books of the insolvent to be made over to the Official Assignee is obvious. In the present case there ought to be no departure from the settled practice of this Court. The Official Assignee has a prior right to the custody of the books (see sec. 124).

"On the 2nd December last a suit was instituted in this Court by the infant cousin of the debtor against himself and two other cousins of his for partition of the joint estate. In para. 18 of the plaint it was stated that the debtor and his cousin Defendant No. 1 were managing the joint family affairs and carrying on the joint family business [see plaint in suit No. 2910 of 1924, *Rangila Aurora v. Lachmichand Aurora*]. That this is a collusive suit instituted with a view to defraud the creditors of the business would be apparent to anyone who cares to go through the proceedings. In that suit Mr. was appointed Receiver and he is said to be in possession of all the books of the business.

* * * * *

"Had I not settled the order of Ghose, J., passed in suit No. 2910 of 1924 on the 17th February last I would perhaps have been led to think that the suit was a *bond fide* one and that the Receiver was a stranger who had refused to part with the books?

"This is in reality an attempt to stay the hands of the creditors and to prevent them from proceeding against the debtor

Gopaldas Aurora, who was only a few days ago arrested and brought up before the Court in execution of a decree and at the same time to deprive the creditors of the benefit of the assets of the business and to investigate its affairs by withholding the books.

"I wish only to add that under sec. 15 (1) of the Act the making of an order of adjudication is at the discretion of the Court. If before making the order the Court requires the insolvent to comply with any requisition it is his duty to do so. In a case like this, the Court requires the debtor trader to make over his books to the Official Assignee as a condition precedent before passing an order and until that condition is fulfilled the insolvent is not entitled to the order he seeks.

"I decline to make an order of adjudication; the petition may be filed and if the debtor wants to appeal against my order under sec. 8 (2) (a) the order will be drawn up on a requisition being put in by his attorney."

On 8th April 1925 Buckland, J., gave liberty to the Petitioner to inspect the statements of the Registrar and to appeal if so advised. On 23rd April the appeal was heard by Buckland, J.

Mr. S. N. Bannerjee on behalf of the Applicant argued that a Petitioner insolvent is entitled to get an order for adjudication if he satisfies secs. 9, 10, 11, 14 and 15 of the Presidency Towns Insolvency Act. The word "may" in sec. 15 (1) means "must" as appears from r. 74 of the Insolvency Rules of the High Court which is in the following terms:—
"If the debtor files a petition the Court shall forthwith make an adjudication order thereon." Cited *Chhatrapat Singh Dugar v. Kharag Singh* (1). Mr.

(2) No. 39 of 1919, dated the 16th May 1919. Unreported.

(4) No. 32 of 1919, dated the 28th May 1919. Unreported.

(1) L. R. 44 I. A. 11; s. C. I. L. B. 44 Cal. 535; 21 O. W. N. 497 (1916).

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S. C. Mitter in his judgment had referred to sec. 99 and r. 150. These rules having nothing to do with the matter, he was absolutely wrong. He refused to make an order as the account books of the firm had not been made over to the Official Assignee. There is no rule which compels the debtor to lodge the books of account with the Official Assignee.

Assuming that since 1915 there has been this practice before the Registrar Mr. Mitter, he is wrong in insisting on the books being filed before he makes an adjudication order. The books can only be filed after the adjudication order is made.

[BUCKLAND, J.—Why is the debtor applying personally and not the firm?]

Mr. Bannerjee.—It is a coparcenary business, there is no contractual relationship between the partners. It is a Mitakshara family business. The whole objection is with regard to the account books.

[BUCKLAND, J.—I am not much impressed with that objection of the Registrar in Insolvency.]

Mr. Bannerjee.—The whole family is not adjudicated. It is only the individual member that is adjudicated [refers to *Sat Narain v. Behari Lal* (2)]. The Registrar has said that the settled practice is to hand over the books of account before adjudication is made since the judgments in *Re Bhuramull Banka* (3) and *Re Joseph Perry* (4). Those two cases have no application here.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—This is an appeal under sec. 8 of the Presidency Towns Insolvency

(3) L. B. 52 I. A. 22 : s. c. 29 C. W. N. 797 (1924).

(3) No. 39 of 1919, dated the 16th May 1919. Unreported.

(4) No. 32 of 1919, dated the 28th May 1919. Unreported.

Act against an order of the Registrar in Insolvency refusing to adjudicate the Petitioner insolvent upon his own petition. That the matter is one with which the Registrar has been duly empowered to deal is not in question.

The petition is in form No. 7 to be found in the appendix of forms to the Insolvency Rules of this Court made under secs. 112 and 114 of the Act, and, as pointed out by learned Counsel, it contains averments which will bring the application within the relevant sections of the Act, and are therefore necessary for the purpose of obtaining the order.

Sec. 9 states that a debtor commits an act of insolvency :—“(f) if he petitions to be adjudged an insolvent.” Sec. 10 provides that subject to the conditions specified in the Act if a debtor commits an act of insolvency, he may present an insolvency petition and the Court may on such petition make an order adjudging him an insolvent. Any difficulty that might arise in combining this with sec. 9 (f) is avoided by the explanation to sec. 10, which says that the presentation of a petition by the debtor shall be deemed an act of insolvency within the meaning of the section. Consequently provided certain other conditions are fulfilled, the mere fact of the presentation of a petition for adjudication is enough on which to make the order.

Sec. 11 contains certain restrictions upon jurisdiction. The only part of the section to which I need refer is sub-sec. (b), under which the Court has no jurisdiction to make the order unless the debtor within a year before the date of the presentation of the insolvency petition has ordinarily resided or had a dwelling house or has carried on business either in person or through an agent within the limits of the Ordinary Original Jurisdiction of the

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Court. The petition in this case states that the Petitioner lately carried on a coparcenary business as a merchant under the name and style of Gopinath Pursottamdas at No. 113, Monahardas Katra, in Calcutta, and has for the greater part of the past 6 months ordinarily resided at 101, Harrison Road, Calcutta.

Further conditions which must be fulfilled are to be found in sec. 14, and to entitle him to present a petition, the debtor must either owe Rs. 500 or have been arrested and imprisoned in execution of the decree of a Court for the payment of money or an order of attachment in execution of such a decree must have been made and be subsisting against his property. The first condition is that which this Petitioner states has been fulfilled, for his petition says that he is unable to pay his debts, which exceed Rs. 500. That he must state under sec. 15, which goes on to provide that if the debtor proves that he is entitled to present the petition, which means that the necessary conditions obtain, the Court may thereupon make an order of adjudication, subject, however, to another Court having insolvency jurisdiction being that to which the application should preferably be made.

R. 74 of the Rules of this Court provides that where a petition is filed by a debtor, the Court shall forthwith make an adjudication order thereon, and the rule appears to contemplate that if the petition is in form in the sense that the Court has jurisdiction and the conditions prescribed by the Act have been fulfilled, the order shall go as a matter of course. This would appear to be in accordance with the view expressed by the Judicial Committee of the Privy Council in *Chhatrapat Singh Dugar v. Kharag Singh Lachmiram* (1). That

1) L. R. 44 I. A. 11; S. C. I. L. R. 44 Cal. 535; 21 O. W. N. 497 (1916).

was a case under the Provincial Insolvency Act, but for the present purpose no distinction need be drawn between that and the Presidency Towns Insolvency Act. It is pointed out in the judgment of the Board, which was delivered by the late Chief Justice of this Court, that the Act entitles a debtor to an order of adjudication when its conditions are satisfied. His Lordship continued :—

“ This does not depend on the Court's discretion, but is a statutory right; and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an ‘ abuse of the process of the Court.’ ”

It appears that that was the ground upon which in that case the petition was refused both by the District Court of Murshidabad and by this Court on appeal. That is not the ground upon which the Registrar has dealt with this application, though he seems to have taken into consideration matters which, according to the judgment of their Lordships of the Judicial Committee, are not relevant to his decision.

The Registrar has referred to sec. 99, which provides that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this Act in the name of the firm, and contains a further provision for disclosure of the names of the members of the firm. This is only an enabling section akin to Or. 20 of the Civil Procedure Code, and does not purport to prescribe anything that is to be done or left undone in order to obtain an adjudication order where a debtor who is a member of a partnership firm or where the members of a partnership firm apply for an order of adjudication. But the Registrar, by his re-

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ference to r. 150 of the Rules of this Court seems to have regarded this as an insolvency petition filed on behalf of a firm of debtors. If that were the case, he would be correct in requiring under the rule that the Petitioner should state the names of the partners. Apparently his reason for having regarded it as though it were a petition filed on behalf of a firm is because the lists annexed to the petition are admittedly those of debts due by and outstandings due to the firm. This does not necessarily mean that the petition is made on behalf of a firm. Learned Counsel has said that there is no partnership firm and drawn my attention to the statement in the petition that the debtor was carrying on a coparcenary business, and submitted that there is no evidence of the existence of a contractual partnership to which the Act and rules refer. In any event, he has submitted that it would be open to a partner to apply to be adjudicated an insolvent and that in such a case he would be right in setting out the debts due by his firm, for the reason that under the ordinary law they would be debts for the full amount of which he would be personally liable. When the case is that of a coparcenary business and not a contractual partnership, he contends that the position is even more favourable to his client, for which proposition he relies upon *Sat Narain v. Behari Lal* (2).

I am disposed to think that this contention is correct, but as this appeal, like the application, is *ex parte*, I have not had the advantage of hearing the matter argued from the standpoint of any person interested in placing the contrary view before me, which may occur at a later stage of this case or even in other proceedings. Should such occasion arise,

(2) L. R. 52 I. A. 22; a. c. 29 C. W. N. 797 (1924).

it may be necessary to reconsider the opinion which I have expressed.

The Registrar has also stated that it is the settled practice of this Court since the year 1915 to insist upon the books of an insolvent who is a trader being made over to the Official Assignee before the adjudication order is passed, and in support of that proposition he has referred to the judgments of my learned brother Mr. Justice Rankin in *Re: Bhuramull Banka* (3) and in *Re: Joseph Perry* (4). If my learned brother's information in the latter case is correct and insolvency is regarded as a privilege in India, that may explain the readiness of persons desirous of availing themselves of the privilege to make over their books of account to the Official Assignee even before the privilege is conferred upon them. But where it is contended that there is no obligation to make over the books of account to the Official Assignee before the order is made, the matter assumes a different aspect. A practice founded upon the willingness of debtors cannot be regarded as being settled practice obligatory upon persons who do not wish to comply with it. There is no rule of the Court which so requires, and were such a rule made, it would be a matter for consideration whether such additional condition could be super-imposed upon the Act which does not demand it. The two judgments referred to by the Registrar do not, in my opinion, support the proposition for which they have been cited. Each case was one of a person who already had been adjudicated an insolvent. In *Re: Joseph Perry* (4), my learned brother merely referred to this matter incidentally, and I do not

(3) No. 39 of 1919, dated the 16th May 1919. Unreported.

(4) No. 32 of 1919, dated the 28th May 1919. Unreported.

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read his judgment as definitely holding that there is an obligation in law or practice on a debtor to hand over his books to the Official Assignee before the adjudication order is made. Both in that and in the other case cited, he was dealing with books withheld from the Official Assignee by an insolvent after adjudication which is a very different matter, and in my opinion there is nothing establishing that it is the duty of an unwilling debtor to hand over his books to the Official Assignee before he has been adjudicated an insolvent.

Lastly, the Registrar has referred to suit No. 2910 of 1924.

The Registrar may be perfectly right in the conclusions which he has drawn from the materials which he has examined in that case, or, on the other hand, it may be, as learned Counsel has stated, no doubt upon instructions, that the facts upon which the Registrar's observations are based are incorrect. It appears that the Registrar's knowledge was due to the circumstance that he happened to have settled an order of Mr. Justice Ghose in that suit in February last. It also appears to be purely fortuitous that the same officer was concerned with that order and this application, but so far as this application is concerned anything which the Registrar learnt in that connection must be regarded as extra-judicial and cannot be utilised as the foundation of his order. I must not, however, be taken as meaning that no reference whatever can be made to external matters, assuming of course that they are relevant, but if an order is to be founded upon them they should be duly brought to the notice of the parties and the parties given an opportunity of furnishing an explanation. I do not know whether that was done in this case; it may be that it was, but in any event the matters referred to have no re-

levancy upon this application, whatever use may be made of them by persons entitled to be heard at any subsequent stage of the proceedings.

The question of the adjudication of a debtor upon his own petition is a comparatively simple matter, and as has been pointed out by the Privy Council in the case cited, if the conditions of the Act are satisfied, the debtor is entitled to the order. All that need be done, therefore, upon a debtor's application is to see whether those conditions are fulfilled, and if so, to make the order. It may be that, in substance, though prematurely, the Registrar was perfectly correct in the view that he took of the matters to which he refers, but they can subsequently be brought to the notice of the Court, and if it should appear that the debtor had no right to apply for an order of adjudication, or that circumstances exist which would justify the Court in so doing, the Court has full power under sec. 21 to annul the adjudication order.

For the foregoing reasons, I set aside the order of the Registrar, dated the 6th April 1925, and the usual order of adjudication will be made.

Mr. S. C. Palit, Solicitor for the Applicant insolvent.

P. D.

Appeal allowed.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
NO. 220 OF 1923.

GREYS, J.
CUMING, J.
1925,
25, April.

JORINA AKTAR KHATUN,
Defendant, Appellant,
v.
HAFIZUDDIN KHAN,
Plaintiff, Respondent.

Mahomedan law—Sunni Hanafi School—Divorce, given by husband to wife under compulsion—Divorce embodied in a compromise with a third person but addressed to wife and not mere acknowledgment of divorce given, if effective.

JOBINA AKTAR KHATUN v. HAFIZUDDIN KHAN.

Under the Hanafi School of Sunni law, a divorce pronounced under compulsion is valid and is none the less so because it is contained in a written document, provided this document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion.

This was an appeal against the decree of Babu Surendra Krishna Ghosh, Subordinate Judge, 4th Court of Zillah Mymensingh, dated the 29th of August 1922, affirming the decree of Babu Suresh Chandra Sen, Munsif, 1st Court at Netrokona, dated the 23rd of May 1921.

The facts of the case will appear from the judgment.

Mr. Gopal Chandra Das and Babu Bhuban Mohon Saha for the Appellant.

Mr. Gunada Charan Sen and Babu Annada Charan Karkoon for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—Defendant No. 1 in the suit appeals against a decision of the Subordinate Judge of Mymensingh confirming a decision of the Munsif of Netrokona directing restitution of conjugal rights at the instance of the Plaintiff, the husband of the Appellant.

Both parties are Sunnis and governed by the Hanafi School. The marriage took place on the 21st Kartick 1315 and the parties lived together as husband and wife. The Appellant left her husband in Aswin 1322 and after this as a result of land dispute between Defendant No. 7 and the Plaintiff, criminal proceedings under sec. 147 of the Indian Penal Code were instituted; these were settled by a compromise which was reduced to writing; one of the terms of the compromise was that

the Plaintiff should divorce his wife. The compromise was subsequently set aside at the husband's instance and both Courts have found that the Plaintiff signed the terms of compromise under compulsion and the question is whether according to the Hanafi School a divorce extorted by compulsion is binding and if so, whether a divorce in writing in the form in which it was contained in this suit is binding. Subsequent to the compromise the wife is said to have married Defendant No. 2 in *nika* in Aswin 1325. No reliance can be placed upon another document which was produced, namely, an unregistered *taluk-namah*. It is undated and found to be unreliable.

The only question therefore is whether a valid divorce was effected by the compromise which has been found to have been executed by the husband under coercion. According to the Hanafi School a pronouncement of divorce is effectual although it has been made under coercion. Hamilton's Hedaya, Vol. I, p. 210, Tayabji's Principles of Mahammadan Law, p. 134 (par. 123), although the learned author raises the question whether at present time the Courts would give effect to a divorce pronounced under such circumstances.

The Respondent contends, however, that even if a divorce pronounced under compulsion is valid the divorce contained in the compromise is not binding as it is contained in a "non-customary" writing, that is to say, in writing not addressed and directed to any person. And we were referred to Baillie's Digest of Mohamadan Law, Vol. I, 2nd Ed., p. 235, where it is stated as follows :—

"A man is compelled by beating and imprisonment to write the repudiation of his wife and he writes that his wife, such an one, the daughter of such an one, the

JORINA AKTAR KHATUN v. HAFIZUDDIN KHAN.

son of such an one, is repudiated, but his wife nevertheless is not repudiated."

This passage is, as I think, explained by the foot-note in the same page. The writing here is treated as an acknowledgment of repudiation which if written under compulsion is not binding but I do not think that it can be taken as authority for anything else or to affect the rule that the written repudiation is valid provided it is addressed to the person to be repudiated. In the case referred to in Baillie, *ubi supra*, there was no repudiation but merely an acknowledgment of one which is not enough.

On an examination of the authorities I think the law according to the Hanafi School is clear that written divorce is valid, provided it is addressed to the person to be divorced. It remains therefore to see the nature of the compromise. It is in these words:—

"I release you the third party Aktar Khatun from the marital bond by giving you three talaks according to the Mohamadan scriptures."

The compromise was signed by the husband and by the wife and it was registered and was addressed by the husband to the wife. It seems to me to be not an acknowledgment but a document which actually effects the divorce.

As I have already stated, to my mind, the law is clear that according to the Hanafi School, which governed the parties, a divorce pronounced under compulsion is valid and that such divorce is none the less valid because it is contained in a written document provided this document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion which in my view the compromise is not.

The appeal accordingly succeeds and we set aside the decree of the 1st Court which was confirmed on appeal and the Appellant will be entitled to her costs here and in the Courts below.

CUMING, J.—I agree.

N. G.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORDER

No. 388 OF 1924.

GREAVES, J.	}	UPENDRA MOHAN ROY
CUMING, J.		CHOWDHURY, Objector,
1925,		Appellant,
12, March.		v.
Heard, 11 and	}	NARENDRA MOHAN ROY
12, March.		CHOWDHURY and anr.,
Judgment,		Petitioners, Respondents.
12, March.		

Lunacy Act (IV of 1912), secs. 62, 65, 67—Declaration about a person as to unsoundness of mind and incapacity to manage his affairs when justifiable—Different factors to be considered by the Court.

Under the present Lunacy Act, what the Courts have got to decide is whether the person before them is of unsound mind and is incapable of managing himself and his affairs and under the provisions of sec. 65 of the Act, it is open to the Courts to find that a man is of unsound mind so as to be incapable of managing his affairs but that he is capable of managing himself and is not dangerous to himself or to others. It is necessary to find that the person is both of unsound mind and incapable of managing himself and his affairs.

Where the Appellant was declared by the District Judge to be of unsound mind and incapable of managing his affairs the High Court on a consideration of the evidence on the record and examination of the Appellant himself vacated the order of the lower Court.

This was an appeal against the order

UPENDRA MOHAN ROY CHOWDHURY v. NARENDRA MOHAN ROY CHOWDHURY.

of K. K. Sen, Esq., District Judge of Zillah Khulna, dated the 23rd of September 1924.

The facts of the case will appear from the judgment.

Dr. Basak and Babu Radhika Ranjan Guha for the Appellant.

Dr. Mitter and Babu Nirode Bandhu Roy for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal from an order of the District Judge of Khulna, dated the 23rd September 1924, whereby he found that the Appellant before us was of unsound mind and incapable of managing his affairs. The learned District Judge came to this conclusion upon the evidence of the Civil Surgeon of Khulna which was to the effect that the Appellant was not in a sound condition and that he was suffering from a great deficiency of memory and from general weakening of mental faculties and this witness further states that he put many questions to the Appellant and he could not in all cases give rational answers; and he further states that he came to the conclusion at which he arrived because he found great deficiency of memory and general weakening of mental faculties and he states the various questions that he put to the Appellant in the course of his examination. It appears that the Appellant was under the observation of this gentleman for a considerable period and that he examined him some seven times in all. This witness further states that the Appellant had no reasoning faculty and that his mind was not sound and that he was not able to manage his properties.

There was, further, the evidence of the Appellant's wife Haridasi who states

that the Appellant had no power of understanding and could not say anything coherently and that he was like an inert mass and could not give any opinion after proper consideration.

There was also the evidence of a son of the Appellant, Narendra, and he states that his father's head was in a deranged condition since he had a stroke of paralysis and that he had no power to look after his health or his estate. He further states that the Appellant did not like visitors, could not speak, would weep and call dead people.

The pleader Promotha Nath Dutta in his evidence stated that the mental condition of the Appellant was not good and that he could not recognise known men and that he had lost his memory and he speaks of seeing the Appellant in a such condition. Two other doctors, on the other hand, gave evidence to the effect that the Appellant was not of an unsound mind. One of them, Babu Satis Chandra Ghose, states that he thought the answers to the questions that he put to the Appellant were sound and he says that he did not find any defect and that the Appellant had a power to exercise judgment although his memory was impaired. The other doctor is Phani Bhusan Roy who states that the Appellant gave proper replies to the questions that he put to him and that the Appellant also put intelligent questions to him. He further states that he noticed, besides physical defect, partial loss of memory probably due to paralysis combined with the old age of the Appellant. This was the evidence which was before the District Judge when he arrived at the conclusion to which we have already referred and the question which we have got to decide in this appeal is whether the conclusion of the District Judge was well-founded. Under the

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present Lunacy Act what the Courts have got to decide is whether the person before them is of unsound mind and is incapable of managing himself and his affairs and under the provisions of sec. 65 of the Act it is open to the Courts to find that a man is of unsound mind so as to be incapable of managing his affairs but that he is capable of managing himself and is not dangerous to himself or to others. But what is to be borne in mind is that in order to arrive at the conclusion at which the District Judge has arrived it is necessary to find that the person is both of unsound mind and incapable of managing himself and his affairs. This was pointed out by a Division Bench of this Court in the case of *Mazaharuddin Khan v. Serajuddin Khan* (1). That was a case under the Lunacy Act of 1858, Act XXXV of 1858. But the words there in sec. 2 are very much the same as in the present Act, namely, that the object of enquiry is to find whether the person was of an unsound mind and incapable of managing his affairs. The only difference, therefore, is that under the Act of 1912 you have to ascertain whether the person is of an unsound mind and incapable of managing himself and his affairs. We were referred to a Bombay case in the course of the argument, *In the matter of Cowasji Beramji Lilaovala* (2). That was a case under the Act of 1858 and Mr. Justice Latham then came to the conclusion that the term "unsound mind" comprehended imbecility, whether congenital or arising from old age as well as lunacy or mental alienation resulting from disease. When the matter first came before this Court we read the evidence and the judgment of the learned District Judge and we came to the conclusion that

it would be better that we should see the Appellant ourselves. The Appellant was, accordingly, produced before us yesterday in the presence of the learned Advocate who appeared on his behalf and we put various questions to him in order that we could ascertain for ourselves as also upon the evidence whether the conclusion of the District Judge was correct and speaking for myself, after having seen the Appellant, I am not prepared to find that he is a person of an unsound mind and incapable of managing himself and his affairs within the meaning of these words as used in the Act of 1912. There is no doubt, we think, that the mental condition of the Appellant has been affected by the stroke of paralysis from which he suffered and both owing to this and his age his memory has no doubt been seriously affected and as has been pointed out to us he was unable to recognise either here or in the other Court his son-in-law and other relatives and apparently, the names of some of his daughters escaped his memory. But he was able to answer questions with regard to his estate with a certain amount of intelligence and also questions with regard to his family and having regard to the evidence which was before the District Judge and which was read to us coupled with what we have gathered from the questions which were addressed to the Appellant we think that the District Judge was not justified in the conclusion at which he arrived and the order which he made. We are not satisfied that the Appellant is of unsound mind and incapable of managing himself and his affairs and the result is that we discharge the order of the District Judge. The manager appointed will be discharged after passing his accounts and he will hand over the property to the Appellant.

(1) 4 C. L. J. 115 (1903).

(2) 1 L. R. 7 Bom. 15 (1892).

USENDRA MOHAN ROY CHOWDHURY v. NARENDRA MOHAN ROY CHOWDHURY.

Let the record be sent down at once.

CLARKING, J.—I agree.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM ORIGINAL DECREES

Nos. 3, 4 AND 19 OF 1923.

WALMSLEY, J.
B. B. GHOSH, J.
1924,
14, November.

MESSRS. H. V. LOW
& Co., Defendants,
Appellants,
v.
HAZARIMULL BABU
and ORS. Plaintiffs,
Respondents.

Transfer of Property Act (IV of 1882), secs. 56 and 81, principles of, if applicable where some of several mortgaged properties are subject to a mining lease, the lessee having taken the lease with notice of the indebtedness of the mortgagor—Lessee, if entitled to have the charge satisfied out of the other mortgaged properties first, where the mortgagor has still a valuable interest in the property, e.g., the superior right to receive rent and royalty.

Where two out of several mortgaged properties were subsequently leased out for mining, the lessees having notice of the mortgagor's indebtedness, and the properties, the subjects of the lease, were ordered to be sold first in execution of the decree had on the mortgage upon the application of the mortgagors:

Held—That the lessees were not entitled to have the mortgage debt satisfied by the sale first of properties other than those subject to the lease, and the principle of sec. 56 of the Transfer of Property Act did not apply as the mortgagors still had a valuable interest in the property, i.e., the right to receive rent and royalty from the lessees, which superior interest might be sold in satisfaction of the mortgage debt. The principle of marshalling of securities as contained in sec. 81 of the Transfer of Property Act also did not apply in such a case as the lessees having taken the lease subject to

the encumbrance with full notice of the indebtedness of the mortgagor had no equities in their favour.

That in the circumstances of the case, the order directing the sale of the leased properties first was properly made.

These were appeals against the decrees of Babu Atul Chandra Banerjee, Subordinate Judge of Zillah Burdwan, dated the 11th of September 1922.

The facts will fully appear from the judgment.

Dr. Sarat Chandra Basak and Babus Nagendra Nath Ghosh, Manindra Nath Banerjee, Jitendra Nath Roy and Prafulla Chandra Chakravarti for the Defendants.

Babus Sarat Chandra Roy Choudhury, Sisir Coomer Banerjee, Sashi Sekhar Bose, Jyotish Chandra Sarkar, Hemendra Nath Sen and Gopendra Nath Das for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

B. B. GHOSH, J.—These three appeals arise out of three suits brought on different mortgages by the same Plaintiff. In the suits out of which appeals Nos. 3 and 4 arise, the Defendants were the same. In the suit which has given rise to appeal No. 19, the principal Defendants were the co-sharers of the principal Defendants in the other two suits who owned an eight anna share of the mortgaged property. The Appellants before us are Messrs. H. V. Low & Co., Ltd., who were added as Defendant No. 3 in the suits from which appeals Nos. 3 and 4 arise and who were the Defendant No. 8 in the suit which has given rise to appeal No. 19. The suits were decreed by the Subordinate Judge against all the Defendants. The mortgage in appeal No. 3 is dated the 9th April 1917. In appeal

MESSRS. H. V. LOW & Co. v. HAZARIMULL BABU.

No. 4, the mortgage is dated the 23rd September 1913 and in appeal No. 19, it is dated the 10th of January 1917. The Appellants before us are the lessees of two mouzahs called Simsa and Barkola and they obtained a mining lease from the mortgagors in appeals Nos. 3 and 4 on the 10th February 1919 with regard to a moiety share of those two mouzahs. They also obtained a similar lease from the mortgagors in appeal No. 19 on the 25th August 1919. There is no question that the Appellants are bound by the several mortgages and that the property in their hands is liable to be sold in execution of the mortgage decrees along with the other properties mortgaged at the instance of the mortgagee. These Defendants in the Court below made an application in each case praying that the two mouzahs of which they had taken leases should be put up to sale last of all. In answer to their petitions, the mortgagors contended that these two mouzahs should be put up to sale first as the whole of the mortgage debt would then be paid off out of the purchase-money of these two mouzahs; they were the most valuable part of their property and something would remain in excess after satisfying the mortgages. The mortgagors also said that, if those two properties were sold first, it would be unnecessary to proceed with the sale of their other properties. The mortgagee was indifferent as to what direction the Court might make with regard to the order in which the mortgaged properties were to be put up to sale. In all the cases, the Subordinate Judge made an order to the effect that these two properties Simsa and Barkola should be put up to sale first as he considered that that was the most equitable order having regard to the fact that the Defendant Company—the Appellants before us—

had taken their mining leases with knowledge of the indebtedness of the mortgagors and on favourable terms and further that the agents of the Company who negotiated the transaction undertook to pay off the several mortgages.

In each of these suits there was another set of Defendants who were the sons of the mortgagors and they pleaded that they were not bound by the leases granted by their fathers as the leases were not granted for the benefit of the joint Mitakshara family of which they were all members. This question the learned Subordinate Judge has left open, and it seems to me that it was unnecessary to decide that question which was an issue between Defendant and Defendant wholly unconnected with the main issues which arose in the mortgage suits.

The Defendant Company have appealed against the decrees passed by the learned Subordinate Judge and they attack the particular portion of the decree in each case in which the order in which the mortgaged properties should be sold is stated, that is to say, they object to the order that mouzahs Simsa and Barkola should be put up to sale first in satisfaction of the mortgage decree. Their contention, in the first place, is that the other properties which are not the subject of the lease to them should be sold first and that, if the mortgages are not satisfied out of the sale-proceeds, then the property leased to them should be sold; secondly, they urged that, if that contention of theirs be not accepted, the order with regard to the sale of the two properties Simsa and Barkola first should be expunged and the mortgagee should be allowed to proceed to execute his mortgages against any property he chooses. It is said on behalf of the Appellants that the law as enacted in sec. 56 of the Transfer

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of Property Act, namely, where two properties are subject to a common charge and one of the properties is sold the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend, should be applied to the present cases. It is next said that, if that provision is not applicable, then the general principle of marshalling of securities as laid down in sec. 81 of the Transfer of Property Act should be applied as a rule of equity.

In my judgment, the answer to the contention that the principle of sec. 56 should be applied is that here the mortgagors have a valuable interest in the property, that is, the right to receive rent and royalty from the lessees, the dead rent being fixed at Rs. 2,000 per annum in each case, the mortgagors may very well say that, if their interest which is still subsisting and which is superior to that of the lessees is sold, then the rest of their property would be preserved, and, in such a case, it seems to me that it will not be open to the lessees to say that the two properties in question should not be sold, because the sale might in the end affect their interest. When I asked the learned vakil for the Appellants whether this principle has ever been applied in any reported decision in favour of the lessee of a mortgagor his answer was that he had not been able to find any case. On that ground and the lessees having taken with full notice, in my judgment, the principle of marshalling of securities is not applicable to the present cases. The contention, therefore, of the learned vakil for the Appellants that properties other than those leased to the Defendant Company should be sold first cannot be upheld.

It is next contended on behalf of the Appellants that the learned Subordinate Judge is wrong in finding on the evidence that the persons who conducted the negotiations for the leases with the mortgagors agreed to pay off the mortgage-debts. It is urged that in the various petitions filed by the mortgagors before the learned Subordinate Judge they did not allege this as a ground for having the two mouzahs Simsa and Barkola sold first and that the story of the agreement is absolutely an after-thought. In appeal No. 19, it is said that there is absolutely no evidence of the alleged agreement. It seems to me, however, that the Appellants when they invoked equity in their favour signally failed in their case; they have not, it appears, paid any rent or royalty to the mortgagors since the date of the lease and this sum would, it is said, amount to over Rs. 12,000 with interest. The mortgage debt in this case would amount to about that sum and it can hardly be said to be equity that the other properties belonging to the mortgagors should be sold in order to pay off the mortgage debt while the Appellant Company have in their hands money due to the mortgagors to the same extent. In my opinion, therefore, on that ground alone the order made by the learned Subordinate Judge should be held to be quite equitable and should stand.

With regard to the other two appeals, the Subordinate Judge has accepted the evidence given by the mortgagors that there was such an agreement by Mr. Samson who is now the general manager of the Defendant Company. There was mention of one Jyotish Chandra Mukerjee in the evidence. Jyotish comes forward and denies the whole story in his evidence. But he goes too far because he says that he had no knowledge what-

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soever of the indebtedness of the mortgagors. It is hardly necessary to point out that with regard to one branch of the mortgagors it was necessary to have the sanction of the Court for the lease and it was recited in the order that the estate of the mortgagors was heavily encumbered and it was, therefore, necessary to grant a mining lease, and, on the basis of that order, the lease was granted. Mr. Samson does not give his evidence. I am unable to hold that the Subordinate Judge was wrong in accepting the evidence given by the mortgagors in these two cases. But apart from that, having regard to the circumstances that the mortgagors are entitled to a large sum of money as royalty out of these properties and that the lease was taken subject to the encumbrance with full knowledge of the indebtedness of the lessors, I think we should not interfere with the order of the lower Court.

The result, therefore, is that all the three appeals are dismissed with costs. We allow only one set of hearing-fee in each appeal to be divided between the different sets of Respondents who have appeared.

WALMSLEY, J.—I agree.

J. N. R. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RFF. No. 4 OF 1925.

CUMING, J.

B. B. GHOSE, J.

1925,

Heard,

20, November.

Judgment,

4, December.

In the matter of
RAJENDRA KUMAR
DUTTA and ABDUL
KH LAKUE, Pleaders.

Legal Practitioners Act (XVIII of 1879), secs. 12, 13, 14, proceedings under, if proper when allegation on which action taken amounts to charge of commission of a specific criminal offence.

Where the allegation against the per-

sons against whom proceedings under the Legal Practitioners Act were taken amounted to a charge of aiding and abetting or conspiring to commit a criminal offence, viz., causing evidence to disappear for the purpose of screening an offender:

Held—That the correct procedure to be followed was that proceedings under the Legal Practitioners Act should not be taken but that if it was thought necessary to take action it should be by way of a criminal prosecution.

In this view the High Court discharged the Reference.

In the matter of CHANDI CHARAN MITTER (1) referred to.

This was a Reference under sec. 14 of the Legal Practitioners Act, made by the 2nd Additional District Judge of Mymensingh (Mr. Nirode Ch. Guha), dated the 31st August 1925.

The ORDER OF REFERENCE was as follows:—

During the trial of Sessions case Cal. No. 200 of 1924 (*Emperor v. Sonaula*, under sec. 471, I. P. C.) which was held before me it transpired that in O. C. Suit No. 265 of 1921 of the local 3rd Subordinate Judge's Court (*Rani Hemanta Kumari Devi v. Sonaula and others*), a document purporting to be a registered Fata Kobala, dated 21st Ashar 1318, was filed on behalf of the Defendants by pleader Babu Rajendra Kumar Dutta. In his deposition before the Sessions Court Rajendra Babu admitted that he received the document from Sonaula (Defendant No. 1). The document was filed on the 6th July 1923 and the Plaintiff's pleader challenged the document as a forgery and cited Babu Digendra Nath Chakravarty, Sub-Registrar, to demon-

(1) 24 O. W. N. 785 (1925),

In the matter of RAJENDRA KUMAR DUTTA and ABDUL KHALEQUE.

trate the forgery. On the 7th July Digendra Babu was examined by the Plaintiff and the Defendant's pleader (Rajendra Babu) retired from the suit and the case was decreed *ex parte* on the same date (7th July 1923). The Plaintiff applied for sanction on the same date and notice in due course was served on Sonaula and he showed cause on 8th September 1923 through pleader Moulvi Abdul Khaleque who was engaged on 18th August 1923 by a *vakalatnama* executed and presented by Sonaula himself. The sanction case was numbered Misc. No. 28 of 1923. The disputed document was marked Ex. C in the original case (No. 265 of 1923) and Ex. 1 in Misc. case No. 28 of 1923. The Court ultimately granted sanction under sec. 476, Criminal Procedure Code, on 12th January 1924 and wrote to the Magistrate on 18th January 1924 to take necessary action. The Sub-Divisional Officer, Myensingh, ordered issue of process on 18th January 1924. On the 1st April 1924 Sonaula filed an appeal to the District Judge against the order for sanction which was dismissed on 9th May 1924. On the 26th May 1924 Sonaula came to Rajendra Babu and instructed him for the return of the documents filed in O. C. Suit No. 265 of 1921 (including the disputed document). According to Rajendra Babu's deposition in the Sessions case it appears that he told Sonaula that he might get back his other documents, but it was not likely that the document which was the subject-matter of the sanction case would be returned. In spite of this and with the full knowledge of the circumstances a petition for return of all the documents filed on behalf of the Defendants in O. C. Suit No. 265 was prepared by one Ali Hosen and Rajendra Babu signed and filed it in Court on 26th

May 1924. It was, in my opinion, clearly the duty of the pleader Babu Rajendra Kumar Dutta to mention in the petition that of the documents, Ex. C was the subject-matter of a sanction case and magisterial enquiry. It seems that the pleader almost anticipated that an order for returning the documents might be passed through inadvertence, and he was prepared to take advantage of it. In fact, an order in the routine form "return if no objection within three days" was passed by the Saristadar "by order" on 26th May 1924 and Rajendra Babu instead of bringing it to the notice of the District Judge that an order for the return of all the documents (including Ex. C) was passed through inadvertence, himself went into the record room and signed a receipt on the back of the petition. According to his evidence in the Sessions case, before he could sign other books he was called away on urgent business and he instructed Ali Hosen (the alleged Mohirir of Rajendra Babu but in fact not his registered Mohirir) to engage some other pleader to finish the work. Ali Hosen (who does not appear to be any pleader's clerk at all and is presumably a tout) then asked the Moulvi Abdul Khaleque and the Moulvi came to the record room, struck out the signature of Rajendra Babu and himself signed on the back of the petition a receipt and took back all the documents including Ex. C which was the subject-matter of the sanction case and magisterial enquiry. It was also clearly his duty to bring to the notice of the District Judge that the order for return of documents without reservation regarding Ex. C was passed through inadvertence and in any case not to take back Ex. C. Moulvi Abdul Khaleque not only took back Ex. C on 27th May 1924 but made it over to Sonaula,

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who was the accused himself. The result of the conduct of Babu Rajendra Kumar Dutta and Moulvi Abdul Khaleque was that the prosecution was hampered and gravely imperilled. But for the accident that the document having been marked an exhibit in the Original Civil Suit No. 265 the Plaintiff had obtained a certified copy, the prosecution in all probability would have failed. It further appears that Moulvi Abdul Khaleque held no power at all in the original case No. 265, and the document Ex. C was filed by Babu Rajendra Kumar Dutta not on behalf of Defendant No. 1 Sonaula (from whom Rajendra Babu had no *vakalatnama*) but on behalf of some other Defendants. Moulvi Abdul Khaleque held a power from Sonaula alone in the sanction case (Misc. No. 28 of 1923). The document Ex. C could therefore have been returned to Rajendra Babu alone and not to Moulvi Abdul Khaleque at all.

From the above my clear impression is that when Sonaula found that his appeal against the sanction was dismissed (9th May 1924) he conspired with Ali Hosen (to all appearance a tout) to remove the forged document by corrupting the record room staff. To this nefarious design Babu Rajendra Kumar Dutta when he got inkling of it, not only put no check but practically encouraged Sonaula to take his chances and helped and aided him into success. The part which Moulvi Abdul Khaleque took was no less serious, in that he actually took back the forged document and put it into the hands of the accused himself and thereby put it beyond the reach of the Court. I cannot conceive of unprofessional conduct graver than this and I feel it my duty to draw up proceedings against both Babu Rajendra Kumar Dutta and Moulvi Abdul

Khaleque under sec. 14 of the Legal Practitioners Act. I shall draw up separate proceedings against each, but this "statement of reasons" will govern both the cases and copies of it will be served on both the gentlemen. Write to the District Magistrate requesting him to instruct the Government pleader to appear in the proceedings on behalf of the Crown and to offer (if necessary) evidence in support of the charges under sec. 14, Legal Practitioners Act.

Babu Surendra Nath Guha for the Crown.

Mr. Sarat Chandra Roy Choudhuri and *Babu Debendra Narayan Bhattacharjya* for Rajendra Kumar Dutta.

Mr. Gopal Chandra Das, Moulvi Md. Nurul Huq Choudhuri and *Babu Satyendra Kishore Ghose* for Abdul Khaleque.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference concerning two pleaders of the Mymensingh Bar Babu Rajendra Kumar Dutta and Moulvi Abdul Khaleque.

The facts appear to be these :

There was a certain Title Suit No. 265 of the local Subordinate Judge's Court (*Rani Hemanta Kumari Devi v. Sonaula and others*).

Rajendra Kumar Dutta was the pleader on behalf of some of these Defendants though it does not appear that he had received any *vakalatnama* on behalf of Sonaula. In the course of this suit a certain document was filed on behalf of the Defendants on the 6th July 1923 by Rajendra Kumar Dutta. The Plaintiff challenged the genuineness of this document, certain evidence was taken and on the 7th July Babu Rajendra Kumar Dutta, the Defendant's pleader, retired from the case and the case was decided

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ex parte. On the same day the Plaintiff moved the Court to prosecute Sonaula for forgery. Notice was issued on Sonaula and he appeared on 8th September 1923 and showed cause. Moulvi Abdul Khaleque appeared for him on this occasion.

The Court ordered a prosecution on 12th January 1924 and wrote the usual letter to the Magistrate on 18th January 1924. The same day the Magistrate issued process. What took place in the Magistrate's Court does not appear but on the 1st April 1924 Sonaula preferred an appeal to the District Judge against the order for prosecution which was dismissed on 9th May 1924.

On the 26th May 1924 Sonaula came to Babu Rajendra Kumar Dutta and instructed him to apply for the return of the documents filed in the original suit including the document which was the subject of the criminal charge. It is somewhat remarkable that this document was still on the record of the civil case. It ought to have been impounded but the probable explanation is that in view of the appeal to the District Judge against the order for prosecution it had come back once more to the original suit file. The usual application for a return of the document was filed and Babu Rajendra Kumar Dutta himself went to the record room to get back the documents. Rajendra Babu himself signed a receipt for the documents on the back of the petition. He was then called away to attend to some other case and one Ali Hosen was told to instruct some other pleader and he went and fetched Mr. Abdul Khaleque who took back the documents, signed receipt for them and made them over including the document, the subject of the criminal case to Sonaula.

What therefore the two pleaders are

charged with amounts to aiding and abetting Sonaula in getting back this document so that he might defeat the criminal case while it was their duty to have brought to the notice of the District Judge that Sonaula was attempting to do this.

Now it will be clear that what is alleged against these two pleaders amounts to a charge of aiding and abetting or conspiring to commit a criminal offence, *viz.*, causing evidence to disappear with the intention of screening the offender, an offence punishable under sec. 201, Indian Penal Code. Both the pleaders have filed statement denying that they had any knowledge that the document in question was being taken back and have supported their explanation with affidavit. In such a case it has been held that the correct procedure to be followed is that proceedings under the Legal Practitioners Act should not be taken but that if it is thought necessary to take action it should be by way of a criminal prosecution. The question has been dealt with in the case of *In the matter of Chandi Charan Mitter* (1) and the judgment of Mookerjee, J., may be with advantage referred to where he deals with the numerous authorities on the point and points out that summary proceedings under the Legal Practitioners Act may result in grave injustice to the persons concerned. We do not think we should be justified in departing from the principles laid down in the case we have just referred to.

We think therefore that the Order of Reference should be discharged. It will be open to the authorities if they think fit to criminally prosecute the two pleaders. On that point we express no opinion.

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It will of course be open to the Additional District Judge after any action that may be taken in the Criminal Court to take action under the Legal Practitioners Act, if so advised.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APP. NO. 2 OF 1925.

WALMSLEY, J.	} THE SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS,
MUKERJI, J.	
1925,	
Heard,	
10, August.	
Judgment,	Appellant,
12, August.	v.
	SADER SAIK,
	Respondent.

Jury, misdirection to—Witnesses for prosecution absent—Application for adjournment refused and trial proceeded with and jury directed to return a verdict of not guilty for want of evidence—Misdirection—Acquittal set aside, on appeal by Local Government.

On the date fixed for hearing in the Sessions Court the witnesses for the prosecution were not present and the trial was adjourned to the next day when too the witnesses not being present, the public prosecutor made an application for further adjournment which was refused and the Judge then empanelled a jury and called upon the public prosecutor to open his case and upon the accused to plead, whereupon the public prosecutor opened the case under protest and informed the Court that he had no witnesses present to support the case for the prosecution and the Judge directed the jury to return a verdict of not guilty as there was no evidence:

Held—That in the circumstances of the case it was a misdirection for the Judge to tell the jury that there was no evidence and that they should return a verdict of “not guilty.”

That the Judge had exercised his dis-

cretion unwisely in not giving the public prosecutor an opportunity to produce his witnesses, since it appeared that there were witnesses whose attendance had not been procured on the date fixed through blunder.

The High Court set aside the order of acquittal and directed a re-trial.

This was an appeal against the decision of the Assistant Sessions Judge of Mymensingh, dated the 30th October 1924, acquitting the accused Respondent of offences under secs. 365 and 366, I. P. C.

The facts were as follows:—

The Respondent Sader Saik was tried on charge under sec. 366, Indian Penal Code, by the Assistant Sessions Judge of Mymensingh with the aid of a jury and was convicted on the said charge and was sentenced to undergo rigorous imprisonment for a period of three years.

On appeal the Sessions Judge set aside the conviction and sentence and directed a re-trial on the ground that the provisions of sec. 360, Cr. P. Code, had not been complied with.

The re-trial took place before the same Assistant Sessions Judge who held the original trial.

In connection with the re-trial the committing Magistrate had through oversight omitted to summon the prosecution witnesses and on the date fixed for hearing the public prosecutor had to apply for an adjournment as none of the prosecution witnesses were in attendance.

The order passed on the said application was as follows:—

“The public prosecutor has applied for adjournment on the ground that none of the prosecution witnesses are in attendance. It has not been shown why the prosecution witnesses are not in attendance. The public prosecutor to request

THE SUPERINTENDENT AND REMEMBRANCE OF LEGAL AFFAIRS v. SADER SAIK.

the Magistrate to produce the witnesses to-morrow as the case is an old one or to inform me if there be no likelihood of the witnesses being produced by 5 P.M. this afternoon."

The public prosecutor accordingly requested the Additional Magistrate to send a telegram to the Sub-Divisional Officer of Kishoreganj, directing him to secure the attendance of the prosecution witnesses next day at 11 A.M. and to send a reply by wire before 5 P.M., but no reply was received.

Later on the same day the learned Assistant Sessions Judge passed the following order :—

"It is 5-15 now. No intimation received whether the witnesses can be produced to-morrow or not. Adjourned the case to to-morrow."

On the next day the learned Assistant Sessions Judge took up the case at 12 noon and no reply from the Sub-Divisional Officer of Kishoreganj having arrived the public prosecutor again applied for an adjournment stating that he was not in a position to explain why the witnesses were absent and pointed out that the re-trial had been ordered on a technical ground and that in the previous trial the accused had been convicted.

The application for adjournment was refused, a jury was empanelled and the accused was called upon to plead and the public prosecutor was made to open his case which he did under protest. The learned Judge directed the jury to return a verdict of not guilty for want of evidence and on such verdict being returned he acquitted the accused.

Against this order of acquittal the Local Government preferred an appeal.

Mr. Khundkar, Deputy Legal Remembrancer, for the Appellant :

Babu Urukramdas Chakravarty for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The facts necessary for the decision of this appeal are as follows :—Sader Saik was tried upon a charge under sec. 366, I. P. C., before the Assistant Sessions Judge of Mymensingh : he was convicted and sentenced to undergo three years' rigorous imprisonment. He preferred an appeal and the learned Sessions Judge set aside the conviction and sentence on the ground that the trying Judge had not complied with the provisions of sec. 360, Cr. P. C.

The case was fixed for fresh trial on October 29th. On that date no witnesses were present, and the hearing was adjourned to next day. Again there were no witnesses present. The learned Judge then refused to grant any further adjournment. He then called upon the accused to plead, and empanelled a jury : he then directed the public prosecutor to open the case, and the latter did so under protest, and informed the Court that he had no witnesses present to support the case for the prosecution. Thereupon the learned Judge directed the jury to return a verdict of "not guilty," and after that verdict had been returned he acquitted the accused.

It seems to me clear that the learned Judge exercised his discretion unwisely both on the first day and the second day. He must have realized that some one had blundered and that the witnesses could not be collected and sent to his Court at less than a day's notice. He should have ascertained what had happened and should have granted a reasonable adjournment.

It is said, however, on behalf of the

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accused that the Code of Criminal Procedure gives us no authority to interfere with the verdict and the order of acquittal. Our attention is drawn to the words of sec. 423 (2) of the Code, and it is urged that there was no misdirection by the Judge, and therefore we cannot disturb the verdict of the jury. I do not agree with this argument for this reason that the public prosecutor did not say that he had no evidence to offer, or that he did not intend to offer any evidence: his attitude throughout was that he had witnesses who would substantiate the case if further opportunity were allowed to him, and I think that in such circumstances it was a misdirection for the Judge to tell the jury that there was no evidence and that they should return a verdict of "not guilty."

I therefore set aside the verdict of "not guilty" and the order acquitting the accused, and direct that he be tried in accordance with law.

MUKERJI, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 130 OF 1925.

NEWBOULD, J.
B. B. GHOSE, J.
1925,
8, April.

KALIDAS RAHA,
Petitioner,
v.
DEODHARI MISTRI,
Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 339—Exception, accused in revisional stage, if can claim benefit of, when he did not raise the defence under the Exception in the lower Courts—Dispute of civil nature, propriety of trial by Criminal Court.

A person accused of an offence under sec. 341, I. P. C., for obstruction of a way by raising a wall, did not raise the defence that he was entitled to the Exception to sec. 339, I. P. C., and denied having raised the wall. But at the same time he con-

tended that the wall which had been raised was on his own land:

Held—That the dispute between the parties was evidently one which could be better determined in the Civil than in the Criminal Court. In the present case the obstruction put up by the accused having been put up in good faith in the belief that he had a lawful right to obstruct the complainant from going along the path, he was entitled to the benefit of the Exception to sec. 339, I. P. C., though he did not clearly raise that defence in the lower Courts.

This was a Rule granted against the judgment and order of Mr. Anath Bandhu De, Magistrate, 1st class, Burdwan, dated the 8th January 1925, confirming those of Mr. Ali Asghar, Magistrate, 2nd class, Assansol, dated the 3rd December 1924.

The facts material to this report will fully appear from the judgment.

Babu Satindra Nath Mukherjee for the Petitioner.

Mr. Bankim Chandra Mukherjee (Advocate), Babu Nolini Kumar Mukherjee for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner has been convicted under sec. 341, I. P. C. He was clearly to blame in not clearly raising in the lower Courts the defence that he was entitled to the Exception to sec. 339, I. P. C. He foolishly denied having erected a wall as alleged by the complainant. But at the same time he contended that the wall which had been erected was on his own land. The dispute between the parties is evidently one which can better be determined in the Civil than in the Criminal Court. The complainant's own case is somewhat vague, and we are not even now sure whether he claims an absolute right

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to the strip of land in dispute, or whether he claims a public right of way, or private right of way for all purposes, or a mere right to go over this land when it is necessary to do so in order to repair the south wall of his house. However that may be, we can see no reason to doubt that the obstruction put up by the Petitioner was put up in good faith because the Petitioner believed himself to have a lawful right to obstruct the complainant from going along this passage. There does not appear to be any suggestion that he acted from any other motive.

The Rule is accordingly made absolute. The conviction and sentence passed on the Petitioner are set aside and the fine and costs, if paid, will be refunded.

J. N. R. Rule made absolute.

PRIVY COUNCIL.**[APPEAL FROM MADRAS.]**

LORD SUMNER.	} KOND. PALLI VIJAYA-	
SIR JOHN EDGE.		BATNAM and anr.,
LORD SALVESEN.		Appellants,
1925,		v.
Heard, 13, May.		MANDAPAKA
Judgment,	SUPARSANA RAO and	
11, June.	ors., Respondents.	

Adoption by Hindu widow—Authority to adopt given by husband, when minor, in a Will—Will registered after executant's death but not by widow, if valid for conferring authority to adopt—Indian Majority Act (IX of 1875), secs. 2, 3—Succession Act (X of 1865), definition of "Will" in—Registration Act (III of 1877), secs. 17, 23, 40, 41.

An owner of property aged 19 years, who was under guardianship and therefore a minor within the definition of sec. 3 of the Indian Majority Act (IX of 1875), executed a Will which purported to be a disposition of his property and also conferred a power of adoption on his widow. The Will was after the death of the executant of the document registered not by

the widow, the donor of the authority, but by the legatee:

Held—That the document did not operate to any effect as a Will, as a disposition of the property or for any other purpose, e.g., as a power to adopt embodied in a Will.

JAGANNATHA BHEEMA DEO v. KUNJA BENARI DEO (1) referred to.

That though inoperative as a Will, the document might nevertheless constitute a valid authority to adopt, requiring to be registered, under sec. 40 of the Registration Act (III of 1877), by the donor or after his death by the donee of the power, in the manner provided by sec. 41.

That in this case the donee of the power having failed to present it for registration within the time allowed by sec. 23, the document was inoperative as an authority to adopt and adoption made by the widow on the strength of it was invalid.

This was an appeal (No. 62 of 1923) from a decree, dated the 16th April 1920, of the High Court at Madras which affirmed a decree, dated the 30th December 1918, of the District Judge of Ganjam.

The suit was instituted by the Appellants who are the daughters of the late Mandapaka Appanna who died on the 1st October 1906 aged 19.

The deceased on the day of his death purported to execute a Will and the questions for determination in the appeal were (i) whether the alleged Will was a Will within the meaning of sec. 17 (3) of the Indian Registration Act, 1877, and (ii) whether an authority to adopt contained in the Will was legally valid. The lower Courts decided that the Will was genuine, that it was a Will, and that the authority to adopt was valid.

Messrs. S. Hyam and B. N. Srinastava

(1) L. R. 48 I. A. 482; s. c. 20 O. W. N. 374 (1921).

KONDAPALLI VIJAYARATNAM v. MANDAPAKA SUDARSANA RAO.

for the Appellants.—The document is bad as a Will so that none of the provisions contained in it are valid, including the provision giving authority to adopt.

The testator being a minor was incompetent to make a Will, and the authority to adopt was not conferred by a Will within the meaning of sec. 17 (3) of the Registration Act, 1877.

The requirements of the Registration Act must be observed with the greatest strictness.

Mujibunissa v. Abdul Rahim (2).

Actually although there is a document called a Will it is found not to be a Will legally, so that the authority to adopt is not one conferred by a Will.

It follows that inasmuch as the document was not registered as an authority to adopt it cannot operate to authorise an adoption.

Jambu Parshad v. Md. Aftab Ali (3) and *Jagannatha Bheema Deo v. Kunja Behari Deo* (1).

If the authority to adopt were valid it might be used for the purpose of defeating the intention of the testator as provided in his Will.

Mr. Ingram for the Respondents contended that inasmuch as the Courts in India had held concurrently that the Will was genuine, that question was not open to the Appellants on this appeal. The Will was registered as a Will and an authority to adopt conferred by a Will does not require registration.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SALVESEN.—The circumstances

(1) L. R. 48 I. A. 482: s. c. 20 C. W. N. 374 (1921).

(2) L. R. 28 I. A. 15, 20: s. c. I. L. R. 23 All. 233; 5 C. W. N. 177 (1900).

(3) L. R. 42 I. A. 22: s. c. I. L. R. 37 All. 49; 19 C. W. N. 282 (1914).

out of which this suit has arisen, so far as they are material to the judgment, may be very shortly stated.

One Mandapaka Appanna, a Sudra in the Ganjam District, who was possessed of a considerable amount of property, died in 1906 leaving a widow and two daughters, the latter being the Plaintiffs in the action. When on his death-bed and within an hour or two of his actual death he executed a document, which purported to be a disposition of his property and at the same time conferred a power of adoption on his widow. This document was registered as a Will at the instance of a legatee. It was challenged by the Plaintiffs (who are still in minority) on the ground among others (1) that it was not genuine and (2) assuming that the signature which it bore to be that of the deceased, that he was incapable at the time of understanding its contents owing to the illness from which he shortly afterwards died.

Both Courts have decided, although with much hesitation, that the Will was genuine and on the question whether the deceased was in a fit condition to dispose of his property, the Subordinate Judge held that he was, and the High Court of Judicature at Madras may be presumed to have endorsed his judgment, although they have not expressly dealt with this matter in their reasons. Whether it is competent in these circumstances for their Lordships' Board to entertain an appeal from what may be represented as concurrent judgments on questions of fact it is unnecessary to consider, for a point of law remains, the decision of which in their Lordships' view is sufficient for the disposal of the appeal.

At the time of his death Mandapaka Appanna was admittedly only 19 years of age and was under guardianship. Act

KONDAPALLI VIJAYARATNAM v. MANDAPAKA SUDARSANA RAO.

No. 9 of 1875 provides, sec. 2, that nothing therein contained should affect the capacity of any person to act in the following matters, namely :—Marriage, Dower, Divorce, Adoption.

Sec. 3 provides as follows :—

"Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before :

"Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before."

It follows, therefore, and indeed is matter of admission, that the document which purported to be a Will of Mandapaka Appanna could have no legal effect as such. On the other hand, as Mandapaka Appanna was over 18 years of age an authority to adopt, whether oral or in writing, was within his legal capacity.

A power to adopt may be embodied in a Will and if the document now under consideration can be treated as such the judgment under appeal cannot be impugned. "Will" is defined by Act 10, 1865, as :—

"The legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death,"

and by sec. 3 of Act 10 of 1897 :—

"Will shall include a codicil and every writing making a voluntary posthumous disposition of property."

The learned Judges in the Court below have held that the document in question satisfied these definitions. If the form of the document only is considered no doubt that would be so, but, having regard to the fact that it was executed by a person who was a minor and incapable of making a Will, their Lordships are unable to

agree with the decision. The so-called Will is not a "legal declaration of the intentions of the testator," for it had no legal effect and was not capable of disposing of any of the estates of the deceased. So far as it purported to deal with his property it was a nullity. That a document is called a Will although it does not operate to any effect as such, will not give it the effect of a Will for any other purposes. This was so held in the case of *Jagannatha Bheema Deo v. Kunja Behari Deo* (1), a case which was not before the learned Judges of the High Court as it was not decided till after their judgment had been pronounced.

It does not follow, however, as the learned Subordinate Judge held that "a person who is incapable of making a Will is incapable of conferring an authority to adopt by a Will though he may be capable of giving an authority to adopt to be exercised after his death." Their Lordships see no reason to doubt that a document which purported to be a Will but was inoperative as such might nevertheless constitute a valid authority to adopt. Here, however, the Respondents are met with a different objection. Act No. 3 of 1877 provides, sec. 40 :—

"the donor, or after his death the donee, of any authority to adopt, or the adoptive son, may present it to any registrar or sub-registrar for registration."

and sec. 41 provides that an authority to adopt shall be registered in the case of the death of the donor on the registry officer being satisfied

(a) that the authority was executed by the donor

(b) that the donor is dead, and

(c) that the person presenting the authority is, under sec. 40, entitled to present the same.

In the present case it is not alleged

(1) L. R. 48 I. A. 482 : s. c. 26 C. W. N. 374 (1921).

KONDAPALLI VIJAYARATNAM v. MANDAPAKA SUDARSANA RAO.

that the donee, who, at the time of the registration of the document as a Will was the only one who could present it for registration, either did so herself or gave authority for the registration. Act III of 1877, Part 3, sec. 17, enacts that all authorities to adopt a son executed after the 1st January 1872, shall be registered, and by sec. 23, that no document other than a Will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution. As the widow, who was the donee of the authority, failed to register it within this period of four months, the deed which was afterwards executed by her on 24th December 1913, adopting Defendant No. 1, cannot receive effect. This indeed was not contested by the Respondents' counsel.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the Plaintiffs are entitled to a declaration, that the Will, dated the 1st October 1906, alleged to have been executed by the late Mandapaka Appanna is void, and also to a declaration in terms of the 2nd, 3rd and 4th heads of their prayer with costs of the suit both in the Courts below and before this Board.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitor: *Mr. H. S. L. Polak* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

LORD SUMNER.

SIR JOHN EDUE.

SIR LAWRENCE JENKINS.
1921,Heard, 21, 24, 25 and
27, November.

Judgment,

21, December.

HABUMAT ALI and
anr., Appellants,
v.
MUSST. NASIB-
UL-NISA,
Respondent.

Custom, proof of—Right of brother's daughter to succeed in place of deceased brother—Proof of succession by uncle's daughter, if sufficient for the purpose.

If there be a customary rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and the High Court was right in holding the custom proved in the case of the latter though no instance was proved of an actual succession by a brother's daughter.

This was an appeal from a decree, dated the 23rd July 1921, of the High Court at Lahore, which varied a decree, dated the 28th May 1915, of the Subordinate Judge of Rohtak.

The parties are Mohammedan Arab-Sayads of Kharhanda in the Rohtak District.

The Plaintiff-Respondent instituted the suit in 1910 to recover possession of properties which she alleged had belonged to Mir Barkhat Ali who died childless in 1872; that his widows succeeded to his property during their lives, and that on the death of the last surviving widow in 1909 the Plaintiff who was the daughter of Mir Barkhat Ali's brother became entitled to the property according to custom.

The Appellants-Defendants claimed to be in possession under transfers effected by Musammat Bismillah Begam, the last surviving widow of Barkhat Ali and they

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contended that the right to challenge these transfers was confined to a male collateral only of Barkhat Ali.

The Subordinate Judge decided that succession in the family was governed by Mahomedan law as modified by custom and that the Plaintiff had failed to prove the custom which she had set up.

He held that the Plaintiff-Respondent and Afzal Ali—a sister's son of Barkhat Ali—were equally related to Barkhat Ali and that by custom a male of equal degree excluded a female so that the Plaintiff was excluded from the succession. In view however of an admission by Afzal Ali that the Plaintiff was entitled to an equal share with him he held that she was entitled to a half share in the properties left by Mir Barkhat Ali.

The High Court on appeal held that the Plaintiff as the daughter of a brother would exclude the son of a sister and passed a decree in her favour for the whole of the property.

The Defendants appealed to H. M. in Council.

Messrs. Dunne, K. C. and Parikh for the Appellants.

Messrs. DeGruyther, K. C. and Wallach for the Respondent.

THEIR LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—This is an appeal from a decree, dated the 23rd of July 1921, of the High Court of Judicature at Lahore, varying a decree, dated the 28th of May 1915, of the Court of the Senior Subordinate Judge of Rohtak.

The suit is brought by Mussammat Nasib-ul-Nisa to recover possession of immovable property described in the plaint on the ground that it formed part of the inheritance left by her uncle, Mir Barkhat Ali, and on the death of Mussam-

mat Bismillah Begam, his last surviving widow, devolved on her as his customary heir.

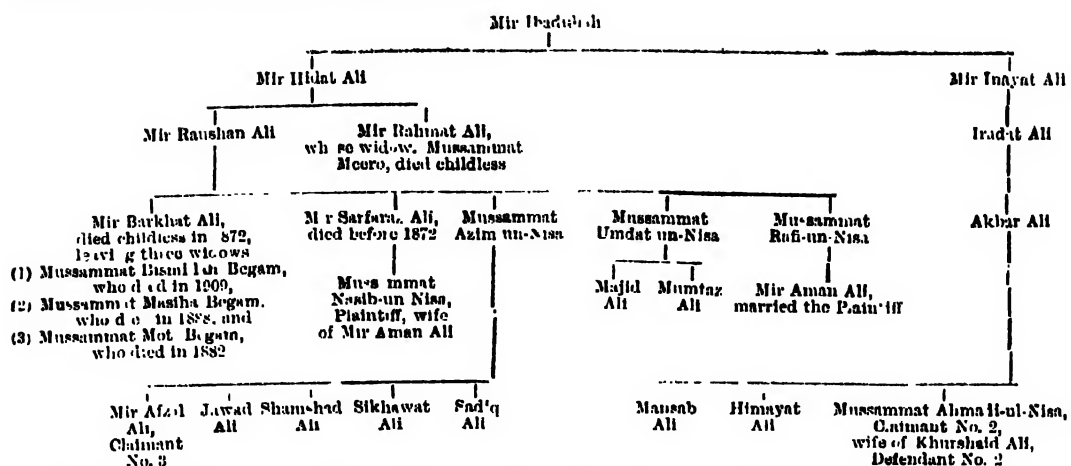
Though the record is voluminous, the points now in issue are narrowed down to two: (a) whether the whole of the property claimed formed part of Barkhat Ali's estate, and (b) whether the Plaintiff has established that she is his customary heir. The items claimed include a moiety of the villages of Salakhni and Kanai.

Up to the Mutiny the entirety of these villages belonged to Bisharat Ali. They were then confiscated for his alleged default of duty. But on the application of Barkhat Ali, whose military service had earned him the good will of the authorities, the villages in 1858 were restored to him and Umrao, Bisharat's son, and their names were entered in the revenue records. The Subordinate Judge held that the name of Barkhat Ali was included as part owner without any apparent rhyme or reason by Barkhat Ali himself when Umrao was a mere boy of 14, that Barkhat Ali had never been in actual possession or enjoyment of the villages, and that the Defendants had so long been in adverse possession of them against Barkhat Ali and his successors, that the Plaintiff was not entitled to lay any claim to them. The High Court, for reasons which appear in its judgment, took a different view and held that the moiety of these villages belonged to Barkhat Ali.

Their Lordships agree with this conclusion.

Has then the Plaintiff established her claim to be the customary heir of Barkhat Ali? The members of his family are Mohammedan Arab-Sayads of Kharbanda, and it is among them that the heir to his property is to be found. Their relationship to him is shown in the following pedigree:—

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Barkhat Ali died in 1872 without issue but survived by the three widows shown in the pedigree. Contrary to the rule of Mohammedan law, they succeeded to the whole of his estate, for an interest terminable with their lives and with a right of survivorship as between themselves.

Mussammat Bismillah Begam was the survivor, and on her death in 1909, three members of the family instituted three separate suits, each claiming as heir of Barkhat Ali to recover possession of the property now in suit. One was brought by Mussammat Nasib-ul-Nisa, one by Mussammat Ahmadi-ul-Nisa, and the third by Mir Afzal Ali. They were consolidated and heard together. The second and third failed, and no appeal has been preferred; in Nasib-ul-Nisa's, a decree was passed in her favour on appeal, and it is against that decree that the present appeal has been preferred.

For Nasib-ul-Nisa it has been argued that, as the heirship of her two rival claimants has been negatived, hers must be taken to be established even as against the Defendants. But their Lordships cannot assent to this contention. The Defendants, though without title, are in possession and the Plaintiff can only recover that possession by establishing her

own title as against them, regardless of what has been determined in the other two suits.

Appended to the Subordinate Judge's judgment are nine pedigrees, G I to G IX, showing the family relationship at the dates of the several successions said to support the customary rules of succession on which the Plaintiff relies. Their correctness is not questioned and the actual succession in each case is proved, not merely by oral evidence, but by judicial decisions or revenue orders made in mutation proceedings.

The devolutions to which they relate have been accurately investigated by the High Court and it would serve no useful purpose for their Lordships to travel over the same ground.

What has to be determined is the inference to be drawn from them as to the rules of succession relevant to the Plaintiff's claim in this suit.

They corroborate the oral evidence that in this family custom is followed in matters of inheritance, and this, in their Lordships' opinion, is established beyond controversy. So the present enquiry is not whether in relation to the particular succession now in question, the ordinary personal law is superseded by a custom,

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but what is the customary rule that regulates it.

That there is a customary rule which entitled Barkhat Ali's widows to succeed as heirs to his estate for limited interests is not disputed; it is equally clear that there is a rule of inheritance in this family which entitles brothers to succeed to the exclusion of sisters. Applying these two rules to the succession on the surviving widow's death, if Sarfaraz Ali had survived, he would have inherited Barkhat Ali's property to the exclusion of his sisters. But Sarfaraz Ali was dead, and the Plaintiff, his daughter, alleges that by the code of customary rules regulating succession in this family, the principle of representation is sanctioned, and she claims that by virtue of it she, as Sarfaraz Ali's daughter, in the absence of male issue, represents him and stands in his place. Their Lordships agree that representation is a part of the rules of succession in this family. It is settled by judicial decision that a son in matters of inheritance represents his deceased father, and the record discloses instances of succession in which a widow was recognized as the representative of her husband, and a daughter as the representative of a deceased uncle. It is thus shown that sex is not a bar to representation, but that widows and daughters in the absence of sons can claim the right in their favour.

But then it is said that no instance is proved of an actual succession by a brother's daughter, and therefore, it is argued, the necessary custom that precisely covers this case has not been proved. But if there be a rule that entitles an uncle's daughter to be her father's representative for the purpose of inheritance, it would be anomalous and arbitrary to withhold from a brother's daughter the same right, and their Lordships hold that

the High Court rightly decided in Nasib-ul-Nisa's favour. In their opinion, therefore, this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The Appellants must pay the costs of this appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 120 OF 1924.

<p>SANDERSON, C. J. RANKIN, J. 1925, 20, March</p>	}	<p>THE OFFICIAL TRUSTEE OF BENGAL, Plaintiff, Appellant, v. W. G. BOWDEN, Defendant, Respondent.</p>
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Landlord and tenant—Calcutta Rent Act (Bengal Act III of 1920) as amended by Act II of 1923 and Act I of 1924, sec. 11, sub-secs. (1) and (2).—Expiry of lease—Breach of covenant during subsistence of original lease—Waiver of such breach by subsequent acceptance of rent with knowledge of such breach—Whether landlord is entitled to a decree for possession.

The Plaintiff, a trustee of the estate of Anna Apcar, deceased, of which J. Apcar was the beneficiary, on 20th November 1919, demised the premises to the Defendant for a period of four years to expire on 30th September 1923. The lease contained a covenant—"not to assign, sublet or part with possession of the said premises or any part thereof without the previous consent in writing of the lessor." The Defendant sublet the upper flat of the premises to a tenant in April 1921 who continued to be in occupation till April 1923. Before the expiry of this lease the Plaintiff gave notice to the Defendant to quit and vacate the premises as the same was required for the use

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and occupation of the beneficiary and brought this suit for a decree for possession and for mesne profits at Rs. 650 per month till the recovery of possession. The Defendant denied that the premises were required for the use and occupation of the beneficiary and claimed benefit of the Calcutta Rent Act. BUCKLAND, J., found that the Plaintiff did not *bonâ fide* require the premises for use and occupation as alleged but allowed the Plaintiff to amend the pleadings in order to raise the issue whether the Defendant could claim the benefit of the Rent Act in view of the said breach of covenant regarding subletting. On the amended pleadings it was found by GHOSH, J., on evidence, that the Plaintiff accepted rent with knowledge of the breach in August and September 1923, so that there being waiver of forfeiture the suit was dismissed :

Held—That subletting the premises without written consent was a technical breach of covenant but there was complete waiver of the breach by subsequent receipt of rent after the landlord had that knowledge. In those circumstances it could not be said that the tenant failed to perform the conditions of the tenancy.

Per RANKIN, J.—By the last words of proviso to sub-sec. (1) of sec. 11 of the Calcutta Rent Act, the Court could in a proper case take into account breaches of the conditions of the tenancy committed during the course of the original tenancy in granting a decree in ejectment at the termination of the lease.

But sub-sec. (1) of sec. 11 does not mean that because a perfectly harmless technical breach was committed in 1921, the Court cannot give the tenant in 1924 the benefit of the Calcutta Rent Act.

This was an appeal against the judg-

ment of Buckland, J., passed on 22nd February 1924 and of Ghose, J., passed on 20th May 1924.

The facts of the case will appear from the judgment.

Mr. Pugh (with Mr. Barwell) on behalf of the Plaintiff argued that the tenant had not performed the terms of the lease which were the conditions of the tenancy because he had sublet the premises. The landlord came to know of this two months before the lease expired. He had his right of forfeiture [cited *Job v. Banister* (1)]. In order to enable the tenant to have the benefit of sec. 11 of the Calcutta Rent Act the tenant must show that he has performed all the conditions of the tenancy. It is immaterial whether the landlord knew about the breach by the tenant. The tenant is not entitled to renewal of lease [cited *Bastin v. Bidwell* (2)].

Mr. B. K. Ghosh (with Mr. P. C. Basu) on behalf of the Respondent.—Before the grant of the lease the Official Trustee knew that part of the house was to be let out by Bowden to Melitus Estate. This shows that the covenant against subletting was never intended to be enforced; learned Judge has found as a fact that the Official Trustee received rent for two months after he knew that the Respondent had broken the covenant against subletting. Cited *Ahindra Nath v. Twiss* (3), where it was held that a Court can grant relief to the tenant, in case of forfeiture where the same was waived by the landlord. Refers to sec. 112, Transfer of Property Act, *Bithaldas v. Lalbehari* (4).

Mr. Pugh in reply.—The words of sec.

(1) 2 K. & J. 374; 60 Eng. Rep. 829 (1856).

(2) 18 Ch. Div. 238 at p. 249 (1881).

(3) I. L. R. 49 Cal. 150 (1921).

(4) I. L. R. 49 Cal. 369 (1921).

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11, sub-sec. (1) are very clear. The tenant must perform all the conditions of tenancy and one condition is that he cannot sublet without written permission of the landlord. Sec. 112, Transfer of Property Act, not made applicable.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal from two judgments, the first of which was delivered by my learned brother Mr. Justice Buckland on the 22nd of February 1924, and the second of which was delivered by my learned brother Mr. Justice C. C. Ghose on the 20th of May 1924.

The suit was brought by the Plaintiff, the Official Trustee of Bengal, as Trustee of the Estate of Anna Apcar, on the 5th of December 1923 : and, it was alleged that the Defendant had been the lessee under a lease, dated the 20th of November 1919 for a period of four years, the term of which expired on the 30th day of September 1923.

There was a further allegation that on the 13th of August 1923, the Plaintiff gave notice to the Defendant to quit and vacate the premises on the expiry of the lease, as the premises were required for the use and occupation of one Johannes Apcar, the present sole beneficiary under the trust.

The plaint alleged that the Defendant failed to give possession of the premises and, it then contained a definite statement that " the premises were *bonâ fide* required for the use and occupation of the said beneficiary Johannes Apcar."

It is therefore clear that when this plaint was filed, the Plaintiff had the provisions of the Calcutta Rent Act in mind, and he was asserting in effect that the Calcutta Rent Act would not protect

the Defendant from an order of ejection by reason of the fact that the premises were *bonâ fide* required for the use and occupation of Mr. Apcar. It is material to notice this and because of what occurred at the trial. The suit was heard on the 21st and the 22nd of February. On the second day, namely, the 22nd, it appears from the judgment of my learned brother Mr. Justice Buckland that the learned Counsel for the Plaintiff then stated for the first time that he relied not only on the allegation that the premises were required for the use and occupation of Mr. Apcar but also upon the latter words of sec. 11, sub-sec. (1) of the Calcutta Rent Act.

The learned Judge came to the conclusion that it was not proved that the premises were *bonâ fide* required by Mr. Apcar for his own occupation : and, I need not say more than that I agree with the learned Judge's finding upon that question of fact.

The learned Judge then allowed the other point, which had been raised by the learned Counsel for the Plaintiff, to be investigated : and, he gave directions that the necessary pleadings should be filed by the one side and by the other : and, he adjourned the hearing of the suit for a month.

The suit then came before my learned brother Mr. Justice C. C. Ghose.

The allegations upon which the Plaintiff relied on that occasion were these : He relied first of all upon a covenant in the lease which is as follows : " The lessee doth hereby covenant with the lessor not to assign, sublet or part with possession of the said premises or any part thereof without the previous consent in writing of the lessor, but such consent shall not be unreasonably withheld in the case of a responsible and respectable per-

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son other than a boarding house keeper or tenants other than Europeans:" and, it was alleged on behalf of the Plaintiff that the Defendant without the knowledge or consent of the Plaintiff and without application made for the consent of the Plaintiff, sublet and gave possession of the upper floor of the premises, during the subsistence of the lease, to one Mr. Stevenson at a monthly rent of Rs. 225 and that the Defendant also without such knowledge or consent and without such application made, and during the subsistence of the said lease, sublet and parted with possession of and was now subletting certain of the godowns, forming part of the said premises to other persons as monthly tenants, and that such persons were now in possession thereof.

The learned Judge came to the conclusion that there had been a breach of the covenant in question: and he stated that in his opinion the question was whether or not there had been a waiver of the breach of that covenant. He then concluded as follows: "In my opinion, therefore, there was waiver of forfeiture of the lease, and accordingly the Plaintiff's suit for ejectment must fail and be dismissed."

With much respect to the learned Judge, it seems to me that the conclusion at which the learned Judge arrived was not framed in the correct manner. Waiver of the breach of the covenant and waiver of the forfeiture are not the same things. In my judgment there was no forfeiture, because even though there may have been a breach of covenant the lessor had not done any act which showed his intention to determine the lease, as provided by sec. 111 . . . (g) of the Transfer of Property Act, 1882, and, the learned Counsel who appeared for the Appellant agreed that in this case there was no for-

feiture. But I understand that the learned Judge meant to come to the conclusion that the Plaintiff had in fact waived the breach of the covenant and that consequently the Plaintiff was not entitled to succeed.

With regard to the two allegations upon which reliance was placed and as to which there is really no question of fact before us, it appears to me that the alleged subletting of the godowns is of no avail to the Plaintiff in this case, because as I understand the case, the position seems to be that the godowns were sublet before the lease was executed and that the ground floor, in the time of the Defendant's predecessor, as well as in the time of the Defendant, had been used as an office for the purpose of conducting the business of the Melitus Estate and that those facts must have been known to every one concerned.

The other matter relating to the subletting of the upper floor to Mr. Stevenson is in a different position: Mr. Stevenson went into possession in April 1921, and remained there until April 1923: and, the learned Judge has found as a fact that the Plaintiff, the Official Trustee, knew either in July or in August 1923 that there had been a subletting to Mr. Stevenson. That finding of fact of the learned Judge has not been contested in this Court.

The question, therefore, remains whether the subletting to Mr. Stevenson in April 1921 is sufficient to prevent the Defendant from relying upon the provisions of the Calcutta Rent Act.

Sec. 11 (1) provides as follows: "Notwithstanding anything contained in the Transfer of Property Act, 1882, the Presidency Small Cause Courts Act, 1882, or the Indian Contract Act, 1872, no order or decree for the recovery of possession of

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any premises shall be made so long as the tenant pays rent to the full extent allowable by this Act, and performs the conditions of the tenancy” In my judgment there was no doubt a technical breach of the covenant committed by the Defendant in April 1921 when he sublet the upper floor of the premises to Mr. Stevenson : and, the technical breach consisted in that he failed to apply for the Plaintiff’s consent in writing to that subletting. There is nothing to suggest that if he had applied he would not have got the consent of the lessor or if the consent had been refused it is possible that the Defendant might have let it to Mr. Stevenson without such consent on the ground that he was a responsible and respectable tenant. That is the technical breach and the only breach upon which, in my judgment, the Plaintiff could rely in this case. I have no doubt that that technical breach was waived by the Official Trustee when he heard about it in July or August 1921. It is clear that he received the rent for August and September 1923 after he had obtained that knowledge. He never made the smallest complaint about the upper floor being sublet to Mr. Stevenson in April 1921, and he did not take any steps to terminate the tenancy on the ground of the breach of the covenant to which I have referred. I have no doubt that there was a complete waiver by the Plaintiff of the technical breach of the covenant.

In these circumstances, in my judgment, it cannot be said that the Defendant failed to perform the conditions of the tenancy within the meaning of sec. 11 (1) of the Calcutta Rent Act.

For these reasons, in my judgment, the conclusion at which the learned Judge arrived was correct and this appeal must be dismissed with costs.

RANKIN, J.—I agree. With reference to the words in the first sub-section of sec. 11 of the Calcutta Rent Act, there are some things that those words *must* import, some things which they *may* import and there are some things which they *cannot* import. I do not think that they can possibly mean that because a breach of covenant was committed in 1921 which was perfectly harmless, which never was made a grievance of, and as to which no request for compensation or damage was ever made, therefore, it is impossible for the Court to give the tenant in 1924 the benefit of the Rent Act. Whether the phrase “and performs the conditions of the tenancy” must be read as applying only to the time, during which the tenant’s right to possession depends entirely upon the Calcutta Rent Act, has been argued before us. If that position be correct it still remains that by the last words of the proviso to sub-sec. (1) the Court could in a proper case take into account breaches of the conditions of the tenancy committed during the course of the original tenancy. But it is not necessary for the purposes of this case to determine any nice question of construction.

The position is that, so far as it appears, no objection could have been taken to Mr. Stevenson. Had permission been asked and refused it would presumably have been open to the tenant to ignore the covenant altogether. Mr. Stevenson appears to have been in occupation of a part of the premises for two years. He left in April 1923. Whether the Official Trustee at that time knew anything about his occupation, it seems almost certain that the beneficiary Mr. Apar to whose instructions the Official Trustee paid great attention, must have known about this fact. So far from making any grievance of the matter, when it was discussed

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between the Official Trustee and his beneficiary in July 1923 the correspondence shows that there was no objection at all being taken about this question of sub-letting. The letter of the 2nd of August is not the letter of the man who says "you have been guilty of this breach; I do not think it necessary to forfeit, but at the end of your time you will have to go." His point is that, "The end of your lease is coming. I desire to charge you more rent; and one of the things which makes it reasonable for me to charge you more rent is the amount of rent you have been realising from your sub-tenants to say nothing of the rent that I presume is paid for the use of the office." Suppose for the sake of argument that in 1921 this matter had come to the notice of the Official Trustee and the tenant had said, "I am very sorry. I should have asked for your permission before I sublet," and the lessor had said, "Never mind, it is all right," or suppose the landlord said, "I will not forfeit but I shall charge you as damages one rupee" and that the tenant had paid. It is absurd, in these circumstances, to suppose that, because there was a technical breach in 1921, that it could have been utilized against the tenant at the end of 1923 or the beginning of 1924. The facts in this case are certainly not so strong but they come in my opinion to the same result: they show, in point of fact, a knowledge of the whole transaction after the event without any complaint being entertained in the mind of the landlord in respect of this matter. Had such a complaint been made, anything that could have been asked as compensation might have been paid by the tenant. In my judgment it would be putting an unreasonable construction upon sec. 13 in this case, if we were to hold that the tenant after 1921 was en-

tirely deprived of any benefit of the Calcutta Rent Act. I entirely agree that the mere question of waiver of the right of re-entry is in no way conclusive in this case.

It seems to me that the learned Judge's decision was right in the result, and, I agree that the appeal should be dismissed.

Mr. J. M. Gregory, Solicitor for the Appellant.

Messrs. N. C. Bural & Pyne, Solicitors for the Respondent.

P. D. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DEOREE

No. 2298 of 1922.

CUMING, J.	TARAPROBAD SAA,
CHAKRAVARTI, J.	Defendant No. 1,
1925,	Appellant,
Heard, 8 and	v.
9, June.	MADHU SUDAN GIRI,
Judgment,	Plaintiff, Respondent.
29, July.	

Hindu law—Hindu widow, debts incurred by—Amount borrowed in excess of necessity—Effect on the transaction—Onus of proof on person challenging transaction to show excess—Nature and scope of enquiry to be made by Court.

In cases where it is shown that the money borrowed by a Hindu widow was more than the necessity justified, the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity, and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If on the other hand the finding of the Court is in the negative, the transaction should be upheld in its entirety.

The onus is on the reversioner who challenges the transaction to show that

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the sum which the widow borrowed for the necessity which really existed was in excess of the necessity and that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge.

It is impossible to draw a line as to the extent to which an excess should be held not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amount lent should not be held to vitiate the transaction. When the excess is disproportionately large that itself being evidence of collusion the Court should not uphold the transaction. In cases where the Court finds that the necessity was inadequate for the entire loan the reversioner should be put to terms.

This was an appeal preferred on the 21st of August 1922, against the decree of G. N. Roy, Esq., 2nd Additional District Judge of Zillah Midnapore, dated the 28th of June 1922, affirming the decree of Babu Nitai Charan Ghosh, Subordinate Judge, 2nd Court at Midnapore, dated the 12th of January 1921.

The facts of the case will appear from the judgment.

Babu Santosh Kumar Pal for the Appellant.

Babu Apoorba Charan Mukerji for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—The suit out of which this appeal arises was brought by the reversionary heir of one Gavinda Giri on the death of his widow Kausalya in the year 1916 for a declaration that the De-

fendant No. 1 had acquired no title by his purchase at the sale in execution of a mortgage decree against the widow.

The facts shortly stated are these : One Gavinda Giri died in the year 1868 sonless leaving a widow Kausalya; she lived with Gavinda's cousin Tulsaram who was her next reversioner, in her husband's house, but Tulsaram drove her away from her home in the year 1891. She brought a suit against Khirode, grandson of Tulsaram and recovered a decree for the share of the land which was left by her husband and it appears that in that suit she was assisted by the present Plaintiff and his brothers who were the sister's sons of Gavinda.

In execution of a decree for mesne profits against Khirode she purchased Khirode's half share in 1896, and was since then in possession of the entire property consisting of 20 bighas 2 cottas and 13 chittaks of land. But she was again disturbed in her possession by the present Plaintiff and his brothers and was dispossessed of 7 bighas out of 10 bighas of lands which were left to her after she had sold other lands. Then she brought a suit for possession of those 7 bighas against the present Plaintiff and his brothers in 1908 and obtained a decree for possession on the 8th December of that year.

Now, it appears that Kausalya mortgaged the lands in suit for Rs. 500 in favour of the Defendant No. 1 in the *benami* of one Harnarain on the 25th Sraban 1314 B. S. and then a second bond was executed by her in favour of Taraprosad, Defendant No. 1, for Rs. 795 on the 13th Magh 1315 B. S. and out of the money so borrowed the money due under the first bond was paid. Taraprosad obtained a mortgage decree on compromise against Kausalya in August 1909 and the

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mortgaged properties were sold in execution of the mortgage decree.

This is the sale which the Plaintiff challenges in this suit as not binding on him.

On the death of Kausalya, Madhu Sudan Giri, the only surviving son of Gavinda's sister, brought this suit as the reversionary heir of Gavinda Giri for recovery of possession of the lands sold in execution of the mortgage decree on the allegation that the Defendants Nos. 1 and 2 had kept him out of possession of the lands without any right.

The Defendant No. 1 contested the suit and his main defence was that the mortgages in his favour were executed by Kausalya for legal necessity and therefore the sale thereunder binds the Plaintiff, the reversionary heir, and he further contended that half share of the properties which Kausalya purchased in execution of her decree against Khirode was her *stridhan* property to which the reversioner had no claim as it was sold in execution of a decree against Kausalya.

The Court of first instance found that there was legal necessity for a portion of the money advanced by the Defendant No. 1 but decreed the suit holding that the Defendant No. 1 was like a mortgagee in possession and as he had rendered no account of the rents and profits he could claim no right to retain possession against the Plaintiff.

On appeal by the Defendant No. 1 the Additional District Judge affirmed the decree of the Munsif and dismissed the appeal although he found that the amount for which legal necessity was established was larger than the amount found by the learned Munsif. The Defendant No. 1 has preferred this second appeal against the decree of the Additional District Judge.

Before I deal with the main question as to whether the learned Additional District Judge has properly applied the principle which applies to a case of legal necessity for alienation by a Hindu widow I shall refer to some of the salient facts which have been found by the Court below.

Kausalya inherited about 10 bighas of land left by her husband and led a peaceful life till she was dispossessed by Tulsaram in the year 1891. She was then plunged in litigation on account of dispossession by her then reversionary heir and it was in 1894 that she recovered a decree for possession and she was again dispossessed by the present Plaintiff at about that time. The learned Munsif, to quote his own words, found that "Kausalya Bewa got possession of a half share after April 1894, and of the remaining half share after 1896. She was, however, not allowed by her husband's nephew to be in peaceful possession of the entire land for any long time. She was dispossessed from 7 bighas out of the 10 bighas that was left to her."

In 1908 the present Plaintiff asserted in the suit brought by Kausalya against him and others that she was in possession of only 3 bighas of land and they were in possession of 7 bighas from 1896 down to 1908. The mortgage bonds in favour of the Defendant No. 1 were executed in 1907 and beginning of 1909. It is clear therefore that before the mortgages she had in her possession only 3 bighas of land even after she had recovered the land from Khirode and she had to carry on litigation with the Plaintiff for the recovery of the 7 bighas in his hand, and she obtained her decree in 1908. It is quite clear therefore that she was kept out of possession of her lands successively by her reversioners. The Plaintiff him-

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self kept her out of possession for about 12 years when she executed her first mortgage bond in favour of Defendant No. 1. The legal necessities for the sum of Rs. 500 covered by the bond of 1907 were first Rs. 180 for payment of earlier debts due under a mortgage which was satisfied by Defendant No. 1 and Rs. 370 taken in cash were said to have been spent :— First, to meet the expenses of litigations, both criminal and civil. Second, medical treatment. Third, pilgrimage to Gaya. Fourth, payment of arrears of rents.

The second bond which the Defendant No. 1 took was for Rs. 795 out of which Rs. 220 were paid in cash and the balance went in satisfaction of the previous bond. The creditor therefore has to establish the legal necessity for Rs. 220 paid in cash. Now the learned Additional District Judge has found that when the first bond was taken Kausalya had been dispossessed of the major part of her lands but has taken no notice of the helpless condition in which the woman found herself on account of the conduct of her reversioners, the Plaintiff being one of them. The learned Additional District Judge has found that all the items of legal necessities except the 4th item did exist but has assessed the amount of such necessities according to his own view as to the amounts which ought to have been spent for the necessities so found.

The total expenses for which the estate was legally chargeable according to the learned Judge amounted to Rs. 350.

Agreeing with the Munsif that the Defendant No. 1 was in possession of the land and had not accounted for the rents and profits thereof, he held that the Plaintiff should get a decree for possession and dismissed the appeal.

The points urged in this appeal are :—
Firstly.—That the Courts below have erred

in holding that the Defendant No. 1, the creditor, was bound to show what the actual amount spent by the widow was.

Secondly.—That the Court of Appeal below was in error in holding that the creditor was entitled to credit not for the sum actually spent but which according to the decision of the Court ought to have been spent by the widow.

Thirdly.—That the Court below having found that legal necessity for the loan existed should not have passed an unconditional decree for possession without directing a refund of the money found to have been borrowed for legal necessity.

We think that the judgment of the learned Additional District Judge is vitiated by the erroneous principles which he has applied in the decision of this case.

It is now well-settled that a creditor as in this case must prove that legal necessity did exist or that he made proper and *bond fide* enquiries as to the existence of such necessity and satisfied himself by all reasonable means as to its existence.

The creditor is not bound to see to the application of the money borrowed by a widow when the money was lent for legal necessity, see *Kameswar Pershad v. Run Bahadoor* (1). On the question of *bond fide* enquiries by the Defendant No. 1 the learned Judge says, "I am not satisfied that the Defendant acted *bond fide*." Then the learned Judge gives his reasons for this view. He thinks that the criminal case could not require Rs. 110 and the Kabiraj who treated Kausalya was not so highly qualified as to deserve a fee of Rs. 50 although the Kabiraj swore that he did receive that sum as his fee. The enquiries which a creditor can make is as to the existence of the necessity and also as to the debts she has incurred for a legal necessity and the amount she is in need

(1) L. R. 8 I. A. 8 (1880).

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of for meeting a necessity. It is impossible for a widow in the position of Kausalya to satisfy the creditor as to the actual amount she must borrow for meeting the future expenses of litigations to which she was driven by the Plaintiff himself. In a case like this the Court should be satisfied that legal necessity existed and that the sum lent was not unreasonably large. The transaction should be shown to be genuine and free from doubts of collusion between the creditor and the widow for raising larger sum than was really needed. The interest of the reversioner should no doubt be protected but at the same time the widow should not be hampered by unreasonable restrictions in raising money when legal necessity exists.

The learned Judge observes that the interest was high but does not take into account the risk which the creditor took and the helpless condition in which the widow was. When the main necessity for the loan was brought about by the wrongful act of the reversioner himself he should not be heard to complain of the high rate of interest more especially when he made no attempt to show that money was available to the widow at a lower rate of interest than was charged in the bond.

The existence of the necessities have been established by the creditor and as the learned Judge does not find that the consideration money was not paid, the creditor in a case like this has *prima facie* discharged the burden which lay on him.

After finding that the legal necessities alleged by the creditor did exist both Courts enquired not as to what was the money actually needed or was spent by the widow but as to what she ought to have spent. For instance in trying the question as to what was the amount necessary for the litigation to which the lady was

driven by the Plaintiff, the learned Judge takes the amount allowed to her in the decree which she eventually got against the Plaintiff for possession of the land as the sum needed for litigation. Everyone acquainted with the costs of litigation in this country knows that the actual amount which a successful litigant gets as costs allowed by the Courts is much less than the actual amount spent by him.

In cases where it is shown that the money borrowed was more than the necessity justified then the Court should find whether the creditor knew or could have known by means of enquiries then available that the money was in excess of the necessity, and if the finding is in the affirmative then the Court should allow the reversioner to recover the property on payment of the sum really justified by the necessity. If on the other hand the finding of the Court is in the negative, the transaction should be upheld in its entirety. In this connection see the cases of *Deputy Commissioner of Kheri v. Khanjan Singh* (2), *Suigam v. Droupadi* (3) and *Ramdei Kunwar v. Abu Jafar* (4).

In the circumstances of the present case the reversioner, the Plaintiff who drove the lady to the litigation for which the money was borrowed, must show that the sum which the lady borrowed for the necessity which really existed was in excess of the necessity and that there were means available to the creditor for making an enquiry as to the actual amount needed by the lady or that the amount was excessive to his knowledge. The mere fact that the amount borrowed is to some extent larger than the sum actually needed ought not to vitiate the mortgage.

(2) L. R. 34 I. A. 72; a. c. I. L. R. 29 All. 331, 11 C. W. N. 474 (1907).

(3) I. L. R. 31 Mad. 155 (1905).

(4) I. L. R. 27 All. 406 (1905).

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It is impossible to draw a line as to what extent an excess should be held not to vitiate the transaction. In the absence of fraud or collusion between the widow and the creditor, when the necessity for the loan is established, mere excess of the amounts lent should not be held to vitiate the validity of the transaction. When the excess is disproportionately large, that itself is evidence of collusion; then the Court should not uphold the transaction. In cases where the Court finds that the necessity was inadequate for the entire loan, the reversioner should be put to terms. The decree for possession should be subject to payment of the sum paid to the widow without interest, the usufruct of the property being set off against the interest. The lower Appellate Court was in error in treating the Defendant No. 1 as a mortgagee in possession and in awarding an unconditional decree for possession to the Plaintiff.

The judgment and decree of the lower Appellate Court are set aside, the case sent back to that Court so that the appeal may be re-heard in the light of the above observations. The Appellant is entitled to the costs of this appeal, the other costs will abide the result.

CUMING, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2177 of 1922.

MESSRS. GOPAL
RAM BHARIRAM,

Plaintiffs,

Appellants,

v.

AGENTS, EAST

INDIAN RY. and

O. & R. RY.,

Defendants,

Respondents.

CRATTERJEA, A. C. J.

CUMING, J.

1925,

7, August.

Indian Railways Act (IX of 1890), sec. 72—Risk note, Form B, consignment of goods by—Non-delivery of complete packages—Suit for damages for non-delivery—Onus—Initial onus on Railway to prove loss—"Loss," meaning of—Suit, proper constitution of, as to parties—Defendant described as "Agent, Railway administration," if sufficient—Appearance by Railway Company to contest suit—Misdescription—Amendment.

Where goods were transmitted by Railway at a lower charge than the ordinary tariff rate upon the consignor signing a risk note, Form B, the burden is upon the Plaintiff, consignor, of proving that the case falls within the exception contained in the risk note, viz., that the goods were lost owing to the wilful neglect of its servants, etc. But before the Plaintiff is called upon to prove that the goods were lost by the wilful neglect of, or theft by, the Railway servants, it must be shown that the goods have been lost; and unless the fact of the loss is admitted by the Plaintiff, the onus is, in the first instance, on the Railway administration to prove that the goods have been lost and it will be then for the Plaintiff to show that the loss was due to the wilful neglect of, or theft by, the Railway servants.

The loss, as contemplated by sec. 72 of the Indian Railways Act, is loss of the goods by the Railway and not loss to the consignor,

MESSRS. GOPIRAM BEHARIRAM v. AGENTS,

THE EAST INDIAN RY. CO. v. JOGPAT SINGH (1) *approved*.

SMITH v. G. W. R. Co. (2) *distinguished*.

The suit having been brought against the Defendant, described as "Agent, East Indian Railway," the Railway Company entered appearance, put in written statement and contested the suit considering itself to be the party sued; and though in the written statement it pleaded that the Plaintiff had no cause of action and no right to sue the Defendant, no specific ground was taken that the proper party had not been sued:

Held—That it was a case of misdescription which could be rectified by a formal amendment.

THE SARASPUR MANUFACTURING COMPANY v. B. B. AND C. I. RAILWAY COMPANY (7) *referred to*.

RAM DAS FEIN v. MR. CECIL STEPHENSON (3), NUBREEN CHUNDER PAUL v. CECIL STEPHENSON, AGENT OF THE EAST INDIAN RAILWAY COMPANY (4), AGENT, BENGAL NAGPUR RAILWAY v. BEHARI LAL DUTT (5) and EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM (6) *distinguished*.

This was an appeal against the decree of Babu Manmotha Nath Basu, Subordinate Judge, 1st Court, Howrah in Zillah Hooghly, dated the 9th of June 1922, reversing the decree of Babu Jitendra Nath Sen, Munsif, 3rd Court at Howrah, dated the 27th of April 1921.

The facts of the case will appear from the judgment.

Messrs. Manmatha Nath Ray and

(1) 28 C. W. N. 1001 (1924).

(2) [1923] 1 App. Cas. 178.

(3) 10 W. R. 266 (1868).

(4) 15 W. R. 534 (1871).

(5) 20 C. W. N. 614 (1923).

(6) 20 C. W. N. 280 (1924) Pat. 5 (1923).

(7) 1. L. R. 47 Bom. 735 (1923).

EAST INDIAN RY. and O. & R. Ry.

Sanat Kumar Chatterjee for the Appellants.

Mr. Probhas Ch. Mitra and Babu Ambicapada Choudhury for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit to recover Rs. 709-10 as compensation for goods consigned by the Plaintiffs' agent for carriage by Railway which were not delivered to the Plaintiffs.

It appears that 13 tins of *ghee* and one tin of mustard oil, in seven packages, were consigned by the Plaintiffs' agent at Shahgunj, a station on the Oudh and Rohilkhund Railway, to the Plaintiffs at Howrah. Only one package (containing one tin of *ghee* and one tin of mustard oil) arrived at Howrah and the Plaintiff was asked to take delivery thereof on giving a full acquittance receipt which he refused to do. The other six complete packages did not arrive at Howrah at all and were not delivered to the Plaintiff. The Plaintiff thereupon served a notice under sec. 77 of the Indian Railways Act upon the Defendants and brought the suit for compensation.

The Court of first instance allowed the claim in part. The Court of Appeal below dismissed the claim altogether. The Plaintiff has appealed to this Court.

Under sec. 72 of the Railways Act the responsibility of a Railway administration for the loss, destruction or deterioration of goods delivered to the administration to be carried by Railway subject to the other provisions of the Act is that of a bailee under secs. 151, 152 and 161 of the Indian Contract Act, 1872, but that responsibility may be limited by an agreement in writing signed by or on behalf of the sender of the goods in a form ap-

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proved by the Governor-General in Council. The goods in the present case were sent under the risk note, Form B, which is approved by the Governor-General in Council. The risk note, Form B, states that the consignor, in consideration of a lower charge than the ordinary tariff rate chargeable for the consignment, agrees to hold the "Railway administration and all other Railway administrations working in connexion therewith, etc., harmless and free from all responsibility for any loss, destruction or deterioration of, or damage to, the said consignment from any cause whatever except for the loss of or damage to the said consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the Railway administration, to theft by, or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connexion therewith, or by any other transport agency or agencies employed by them respectively, for the carriage of the whole or any part of the said consignment; provided the term wilful neglect be not held to include fire, robbery from a running train or any other unforeseen event or accident."

As stated above, six complete packages were not delivered at all, and the seventh package was tendered but the Plaintiff was asked to give a full acquittance receipt. The defence pleaded non-liability under the risk note, Form B. The Court of Appeal below held that the burden of proving that the case falls within the exception contained in the risk note, viz., that the goods were lost owing to the wilful neglect of the Railway administration or to theft by or wilful neglect of its servants, etc., is upon the Plaintiff. That

having regard to the authorities must be held to be so. But before the Plaintiff is called upon to prove that the goods were lost by wilful neglect or by theft, it must be shown that the goods have been lost. Unless that initial fact is proved, viz., that the goods have been lost, we do not see how the Plaintiff can be required to prove how the loss occurred.

The goods were made over to the Railway for carriage and they have not been delivered to the consignee. How is the consignor or the consignee to know whether they have been lost? We think that it is for the Railway administration to prove in the first instance that the goods have been lost, and it will be then for the Plaintiff to show that the loss was due to the wilful neglect of or theft by Railway servants. That also must in almost every case be impossible for the Plaintiff to prove, but that is what he undertakes to do under the risk note, at any rate the decided cases hold that it is for him to prove it.

In the recent case of *The East Indian Railway Company v. Jogpat Singh* (1), Page, J., considered the question exhaustively and came to the conclusion that except in cases where the Plaintiff admits that the goods have been lost, a Railway Company is not entitled to rely upon the provisions of the risk note which *pro tanto* exempt it from liability unless and until evidence has been adduced which satisfies the Court that a loss has occurred.

It is contended that that was a case of non-delivery as regards which no issue was raised in the present case. But the present case was also one of non-delivery. It is true, the learned Subordinate Judge refers to the suit as being one for recovery of goods lost in transit. Evidently he misunderstood the Plaintiff's case for

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which the Plaintiff was not responsible. The Plaintiff's case (as appears from the plaint and even from the statement of the case in the judgment of the trial Court) was that the goods were not delivered to him. The third issue, *viz.*, "Are the Plaintiffs entitled to the amount of damages claimed or any portion thereof" was wide enough, and must be taken to have been framed with reference to the Plaintiff's case as stated in the plaint which was one for non-delivery. Then it is said that in the notice under sec. 77 the Plaintiff admitted the loss of the goods. But we do not find any such admissions. The notice was merely in terms of the section which provides for compensation for "the loss, destruction or deterioration of animals or goods."

We do not think therefore that there was any admission on the part of the Plaintiffs that the goods were lost by the Railway.

It is contended, however, that "loss" means loss to the consignor and not loss of the goods by the Railway. In other words, "non-delivery" of goods is "loss" of goods to the party. But if so, there would have been no necessity for the words "loss, destruction or deterioration" in the risk note, Form B. A non-delivery may be due to loss of the goods, but may be due to other causes, and it is possible to conceive of cases where goods have not been lost but not delivered. For instance one tin of *ghee* may be mixed up with thousand others in the Railway godown, and no proper search has been made for finding it out. It is unnecessary to consider whether a temporary loss is a loss within the meaning of the section, because in the present case there is not only no evidence that the goods have been lost or what became of them, but there is no suggestion of any temporary loss of

the goods in the manner referred to above.

It is contended that the judgment of Page, J., is opposed to that of *Smith v. G. W. R. Co.* (2). But in that case the loss of the goods was admitted by the Plaintiff although the Railway Company did not offer any explanation as to how the goods were lost, and it was held that the refusal of the Defendants to account for the loss of the goods was not evidence which justified the Court in inferring that the loss arose from the wilful misconduct of the Defendants' servants.

In the case of *The E. I. Railway Company v. Jogpat Singh* (1), Page, J., has referred to a number of decisions as supporting his view as to the meaning of the expression "loss" and has considered the cases in which a contrary view was taken. We entirely agree with the learned Judge with regard to the meaning of the expression "loss."

It is contended on behalf of the Respondent that the suit is not brought against proper parties, the Defendants being described as "Agent, East Indian Railway" and "Agent, Oudh and Rohilkhund Railway." Reference is made to the cases of *Ram Das Sein v. Mr. Cecil Stephenson* (3), *Nubeen Chunder Paul v. Cecil Stephenson, Agent of the East Indian Railway Company* (4), *Agent, Bengal Nagpur Railway v. Behari Lal Dutt* (5) and *East Indian Railway Company v. Ram Lakhan Ram* (6).

In the first case the Defendants were "Mr. Cecil Stephenson, Deputy Agent of the East Indian Railway Company and Mr. W. B. Latimar, District Engineer of

(1) 28 O. W. N. 1001 (1924).

(2) [1922] 1 App. Cas. 178.

(3) 10 W. R. 366 (1866).

(4) 15 W. R. 534 (1871).

(5) 29 O. W. N. 614 (1925).

(6) I. L. R. 3 Pat. 230; [1924] Pat. 9 (1925).

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Rajmehal and Birbhum." Obviously there was no cause of action against Mr. Cecil Stephenson, Deputy Agent, and Mr. Latimar, District Engineer, and they could not represent the Railway Company. In the second also the suit was against Mr. Cecil Stephenson, Agent of the Railway Company. In the third, the Defendant was described as Agent, Bengal Nagpur Railway, and it was held that the plaint could not be allowed to be amended as it was not a case of misdescription, but the substitution of one party for another who had been wrongly sued and the suit would have been barred by limitation at the date of the amendment. In the fourth where a suit was instituted against "The Agent, East Indian Railway" it was held that the Plaintiff was not entitled after the period of limitation, for the suit had expired to amend the plaint by substituting the Railway Company for the Defendant originally sued.

On the other hand in the case of *The Saraspur Manufacturing Company v. B. B. and C. I. Railway Company* (7), where the Defendant was described as the Agent of the Railway Company and the Defendant Company appeared and filed a written statement raising various pleas in defence the Court held that it was a case of misdescription and allowed amendment. It is to be noted that in the case of *Agent, Bengal Nagpur Railway v. Behari Lal Dutt* (5), Suhrawardy, J., observed that on the facts of the above case he might hold the same opinion.

In the present case it is true the East Indian Railway in the written statement pleaded that the Plaintiff had no cause of action nor any right to sue the Defendant, but no specific objection was taken by the Defendant, on the ground that the pro-

per party had not been sued, and the Railway Company entered appearance, put in written statement and fought out the case. The question of the proper party not being sued is not even referred to in the judgment of the trial Court. The Oudh and Rohilkhund Railway pleaded that it being a Railway owned and worked by the Government, the Secretary of State should have been sued. But the Oudh and Rohilkhund Railway did not prefer any appeal against the decree of the trial Court, and it was only the East Indian Railway which appealed and it cannot be said that the defence of the two Railways on this point was the same. There is no question of prejudice to the Company, as it knew well the claim made against it and considered itself the party sued. The present case is stronger than the Bombay case, as in the present no specific objection was taken in the trial Court on the ground that the East Indian Railway had not been sued. We think that it is a case of misdescription which can be rectified by a formal amendment as the case has been fought out on the merits by the Railway Companies. By the amendment no new Defendant would be added or substituted so as to attract the provisions of sec. 22 of the Limitation Act. The Appellant has put in a petition for amendment and we allow the amendment.

The result is that the decree of the lower Appellate Court is set aside and that of the Court of first instance restored. Each party will bear his own costs of this Court and of the lower Appellate Court.

N. G.

(5) 29 C. W. N. 614 (1925).

(7) I. L. R. 47 Bom. 785 (1923).

CIVIL REVISIONAL JURISDICTION]

RULE No. 801 OF 1925.

S. CHINDRA LAL MITTER,

Defendant No. 2,

Petitioner,

v.

PANCHANON MITTER and

ors., Plaintiffs, and

ors., Defendants,

Opposite Party.

WALMSLEY, J.
MUKERJI, J.
1925,
22, July

Civil Procedure Code (Act V of 1908), sec. 94. Or. 39, r. 1. Temporary injunction restraining Defendants from interfering with Plaintiffs' possession, if may be granted, on the ground of apprehended interference with collection of rent and breach of the peace Jurisdiction.

Where it was alleged in the plaint that one of the three Plaintiffs was in possession and in the prayers for relief, the Plaintiffs asked for declaration of title and consequential reliefs and also for an injunction to restrain the Defendants from interfering with the possession of Plaintiff No. 1 till the decision of the suit, and an application by the Plaintiffs for a temporary injunction to restrain the Defendants from interfering with the Plaintiff No. 1's possession, upon the allegation that unless the injunction was granted there would be interference with Plaintiffs' collection of rents and there might be an apprehension of a breach of the peace, was granted by the trial Court:

Held—That whatever other remedies the Plaintiffs might have in the matter, there was no case for the issue of a temporary injunction either under Or. 39 or under sec. 94 of the Civil Procedure Code and the order was passed without jurisdiction.

This was an application under sec. 115 of the Code of Civil Procedure, 1908, in the matter of Mis. Appeal No. 75 of 1925, of the Court of the 1st Additional District Judge of the 24-Perganas, (Alipur) and in Title Suit No. 15 of 1925 of the Subordi-

nate Judge, 2nd Court, 24-Perganas, (Alipur).

The facts of the case material for the report will appear from the judgment.

Dr. Bijan Kumar Mukerji for the Petitioner.

Babus Rupendra Coomer Mitter, Mrityunjoy Chattopadhyaya and Panna Lal Dutt for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—It is unnecessary to set out the facts connected with the litigation out of which this application arises as they have been set out in detail in the judgments of the two lower Courts. The application arises out of an order issuing a temporary injunction restraining the Defendants, one of whom the Defendant No. 2 is the Petitioner before us, from interfering with the possession of the Plaintiffs. The sole question before us now is whether the Courts below had jurisdiction to pass the order of temporary injunction complained of in this case. The order has been made in connection with a suit which is now pending in the second Court of the Subordinate Judge of the Twenty-four Perganas. The prayers in the plaint in that suit are substantially as follows: (a) That the right of the Plaintiffs who are three in number, as *shebait*s of certain deities may be declared; (b) that it may be declared that the three Plaintiffs are entitled to the management of the *debutter* properties for a period of three years commencing from the 1st Magh 1331, B. S., each of the Plaintiffs being entitled to such management for a period of one year; (c) that the Defendants be restrained from interfering with the possession of the Plaintiff No. 1 till the decision of the suit; the prayers (d), (e) and (f), that if necessary a scheme may be framed, need not be referred to as they

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relate to certain consequential reliefs. It is clear, therefore, that the suit is not for recovery of possession against the Defendants. In cl. (c) to which I have already referred, the Plaintiffs pray for an injunction restraining the Defendants from interfering with their possession only till the decision of the suit. There is, therefore, no prayer for any injunction which may last after the disposal of the suit. The question is whether, upon prayers such as these, a temporary injunction may be issued by the Court in connection with the suit. In order to determine this question, we have to refer to the application upon which this injunction has been granted. The application filed by the Plaintiffs supported by the affidavit of the Plaintiff No. 1 states, first of all, the facts relating to the suit that is now pending. In para. 2 of the application, it is distinctly stated that the Plaintiff No. 1 is now in possession of the properties which form the subject-matter of the suit, having been put in possession thereof by the last manager Kanailal Mitter. In para. 3, it is stated that, if the Defendants be not restrained from interfering with the possession of the Plaintiff No. 1, there will be a serious dislocation of business, the properties will be wasted, the *sheba* and *pūja* of the deities will suffer as there will be no realization from the *debutter* properties and there will be breaches of the peace. Upon these allegations, it is difficult to say how a case justifying an injunction either under the provisions of Or. 39 or sec. 94 of the Code of Civil Procedure has been made out. Indeed, the learned vakil appearing on behalf of the Opposite Party does not profess to contend that the case comes within the purview of Or. 39, C. P. C., but he urges that the injunction granted should not be disturbed inasmuch as it

was really issued in accordance with the terms of sec. 94, C. P. C., to prevent the ends of justice from being defeated. The allegations taken at their highest amount to this that, if an injunction is not granted, there will be interference in the Plaintiffs' collection of rents, that there may be apprehension of a breach of the peace and that there may be disturbances of the Plaintiff No. 1's peaceful possession of the properties to which he has been put in possession. These allegations even if established would not, having regard to the nature of the suit and the reliefs prayed for, bring the case within the scope of sec. 94, C. P. C., and it cannot be said that, even if these allegations be true, the refusal to grant a temporary injunction would defeat the ends of justice. Whatever other remedies he may have in the matter, injunction in the present suit is not his remedy. In this view of the matter, I am of opinion that the order that has been passed restraining the Defendants from interfering with the Plaintiffs' possession till the decision of the suit has been passed without jurisdiction. I would, therefore, make the rule absolute and set aside the order passed by the Court below with costs to the Petitioners. the hearing-fee being assessed at two gold mohurs.

WALMSLEY, J.—I agree.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 769 OF 1924.

NEWBOULD, J.

MUKERJI, J.

1924,

Heard, 17 and

18, November.

Judgment,

24, November.

R. W. VALLANT,
Petitioner,

v.

MRS. ELEAZAR,
Opposite Party.*Indian Penal Code (Act XLV of 1860), sec. 368*

R. W. VALLIANT v. MRS. ELEAZAR.

—*Kidnapping—Elements necessary to constitute the offence.*

In order to support a conviction for kidnapping from lawful guardianship the following are the points requiring proof— (1) That the person kidnapped was then a minor under sixteen years of age if a female. (2) That such person was in the keeping of a lawful guardian. (3) That the accused took or enticed such person out of such keeping. (4) That he did so without the consent of the lawful guardian.

The mere fact that the minor leaves the protection of her guardian does not put her out of the guardian's keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping:

Held, on a consideration of the circumstances of the case—*That the offence of kidnapping was not made out.*

This was a Rule granted on the 2nd September 1924 against an order of the 3rd Presidency Magistrate of Calcutta (A. Z. Khan, Esq.), dated the 6th August 1924, convicting the Petitioner under sec. 363, I. P. C., and sentencing him to pay a fine of Rs. 200 with detention in Court till its rising.

The facts of the case will appear from the judgment.

Messrs. Langford James and Camel and Babu Satindra Nath Mukherjee for the Petitioner.

Mr. Khundkar for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Petitioner R. W. Valliant has been convicted by the 3rd Presidency Magistrate, Calcutta, of an offence punishable under sec. 363, I. P. C., and sentenced to be detained till the rising of the Court

and to pay a fine of Rs. 200 or undergo three months' rigorous imprisonment in default of payment. He has obtained a Rule calling on the Chief Presidency Magistrate to show cause why the conviction and sentence passed on him should not be set aside on the two following grounds:—

"For that upon the facts found and proved in the case, no offence under sec. 363 has been made out against the accused and the learned Magistrate has erred in law in not holding so."

"For that the reasons given by the learned Magistrate for convicting the accused are unsound and illegal."

The Petitioner has been convicted of having kidnapped Mildred Eleazar aged about 15 years and 5 months from the lawful guardianship of her mother. It appears that about two months before the date of occurrence, the 24th May last, the Petitioner and the girl met and struck up a friendship. This friendship ripened into affection. The girl's mother and brother disapproved of this. There was an episode on the 20th May which led to the girl being chastised by her mother. On the afternoon of the 24th May there was a quarrel between the girl and her brother. They kicked each other and the girl left her home and went to the house of a friend Mrs. Victor. From there she wrote a letter to her mother in which she said she was not coming back. At Mrs. Victor's she was met by the Petitioner and the two went to the house of Miss Christian, a sister of Mrs. Victor. The girl wanted to stay the night there but Miss Christian's brother did not consent to this. The Petitioner who had left the girl in order to fulfil an engagement as a musician at the Saturday Club returned to the Victor's at about 8 P.M., and took her to his mother's house in Kidderpore

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where she remained for four days. In the meantime the police had been informed of the disappearance of the girl. The Petitioner when questioned about the girl denied knowledge of her whereabouts but after he was arrested he wrote to his father and the girl was produced and made over to her mother.

In order to support a conviction for kidnapping from lawful guardianship the following are the points requiring proof.

(1) That the person kidnapped was then a minor under 16 years of age if a female.

(2) That such person was in the keeping of a lawful guardian.

(3) That the accused took or enticed such person out of such keeping.

(4) That he did so without the consent of the lawful guardian.

In the present case it has been established that the girl Mildred Eleazar was under 16 years of age and that she was in the keeping of her mother who was her lawful guardian prior to her leaving her home on the 24th May. The question we have to decide is whether it has been proved in this case that the Petitioner took or enticed the girl out of the keeping of her mother. Several cases decided by English and Indian Courts were cited before us including those to which reference has been made in the judgment of the lower Court. In these cases the following important principles have been laid down. The mere fact that the minor leaves the protection of her guardian does not put her out of the guardian's keeping. But if the minor abandons her guardian with no intention of returning she cannot be held to continue in the guardian's keeping. Which principle should be applied to a particular case depends on the facts of that case. We are in some difficulty in the present case as the learned

Magistrate has not stated clearly the facts found by him on which he bases his conviction of the Petitioner. The guilt or innocence of the Petitioner depends on whether when the girl left her home she did so of her own accord and had definitely decided not to return or whether her conduct was a mere petulant outburst in consequence of a quarrel with her brother. The girl's evidence gives us no assistance. She has told two totally different stories to the police and to the Magistrate and her attempt to explain away her former statements is too absurd to need discussion. Her mother is not a witness on whom we can place implicit reliance. A most important piece of evidence on the question of the state of the girl's mind when she left home would be the contents of the letter which she wrote to her mother from Mrs. Victor's house. This letter has been withheld by the prosecution and all we know of its contents is that she wrote that she was not coming back. Further the Victors who could have given important evidence on this point have not been produced. The Petitioner acted foolishly in denying knowledge of the girl's whereabouts when questioned by the police. But the explanation he has given in his written statement, that he thought she would be ill-treated if sent back to her mother does not appear to us unreasonable. On a full consideration of the oral and documentary evidence in the case we hold that the prosecution has failed to prove that the Petitioner has committed an offence punishable under sec. 363, I. P. C.

We accordingly make this rule absolute. We set aside the conviction and sentence of the Petitioner and acquit him of the charge on which he was tried. The fine, if paid, will be refunded.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF
LOWER BURMA.]

LORD ATKINSON.

LORD SHAW.

LORD DARLING.

1925,

Heard, 8, 11, 22

and 25, May

Judgment, 30, June.]

MAUNG BYA and anr.,

Appellants,

v.

MAUNG-KYI NYO and

ors., Respondents.

Watercourse—Rights of riparian owners—Artificial and natural watercourse, if differ—Damming up of channel—Resulting loss to neighbouring owner—Liability—English law, applied.

The widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse does not convert it into a canal.

In the case of a natural watercourse, the riparian owners are each entitled to the unimpeded flow of the water in its natural course and to its reasonable enjoyment as it passes through his land, as a natural incident of the ownership of his land. In the case of an artificial watercourse, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. There is, however, a well-established principle of law that a watercourse originally artificial may have been made in such circumstances and have been used in such a way that an owner of land situated on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream.

A raised road or bund ran transversely across the depressed ground through which flowed an ancient fresh-water channel and was properly provided with a gap for the flow and a bridge over the channel. The bund thus provided with an eye and a bridge to permit the inflow and outflow of water was interfered with by the Defendant

who filled up the eye and the channel course thereat and converted an innocuous bund into a dam, which dammed back the water on to the Plaintiff's land:

Held—That the Defendant was responsible for damage thus caused to the Plaintiff's property.

The principles of law as laid down in English decisions applied.

This was an appeal (No. 106 of 1924) from a decree, dated the 31st May 1921, of the Chief Court of Lower Burma, which reversed a decree, dated the 27th September 1919, of the District Court of Pyapon.

The litigation was instituted by the Appellants who claimed to recover from the Respondents damages for losses alleged to have been caused by the erection of a bund by the Appellants.

The result of this erection was, they stated, that their lands were inundated by flood water. The District Judge found that the bund had been erected by the Defendants over a naturally formed canal and had thereby shut out the flow of water through the canal, and that this action by the Defendants had caused the floods and damage alleged. He accordingly made a decree awarding damages of about Rs. 8,000.

The Chief Court were of opinion that the case set up in the pleadings had not been established and they further held that the canal was a natural watercourse, that the bund was built by Government, and that the Plaintiffs had never acquired any right to a free flow of water past the point where the bund was erected.

Messrs. Hon. G. Lawrence, K. G. and Besley for the Appellants.

Messrs. Harney, K. C. and Leach for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal

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from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth, JJ.), dated 31st May 1921, allowing the appeal of the Respondents against a decree of the District Court of Pyapon (Po Bye, District Judge), dated 27th September 1919, by which the said District Judge ordered the Respondents to pay the Appellants the sum of Rs. 8,821-48 by way of damages and the costs of the suit.

The Appellants in the second paragraph of their case allege that the question raised is whether in Burma a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner by which the water would otherwise have been drained from the land of the higher owner.

In a sense, but only in a limited sense, is that statement accurate. Save in the second and third of the reasons for their appeal it is put forward that the law applicable in Lower Burma to the flow of and flooding by fresh-water rivers or watercourses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is different from the law as applied to similar subjects in England. A little consideration of the two cases cited will show that there is no conflict between the two systems of law, and it was not contended in argument on the hearing of the appeal that the general principles of the laws of England touching the matters above-mentioned did not apply to Lower Burma.

The action out of which the appeal has arisen was brought by the two Appellants (who are husband and wife) in the District Court of Pyapon, Lower Burma, to recover damages amounting to Rs. 13,448 for the wrongful flooding by the acts and procurement of the Respondents of a

large tract of paddy lands, 68,541 acres in extent, belonging to the Appellants, whereby the productivity of these lands was, in the season in which the acts were done, so reduced that they only yielded 3,867 baskets of paddy instead of their normal yield of about 17,300. The District Judge decided in favour of the Appellants and awarded them Rs. 8,821-48 damages. The Chief Court on appeal reversed the decree of the District Judge, and on grounds which appear to the Board strange, and are indeed unsound, decided in the Respondents' favour.

Several maps of the locality were given in evidence; the two most intelligible and useful were the first, a map marked Ex. A, and the second, dated in the year 1906-7, described as Ex. 2A. With almost perverted ingenuity the draftsman of these and, indeed, of many other maps, has omitted to place upon the face of them any indication of the points of the compass, so that in dealing with them one is obliged to use the words left and right, and top and bottom of the maps in order to endeavour to fix any point or object. A study of these two maps, however, enables one to get an idea of the terrain, especially as the map of 1906 represents what was the nature of the tract of country with which the case is conversant before any of the works were executed, the misuse of which is alleged to have caused the flooding, and as the second map, Ex. 2A, shows what were the features of that tract after these works had been executed. The map of 1906-7 purports to be a plan 126 of Sakangyi circle, Bogale township. It corresponded closely with the map Ex. A.

Many rivulets or watercourses are depicted upon it. They correspond with those depicted upon Ex. A. The main difference between them is that on the

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latter a prolongation of the watercourse from Singu Chaung is to be found which is absent from 2A of 1906-7.

The watercourse, styled extravagantly the canal, represented on A, and lettered A, B, C, D, G, H, emptying into the sea creek at A is precisely the same watercourse as is represented on the map of 1906-7, coming from Singu Chaung and debouching into the same sea creek at the same place. No doubt the so-called canal is represented as being something broader than the corresponding stretch of watercourse on the map of 1906, but the fact of vital importance is that all the rivulets or watercourses are depicted as of the same width and kind, and resemble each other in all respects. There could be no object in depicting on this map a watercourse as existing where none, in fact, existed when the map was made. The map therefore absolutely refutes the contention put forward with some hardihood on behalf of the Respondents, that before the canal was made its site was a mere depression in the earth surface through which no stream ran; but in which, after heavy rain, stagnant water for a time accumulated. Now what was done in 1913-14 was, in their Lordships' view, the widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural watercourse, not in their view the making by excavation and such work of a watercourse, styled a canal, where none such theretofore existed.

The lands of the first Respondent lie to the left-hand side of the map, between the lands of the Appellant and the sea creek Kyonkan Chaung. On the map Ex. A they are numbered 17, 18, 30, 31, 32. The other Respondents are merely cultivators in the village of Kamakalu. The lands of the Appellants are comprised in

three kwins lying to the right of the first Respondent's lands and named respectively Kasaung Ngotto (both marked on Ex. A), and Sakangyi South and Kasaung Ngotto (both marked on map B). They are numbered separately 1-14 on map marked B. In addition to the refutation of the Respondents' suggestion as to there never having been formerly a rivulet or watercourse where the canal exists now, one finds that several witnesses depose to there having been a small Yo where the bridge was afterwards erected, that a jungle log was placed across the Yo before the bridge was built, which certainly suggests to their Lordships that this log was designed to fulfil the function of stepping stones to enable people to cross the stream, possibly dry-shodded and in safety.

In the present case the early history of this *locus in quo*, this large tract of paddy land intersected with rivulets of water, large or small, is very vague. The evidence as to what were the rights and obligations which the inhabitants owed to each other in reference to these watercourses, the local law as to their regulation, their enjoyment and protection, is so confused and contradictory that it has occurred to the Board that it would possibly be better to reverse the usual order of procedure and, before dealing with the evidence of the witnesses, the facts proved, and the rulings of the judges, to demonstrate, by reference to four or five well-known English cases, what the well-established law is touching the flow of and flooding by rivers and watercourses, the diminution of their currents or the diversion of their course, the trespass upon their beds, the incursion of the sea upon one's land, and the measures the owner may take to protect himself, and then by applying a coherent and consistent body of prin-

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ciples to the facts proved, endeavour to solve in harmony with English law the issues raised, considering any local law which may modify the English law.

The first of these cases is *Bickett v. Morris* (1). It deals with trespass on the alveus or bed of a fresh-water watercourse.

The Appellant obtained, in consideration of £10 paid by him, permission from a riparian owner on the river Kilmarnock, in Ayrshire, to extend a certain wall then standing on the Respondents' premises on to the alveus of the river as far as was indicated by a red line drawn on an identified ordnance map. The Appellant proceeded to build the wall, but, as the Respondents alleged, not in the direction indicated. The Respondents accordingly applied for an interdict against him, and brought an action for a declaration that the Appellant had no right to erect buildings on the solum of the river beyond the red line aforesaid. Lord Cranworth, in delivering judgment, dealt at length with the legal points raised in the discussion. At page 58 of the report he said :—

“By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the alveus or bed of the river *ad medium filum aque*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them, up to what was the *medium filum aque*, in the same way as they were entitled to the adjoining land. The appellant contended that as a consequence of this right every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus so long as other

proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that is a true exposition of the law.”

Lord Cranworth then dealt with the difficulty, almost the impossibility, of determining in anticipation what damage may result in flood time by the erection of buildings on the alveus of a stream, and speaking of the riparian proprietors, put their case succinctly in these words :—

“They are entitled to say ‘We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.’ This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure.”

Lord Westbury, at page 61 of the report, thus expresses himself :—

“When, however, it is said that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not by any means follow that that property is capable of being used in the ordinary way, in which so much land uncovered with water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors of the stream. Now the interest of a riparian proprietor in the stream is not only to the extent of preventing it being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.”

So much as to interference with the alveus which is stated in the head-note of this case to be *sacred*.

In *Menzies v. Breadalbane (Earl of)* (2), it was held that a proprietor on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would, if completed, in times of ordinary flood throw the waters of the river on to the grounds

(1) L. R. 1 H. L. 47 (1860).

(2) 3 Bligh N. S. 414 (1829).

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of a proprietor on the opposite bank so as to overflow and injure them, should be restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of floods, *i.e.*, ordinary flood, from its accustomed course and throwing the same upon the lands of the Appellant. Lord Eldon, in delivering the judgment of the House, (at page 418) said :—

“ It is unnecessary to trouble your Lordships with any observations on the law of England . . . because it is clear beyond a possibility of doubt that by the law of England such an operation ” (*i.e.*, as that complained of) “ could not be carried on . . . ”

At p. 419 he then said :—

“ But let us see what is said on this subject by the institutional writers on the law of Scotland.”

He then quotes with approval the following passage from Erskine's Institutes :—

“ When a river threatens an alteration of the present channel by which damage may arise to the proprietor of the adjacent or opposite ground it is lawful for him to build a bulwark *ripari muniendæ causa* to prevent the loss of ground that is threatened by that encroachment.”

Lord Eldon then proceeds :—

“ so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security ; but this bulwark must be so executed as to prejudice neither the navigation nor the grounds on the opposite of the river.”

This right of navigation, however, is not a right of property. It is simply a right of way which must not be interfered with. [*Orr Ewing v. Colquhoun* (3)].

In *Nield v. The London and North-Western Railway Company* (4), the De-

fendants owned a canal which was threatened with an overflow into it of flood water from a neighbouring river, and, fearing damages to their premises situated on the banks of the canal, placed across the canal some planks rising up higher than the level of the water in the canal, which, being obstructed when the flood increased, rose till it flooded the Plaintiff's premises. In an action brought by the Plaintiff to recover damages for this injury, it was held that the Defendants were not liable on the ground that they had not brought on to the Plaintiff's premises the water which did the injury, and that there was no duty on the owners of a canal analogous to that resting on the owners of a natural watercourse not to impede the flow of the water down it.

So much as regards fresh-water streams. As regards the right of an owner of land whose land is exposed to the inroads of the sea, the case of *The King v. The Commissioners of Sewers for Pagham* (5), many times approved of, is a distinct authority. In delivering his judgment that most able and learned Judge, Bayley, J., stated the rule of law in these words :—

“ Every land owner exposed to an inroad of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners (*i.e.*, the defendants) may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they make unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment for an abuse of the powers vested in them. But if they act *bona fide*, doing no more than they honestly think necessary for the protection of the level (*i.e.*, the land they superintend) their acts are justifiable, and those who sustain damage therefrom must protect themselves.”

(5) 8 B. & C. 355 (1822).

(3) 2 App. Cas. 839, 840 (1877).

(4) L. R. 10 Ex. 4 (1874).

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The last English case necessary to refer to on this subject is that of *Whaley v. The Lancashire and Yorkshire Railway Company* (6). It is somewhat peculiar in its features. The Defendants were proprietors of a railway which ran along from east to west over a flat country on a low embankment. A ditch ran along on each side of this embankment for the purpose of draining the railway. The surrounding land sloped from south-east to north-west, so that the land on the north-west side of the railway embankment, where the damage occurred, was at a lower level than on the south-east side of the embankment. The Plaintiff was a farmer occupying lands on the north-west side, the lower side of the railway, but separated from it by other lands belonging to other persons. By reason of an unprecedented rainfall a quantity of water which accumulated on the south-eastern side of the embankment, was dammed up against it, and ultimately rose to such a height as to expose the embankment to danger. This water, it was apparently considered, might possibly have percolated through the embankment, and in no sense did the Company, as did the Defendant in *Rylands v. Fletcher* (7), bring the water upon or up to the Company's lands, but when the water had risen to such a height that the Defendants thought it was necessary for the protection of their embankment, they caused trenches to be cut in the embankment, through which the water was enabled to escape to the north-west side of the railway and from thence to flow into the adjoining lands and ultimately to the Plaintiff's land, damaging his crops. The case was tried before Mr. Justice Day and a jury. The jury found that the cutting of the trenches through which the water

flowed was reasonably necessary for the protection of the Defendants' property, that it was not done negligently, and that the Plaintiff was injured by the water that so came through the trenches to the extent of £138 beyond what it would have been if the trenches had not been cut. On these findings the learned Judge gave judgment for the Plaintiff for £130. Brett, M.R., deals in his judgment with the facts of the case and the principles applicable to it. At page 137 he said :—

"But then it is suggested that if a person has brought the danger on his land, it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other; that is all. . . . In this case the water endangered the embankment and, moreover, it would have gone on to the plaintiff's land in any event; but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on to the plaintiff's land, it would have gone without doing the injury which was done by reason of its pushing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and therefore it seems to me that they are liable."

Lord Justice Lindley, at page 140 of the report, says :—

"It appears to me that this case is more analogous to the Scotch case of *Menzies v. Earl of Breadalbane* (2) and *Nield v. L.N.W.R. Company* (4).

"It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land may fence off and protect his land from it, and so turn it away without being respon-

(6) 13 Q. B. D. 131 (1884).

(7) L. R. 3 H. L. 330 (1868).

(2) 3 Bligh N. S. 414 (1829).

(4) L. R. 10 Ex. 4 (1874).

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sible for the consequences, although his neighbours may be injured by it.

"*Rea v. Payham Commissioners* (5) is another step in the same direction We must look at the board question, which is whether a landowner on whose land there is a sudden accumulation of water, brought there without any fault or act of his, is at liberty actively to let it off on the land of his neighbour without making that neighbour any compensation for damages, because the landowner by doing so has been able to save his own property from injury? I can see no authority for that, and it appears to me the general rights and duties of landowners are decidedly against it."

Some point was made in this case to the effect that the stream alleged to have been stopped up was at best merely an artificial watercourse and not a natural one. In the latter case the successive riparian owners have been each entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land. In the former case, however, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. [*Rameshwar Pershad Narain Singh v. Koonji Behari Pattuk* (8) and *Kensit v. Great Eastern Railway Company* (9)].

There is, however, a well-established principle of law directly bearing upon this case and vitally affecting it, namely, that a watercourse originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. [*Sutcliffe v. Booth* (10), *Holker v. Porritt*

(11) and *Baily & Co. v. Clark, Son and Morland* (12)].

It is not necessary in order to apply the principles of these decisions to analyse the evidence in detail. It was proved by a Public Officer, the Superintendent of Land Records, and not contradicted, that this so-called canal went right up to the boundary of the Appellants' land; while in the following five paragraphs of the written statement of the Respondents they practically admitted the facts founding the charge against them, though at the same time they misrepresent the conduct and action of the Appellants. These paragraphs run thus:—

6. The said channel became wider and longer through erosion, with the result that the salt water from Kyonkan Chaung overflowed on the lands of this defendant and of adjoining cultivators and caused damage thereto.

7. In order to prevent such damage in or before the year 1914 the first defendant admits there was a bund erected across the said channel at a point where it flows through the land of this defendant and others. Such erection was said to be by the permission of Maung Thi Hla, the then Township Officer of Bogale.

8. The said bund gave away in or about the year 1916-17, and this defendant with his assistants repaired the bund formerly erected at the same place where the original bund was erected without any objection on the part of the plaintiffs or any one else.

9. On the 1st July, 1917, the first plaintiff and others illegally trespassed on the first defendant's lands originally acquired and lands purchased afterwards and opened the said bund, but the bund was erected again as there was no legal order and report to that effect was made to Thugyi Maung Shwe Loon.

10. On or about the 25th August, 1917, in pursuance of an order of the Deputy Commissioner of Pyapon, the said bund was

(5) 8 B. & C. 355 (1823).

(8) 4 App. Cas. 121 (1878).

(9) 27 Ind. L. 122, 134 (1884).

(10) 32 L. J. Q. B. 136 (1863).

(11) L. R. 8 Ex. 107 (1873).

(12) [1902] 1 Ch. 649, 664, 669, 673.

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opened, and after such date it has not been closed.

The evidence and findings of the Judges upon these statements establish, as will presently be shown, that the Defendants themselves erected the bund referred to in the second as well as in the third of these paragraphs. To effect this work they must have gone in upon the alveus of the canal, closed up with this bund, the eye of the bridge what was the outfall of the canal into the sea, and thus have offended against the law as laid down in the English cases. The District Judge framed for himself certain issues and answered them thus: To the second issue he gave the answer that the canal was not a Government constructed work, but was for a long time before 1906-1907 a naturally formed channel. The third issue so framed ran, "Did this canal facilitate the free outflow of rain water from the Plaintiffs' (Appellants') paddy lands?" His answer ran thus: "There cannot be any doubt that as all the parties admitted the canal takes the water into the Kwin from the Kyonkan Creek at flood tide, and takes the water out from the Kwin into the creek at ebb tide, therefore a certain extent of rain water must find its way into the Kyonkan Creek as a natural consequence." And, again, "there cannot be any doubt as to the motive of the Defendants that they erected the bund and closed the canal to protect their own fields from salt water; but there cannot also be any doubt that the stoppage of the outflow at ebb tide caused the excess water to remain in the fields of both the parties." He answers the fifth issue in the following words: the "weight of evidence is clearly in favour of the Plaintiffs," and I would [thus] answer the fifth issue.

He further finds that Map 2A makes it clear that the channel had been in exist-

ence before the year 1906-1907, and that there was no canal construction by any one. He ultimately gave a decree in favour of the Appellants for Rs. 8,821-48. No case has been made that these damages were excessive in amount if the legal wrong complained of had been actually committed. There was ample evidence in the case to sustain the findings of the District Judge if he believed the witnesses who gave it, as apparently he did, having seen and heard them. It appears to their Lordships plain that the access of some salt water from the creek through the eye of the bridge into the canal twice in the twenty-four hours in flood tide does not resemble in any way those incursions of the sea dealt with in *The King v. The Commissioners of Sewers for Pagham* (5), and still less did the closing up of the eye of the bridge, by this bund, and in seasons of heavy rain the ponding up of the fresh water in the canal, so that lands higher up that stream were flooded resemble those necessary precautions which a landowner whose land is at the mercy of these incursions of the sea is entitled to take to protect his property. If the stopping up of the outfall of the canal was justifiable by reason of this access of some salt water at flood then every fresh water tributary to a tidal river could be closed up at its mouth to prevent the like consequences.

Both the cases referred to in the third reason for the Appellants' appeal deal with surface water, the rain which falls on agricultural land not with watercourses of any kind. They are irrelevant therefore to the questions in controversy in this case, and are not in conflict, it appears to their Lordships, with any of the English cases cited.

The Respondents appealed, and on the appeal the learned Judges of the Chief

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Court of Appeal seem to have taken a course as unwise as it was extraordinary. The Appellants had undoubtedly in paragraph 4 of their plaint stated that the Government had in the year 1913 dug this canal, shown by letters A, B, C, D, on Ex. "A." That was no doubt found to be untrue, but no evidence whatever was given to show that the Government had any jurisdiction or authority to do such a thing, and what is much more important that if they had such authority an action could not be brought for any injurious consequence resulting to individuals from its execution.

That paragraph of the plaint is followed by two others, Nos. 5 and 9.

5. The said canal thus facilitated the free outflow of the rain water from the plaintiff's paddy lands aforesaid into the said Kyonkan Chaung and rendered cultivable all the lands situate in Kasaung Ngotto West Kwin and Sakangyi South (A) and (B) Kwins, which adjoin the said Kamakalu Kwin.

9. The plaintiffs have been informed and verily believe that during the month of Kason or Nayon, 1279 B. E., the first defendant's tenants and servants by order of the first defendant and the defendants Nos. 2 to 8, closed the said canal at the point B shown in red ink in the plan Exhibit A.

The alleged wrong for which the Plaintiffs claim damages was the stopping up by a bund of the outfall of the canal, by which means the water of the canal, having been denied escape at the proper place, was ponded up, flowed back, and flooded their lands. The identity of the body or person which or who actually formed the canal was a matter wholly irrelevant to the matters in issue. It did not form even an ingredient in the cause of action, and there is not an averment in the plaint to show that the Plaintiffs did not rely upon the canal being an old natural watercourse enlarged, but new or

artificial. The plaint is entirely consistent with their relying upon the one thing or the other, as suited them best.

Yet, strange to say, one of the learned Judges in the Chief Court (Mr. Justice Duckworth) considered that this statement as to the digging of the canal by the Government was a matter of such vital importance, that the judgment of the District Judge should be reversed, and his decision in the Plaintiffs' favour be overruled because this allegation had not been proved.

In justice to Mr. Justice Duckworth, the following passages from his judgment should be quoted :—

"I have only to add a few remarks. It appears to me that the plaintiff-respondent Maung Bya set up a certain case in his pleadings, by which he must either stand or fall. It is clear, from his plaint, that his case was that, until Government made a canal, the lands which belong to him were unworkable, but that, after Government made a canal connecting the Fishery creeks with the Kyonkan Chaung, his fields became cultivable. Further, he contended that owing to the appellant Maung Tet closing this canal, at the Kyonkan Chaung end, by a bund, in 1917 he suffered certain damage through his fields becoming inundated."

It does not appear to their Lordships that this is at all an accurate or fair construction of the plaint of the Appellants.

The learned Judge then proceeds :—

"In fact, treating this channel, as I think we must, as a natural watercourse [see *Kaw La v. Maung Ke* (13), we find that appellant (defendant) is a riparian proprietor, whereas the respondent (plaintiff) is not.

"This is the only view of the case which can be inferred from the evidence."

This would go to show that the map of 1906 was right, and that what was done in 1913 was to clean up flooded areas and deepen a natural watercourse, and not to

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create a new one, involving the forfeiture of the riparian owners' rights.

The last paragraph, the different portions of which seem scarcely consistent with each other, runs thus :—

"It is quite unnecessary to consider any other points. The respondent set up a case, which he failed to prove, and obtained a decree before the District Court on a case which he had not pleaded. It is settled law that a plaintiff must not be permitted to succeed on a case which he has not put forward directly or indirectly in his plaint. Further, it is apparent that the learned Judge of the District Court took a mistaken view of the facts, his chief error being his overlooking the fact that respondents' lands drew no advantage whatever from this channel until it had opened a way through the road bund into the Kyongkan Chaung, and that only some four years prior to any cause of action having arisen.

"I concur with my learned brother in allowing the appeal with costs, and in the decree passed by him, including special costs to Messrs. Leach and Lentaigne Junior."

The passage appears to suggest that a Defendant who diverts or stops the flow of a natural watercourse and thereby floods the lands of a riparian owner is not to be held responsible in damages for the wrong unless he, the Defendant, has made a profit by it. In their Lordships' opinion such a doctrine is unsound.

The other learned Judge, Mr. Justice Maung Kin, deals with this point somewhat differently. He says :—

"The finding that the canal was not one made by the Government is not contested before us. It is, however, contended that plaintiff had the right to the undisturbed flow of water from his land through the canal into the Kyonkan Chaung on the ground that the canal is a natural waterway.

"It is doubtful whether the learned District Judge was right in giving a decree upon a case not set up by plaintiff in his

plaint. The basis of the suit as described in the plaint is that the canal was dug by the Government for the benefit of the cultivators, and that it, in fact, benefited them, because it drained the surplus rain water from plaintiff's land."

This, as has been already pointed out, is not a true construction of the Appellants' case and contention.

The learned Judge then proceeds to add :—

"I may add that there is no equity in favour of plaintiff. He had not derived any benefit before the depression became sufficiently wide and deep to allow of its carrying water coming from the direction of his land, and when the bund was built by Government, there was no reason for thinking that that water would flow in the direction of the bund. But the defendants have all along enjoyed the benefit of the existence of the bund, because it has prevented brackish water coming to defendants' lands from the Kyonkan Chaung. I do not see any justice in allowing plaintiff's claim to remove the bund for the benefit of his land, unless he has a natural or prescriptive right to make it. I have held that he has no natural right, and sufficient time has not elapsed for a prescriptive right to ripen.

"For the above reasons I would allow the appeals Nos. 183 and 188 of 1919, with costs."

It appears to their Lordships difficult to understand what the learned Judge meant by the first of these paragraphs.

Their Lordships are quite unable to concur with the learned Judges of the Chief Court in the views they have taken of the rights and liabilities of the parties litigant in this case. They think these views are conflicting *inter se*, unsound and misleading. To gather together the points fully dealt with above it may be said that in their Lordships' view it is clearly established (1) that a raised road or bund ran transversely across the depressed ground through which flowed the channel of water, and was properly pro-

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vided with a gap for the flow and a bridge over the channel, (2) that the bund thus provided with an eye and a bridge to permit the inflow and outflow of water was interfered with by the Respondent, who filled up the eye and channel course thereat, and converted an innocuous bund into a dam, which dammed back the water on to the Appellant's land, and that in law (3) the Respondents are responsible for the damage thus caused to the Appellant's property. They think the judgment appealed from was erroneous and ought to be set aside, that the decision of the District Judge was right and should be restored, and will humbly advise His Majesty accordingly. The Respondents must pay the costs of the Appellants in the hearing of the Chief Court and of this appeal.

Solicitors : *Messrs. Light & Fulton* for the Appellants.

Solicitors : *Messrs. Henry Hilbery & Son* for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 110 of 1925.**

SANDERSON, C. J. RANKIN, J. 1925, Heard, 11, December. Judgment, 14, December.	}	RADHA KISSEN GOENKA, Defendant, Appellant, v. THAKURSIDAS KHEMKA, Plaintiff, Respondent.
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Suit under Chap. XIII A of the Rules of the Original Side—Unconditional leave to defend—Practice—Denial of main portion of the Plaintiff's claim—Sale of securities, if without jurisdiction.

Where there is a general denial of the main portion of the Plaintiff's claim, unconditional leave to defend should be given and it is wrong practice under Chap.

XIII A of the Rules of the Original Side (new rules) to make an order for furnishing security merely because the Judge thinks that the Plaintiff has a better prospect of success than the Defendant.

The Court has no jurisdiction under Chap. XIII A to make an order for sale of securities.

JACOBS v. BOOTH'S DISTILLERY CO. (3)
followed.

SUKHLAL CHUNDERMULL v. EASTERN BANK, LTD. (1) *discussed.*

This was an appeal from an order of Mr. Justice Ghose under Chap. XIII A (new rules). The Plaintiff alleged that there were various dealings with the Defendant; that after the adjustment of the account a sum of Rs. 20,364 was found due to the Plaintiff and the Defendant admitted the liability and promised to pay it on demand with interest at the rate of 12 per cent. per annum; that at the time of the adjustment the Plaintiff held certain shares and jewelleries of the Defendant as security and since adjustment the Defendant had paid Rs. 4,995-4-0 and that the sum of Rs. 17,535-1-6 was now due to the Plaintiff with interest, Rs. 5,218-8-9, and the Plaintiff prayed for an order for sale of the securities. After filing the plaint, the Plaintiff took out summons under Or. XIII A for final judgment. The Defendant totally denied that he ever promised to pay interest and stated that the Plaintiff had received various sums from and also on behalf of the Defendant by way of dividends on the shares and asked for an account. The matter came before Ghose, J., on 7th July 1925, and he was pleased to order on the Defendant to give security of Rs. 22,753-10-3 within a fortnight, in default the suit to stand decreed for

(1) I. L. R. 42 Cal. 735 (1915).

(3) 85 L. T. 262 (1901).

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Rs. 22,753-10-3 with costs of suit on scale No. I; the securities were directed to be sold by the Registrar and the sale proceeds to be applied in satisfaction of the decree.

Mr. A. K. Roy placed the judgment of the lower Court.

RANKIN, J.—Is there no authority of this Court where it has been held that an appeal does not lie from a default order imposing terms?

Mr. S. N. Bannerji.—The first point I was going to take is that no appeal lies. [Cited *Sukhlal Chundermull v. Eastern Bank, Ltd.* (1)].

Mr. A. K. Roy (with *Mr. P. C. Basu*) argued on behalf of the Defendant that this Court has held in *Chotulal Misser v. Marwari Commercial Bank, Ltd. and Rai Bahadur Bissesswar Lal Halwisiya* (2) that an appeal lies from an order made under Chap. XIII A imposing terms inasmuch as a decree follows forthwith for non-compliance with the said order. In this case there is substantially a denial of the Plaintiff's claim. There is no mention of interest in the document relied on by the Plaintiff. The claim for interest is denied. There is further denial of the second adjustment although the Defendant does not specifically state what sum was due. [Cites *Jacobs v. Booth's Distillery Co.* (3)].

Mr. S. N. Bannerji (with *Mr. S. R. Dass*) argued on behalf of the Respondent that Or. 14 of the Rules of the Supreme Court are different from the Rules of this Court under Chap. XIII A and placed the Rules. The learned Judge used his discretion and the Court on appeal ought not

to interfere with his discretion. The learned Counsel for the Defendant admitted at the trial Court that Rs. 15,000 was due as principal. The learned Judge was justified in accepting the Plaintiff's story when there was that admission as the Defendant does not state what amount was due. By the order for sale of securities the Defendant is not prejudiced as the Plaintiff has the right to sell under sec. 176 of the Indian Contract Act.

Mr. Roy in reply stated that the admission was made to buy peace in full settlement of the Plaintiff's claim. There is the denial of the main portion of the Plaintiff's claim and that there were the issues regarding interest and what amount was due.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—This is an appeal from an order made on the 7th of July last by my learned brother Mr. Justice C. C. Ghose under Chap. XIII A of the Rules of the Original Side which provide the procedure for obtaining summary judgments in cases where a debt or liquidated demand in money is alleged to be payable by the Defendant.

The plaint set out that there had been certain transactions between the parties and that on the 6th of April 1922 an account was adjusted which showed a sum of Rs. 20,304 due by the Defendant to the Plaintiff. It was further alleged that the Defendant acknowledged in writing his liability for this amount and it further alleged that the Defendant promised to pay the same on demand with interest at 12 per cent. per annum. The plaint further stated that the Plaintiff held certain shares and certain jewellery as security for the debt : and, finally it stated that the Plaintiff had received on account of the

(1) I. L. R. 43 Cal. 735 (1915).

(2) No. 174 of 1924, dated the 8th June 1925, Unreported.

(3) 85 L. T. 262 (1901).

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Defendant various sums of money amounting to Rs. 4,995. Para. 5 of the plaint then goes on to state that the account between the parties up to March 1923 was made up and that the sum found due was Rs. 17,535 and that a copy of the account was sent to the Defendant who received the same with no objection thereto. The Plaintiff submits that the same should be taken as accounts adjusted. The Plaintiff in the relief which he claims asks for a decree for Rs. 22,753, for an account, if necessary, of the transactions, for a declaration of charge on the shares and jewellery, and an order for sale and certain further reliefs.

The Plaintiff having taken out a summons for summary judgment the Defendant by his affidavit totally denied that there was any promise to pay on demand or to pay interest. The document exhibited to the plaint contained no mention of any promise to pay interest. He stated further that he had made various payments to the Plaintiff and that the Plaintiff had received certain dividends upon the shares held by him in deposit, which ought to be directed by the Court to be found by an account so as to ascertain the amount due. He denied having received the account sent to him or having in any way agreed to the later adjustment of account set up by the Plaintiff. He goes on to say that if the shares and the jewellery are sold the Plaintiff will be found to be entitled to recover nothing more, but he does not say, apart from sale of the shares and the jewellery, that the sum due is any given sum or that nothing is due. With that exception he gives denial of the money portion of the Plaintiff's claim.

In his affidavit in reply the Plaintiff sets out a short account purporting to say exactly what he has received by way of

dividends and payments and purporting to verify his original plaint.

If the matter stood there it is reasonably clear that no judgment should have been passed against the Defendant under this procedure at all. To begin with, the claim for interest was denied and it is entirely a wrong practice under Chap. XIII A for a learned Judge to order security merely because looking at the statements on either side he rather thinks that the Plaintiff has a better prospect of success than the Defendant. There was a specific denial with respect to this agreement and it would be quite impracticable to decide that matter under Chap. XIII A.

As regards the main question, it is clear that the Plaintiff was an accounting party and though he gave a version of an adjustment, he did not profess to be at all sure that it amounted to a promise by the Defendant to pay the sum so found because he submitted that it amounted to an adjusted account and he asked for an account by way of an alternative relief.

So far, therefore, it seems to me that this case is one in which the proper order would have simply been an unconditional leave to defend; but it appears that at the last stage of the summons the parties appeared before the learned Judge and the learned Counsel for the Defendant is recorded to have said that he consented to a decree for Rs. 15,000 "which he contended was the principal sum due." If that Rs. 15,000 had been offered as the purchase price of peace in settlement of the whole matter, it could not have been taken as an admission for any purposes of this sort; but it certainly looks as though that was the Defendant's statement of the amount that he really owed. There may be some doubt about the minutes, and we have enquired to-day as to what figure the

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Defendant admits. We are told that he admits at any rate Rs. 13,000.

It seems to me, therefore, that one may on this summons give judgment against the Defendant for Rs. 13,000; but it is to be observed that a part of the Plaintiff's relief which he seeks by going on with the action is an order for sale of the security. Under the practice of Chap. XIII it is one thing to give judgment for a given sum and it is another thing to say whether that judgment should be immediately enforceable having regard to other matters outstanding between the parties.

It seems to me that the order of the learned Judge (a part of which as regards the sale of these properties is entirely without jurisdiction under Chap. XIII) should be altogether set aside and that the proper order to make is that the Plaintiff on this application should have judgment for Rs. 13,000, but that this judgment is not to be executed pending the final determination of the other matters in the suit. The Defendant must have leave to defend as regards the rest of the claim.

SANDERSON, C. J.—I agree. As regards costs, we are of opinion that the Plaintiff must pay the Defendant's costs of the appeal, and there will be no costs of the summons before my learned brother on the Original Side.

The Defendant must file his written statement by Friday next and there will be cross-order for discovery within a week of the filing of the written statement.

This case will be put in the special list of suits.

Messrs. N. C. Bural and Pyne, Solicitors for the Appellant.

Mr. P. D. Hematsingha, Solicitor for the Respondent.

P. D.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2087 OF 1922.

CUMING, J.	PROSONNA KUMAR DE
CHAKRAVARTI, J.	and ors., Defendants,
1925,	Appellants,
Heard, 13 and	v.
18, May.	ANANDA CHANDRA
Judgment,	BHATTACHARJEE and
18, May.	ors., Plaintiffs,
	Respondents.

Landlord and tenant—Right of landlord to re-enter on abandonment of holding - Transfer of non-transferable holding and making over possession to transferee - Necessary inference as to abandonment.

For a landlord seeking to re-enter it is not necessary to prove as a fact that the holding has been abandoned but it is a direct inference from the fact that the entire holding was sold and possession given to the purchaser.

This was an appeal preferred on the 16th of August 1922 against the decree of Babu Saroda Kumar Sen Gupta, Subordinate Judge, 2nd Court of Zillah Tipperah, dated the 18th of May 1922, reversing the decree of Babu Jitendra Nath Chatterji, Munsif, 7th Court at Comilla, dated the 31st of May 1921.

The facts of the case will appear from the judgment.

Rabu Susil Kumar Bose for the Appellants.

Babus Gobinda Ch. Dey Roy and *Upendra Kumar Roy* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—In the suit out of which this appeal has arisen the Plaintiffs sued for a declaration of their *brahmattar* right to the disputed land and for recovery of *khas* possession thereof after evicting the Defendants. The Plaintiffs' case was that the *pro forma* Defendants who had held the land under them in *raiyati*

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right had abandoned it without making any provisions for the payment of rent. The Plaintiffs had come to know that the *pro formâ* Defendants had sold the land to the principal Defendants. As the *pro formâ* Defendants had no right to transfer without the consent of the landlords the Plaintiffs as landlords claimed to re-enter upon the land.

The defence was that the whole *jama* had not been transferred, that the *pro formâ* Defendants were still in possession, that they had tendered rent to the Plaintiffs from time to time, and further that the sale was not an out and out sale but made with the condition attached, that in case of payment of the price within 7 years the property would be re-conveyed to the *pro formâ* Defendants and further that the sale was made with the consent of Plaintiff No. 1.

The trial Court held that the *pro formâ* Defendants had not abandoned the land. Hence he dismissed the Plaintiffs' suit.

The Plaintiffs appealed to the District Court and the learned Subordinate Judge decreed the appeal and the Plaintiffs' suit with costs. He held that the *pro formâ* Defendants had abandoned the land without making any provision for the payment of rent, that the *pro formâ* Defendants had no transferable interest in the land and that therefore the Plaintiffs had a right to re-enter.

The Defendants, the purchasers, have appealed to this Court. In appeal two points have been argued. First, that the purchase was made with the consent of the landlords, and the lower Appellate Court has not considered this point. As far as can be seen this point was not argued before the lower Appellate Court. The trial Court in dealing with this point stated that the Plaintiff No. 1 had not denied that the purchase was with his

consent and the trial Court seems to think that it was for the Plaintiff No. 1 to examine himself and to prove that the purchase was not made with his consent. On the contrary it was for the Defendants to prove that the purchase was made with the consent of the Plaintiffs, and, if they desired, to examine the Plaintiff No. 1 on this point. It was for them to summon him as a witness or to examine him on commission. Probably for this reason the point was not urged in the lower Appellate Court. There is nothing in this contention.

The next point argued was that the transaction was really a mortgage by conditional sale. This point again does not seem to have been argued before the lower Appellate Court; and probably for a very good reason, for the *kobala* itself does not show that it was a mortgage by conditional sale, but *primâ facie* it is an out and out sale.

This appeal is really concluded by the findings of fact arrived at by the lower Appellate Court. The lower Appellate Court has found that the Defendants have sold the land and have made no arrangement for the payment of the rent. As the learned Judge points out if they really desired to pay the rent they could have sent the rent by postal money order or have made a deposit in Court. Clearly they did not make any attempt to pay the rent or any arrangement for making the payment of rent. He also finds that the principal Defendants are in possession. It is not necessary to prove as a fact that the holding has been abandoned but it is a direct inference from the fact that the entire holding was sold and possession given to the purchaser. See the case of *Sheikh Chand Pramanik v. Romoni Mohan Roy* (1).

(1) 17 C. W. N. 1105 (1913).

PROSONNA KUMAR DE v. ANANDA CHANDRA BHATTACHARJEE.

The facts proved are sufficient to justify the lower Appellate Court's finding that the *pro formâ* Defendants have abandoned the lands. This being so, the Plaintiffs clearly have a title to re-enter.

The appeal therefore fails and is dismissed with costs.

The cross-objection not being pressed is also dismissed.

CHAKRAVARTI, J.—I agree.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGINAL DECREE

No. 277 OF 1922.

WALMSLEY, J.	SURENDRA NARAIN
CHAKRAVARTI, J.	SINHA and ORS., Defendants Nos. 1, 2 and 3,
1925,	Appellants,
Heard,	v.
10, February.	RAJA BEJOY SINGH
Judgment,	DEODHONIA, Plaintiff,
26, February.	Respondent.

Putni tenure, nature of—Putnidar, if may use land for brick-making—Injunction, if may issue, at the instance of zamindar—Absence of provision in putni lease about brick-making, if can be construed to prohibit it by implication.

Where on the suit of the zamindar the lower Court granted an injunction restraining the putnidar and his lessees from making bricks:

Held (on the question whether the relation of zamindar and putnidar was such as to debar the former from getting the relief claimed).—*That the only matter to be considered was whether the use made of the land affects the landlord's security in the matter of the rent reserved. If the use does not threaten the complete destruction of the property or if it does not threaten such a change as to endanger the rent the zamindar has no cause for complaint.*

Held further—*That it could not be held*

that because the putni instrument did not authorise brick-making it forbade it by implication.

Real nature of putni taluks as distinguished from ordinary leasehold interests pointed out.

This was an appeal against the decree of Babu Asutosh Pal, Subordinate Judge of Zillah Murshidabad, dated the 31st of July 1922.

The facts of the case will appear from the judgment.

Dr. D. N. Mitter, Sir Provash Chandra Mitter and Babu Narendra Krishna Bose for the Appellants.

Dr. S. C. Basak and Babu Ramani Mohan Chatterjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

WALMSLEY, J.—This is a novel case. The learned Subordinate Judge of Murshidabad has granted to the zamindar an injunction restraining the putnidar and his lessees, the Defendants, for making bricks anywhere in the putni, and also a nominal sum by way of damages for the mischief caused by the brick-making that has already taken place.

The Defendants appeal and urge that the decision is wrong on three grounds, firstly, because the relation between zamindar and putnidar is such that the former is not entitled to the relief claimed; secondly, because the document creating the putni contains no stipulation against brick-making; and thirdly, because the practice was begun many years ago, and has been continued without objection by the zamindar until this suit was instituted.

It appears to me that the Defendants are entitled to succeed on each of these grounds,

In regard to the first ground, the only

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matter to be considered is whether the use made of the land affects the landlord's security in the matter of the rent reserved. If the use does not threaten the complete destruction of the property, or if it does not threaten such a change as to endanger the rent, the zamindar has no cause for complaint [see the case of *Barada Prosad Banerjee v. Bhupendra Nath Mukerjee* (1)]. In the present instance neither of those dangers is present: where the bricks are made the surface of the land will be changed no doubt, but not irremediably and the evidence is that at present the area affected is about 1 per cent. of the whole.

An attempt has been made to treat the relation between a zamindar and a *putnidar* as similar to the relation between the English owner in fee simple and the lessee for a term of years, but the relation is really very different, and the comparison does not assist us.

On the second point, the learned Judge seems to think that because the *putni* instrument does not authorise brick-making it by implication forbids it, and secondly, that a reservation against digging tanks without permission may be construed as a reservation against the excavation involved in brick-making. I do not think that either view is correct. There is no reservation against brick-making, and the zamindar cannot succeed by showing that there is no clause that permits brick-making. As for the clause about digging tanks, brick-making may not be such an old practice as tank-digging, but it was very well-known in 1853 when the *putni* was created, and if the reservation had been intended to cover brick-making it might have done so expressly.

On the third point the learned Judge has treated the evidence in a very strange

manner. The Defendants were able to show payments on account of brick-making as far back as the closing years of last century. These payments are entered in large books of account which appear to wear the marks of being genuine. The Judge, however, says nothing at all about the *rokars* containing these entries, and he objects to the *sumars* and cheque *muris* on the ground that they come from the custody of the *putnidar's* vendor and were produced late. The first objection confuses with title deeds documents which are valuable for the information they give about incidents connected with the *putni*, but do not in themselves form any part of the evidence of title. The second objection springs from the same confusion of thought: the present *putnidar* had to call upon his vendor to produce the papers, and it is not shown to us that he was negligent in seeking the aid of the Court to compel the production: so he cannot be held responsible for the fact that the papers were produced late. Another remark must be made about the Judge's treatment of the evidence on this point: he says that the oral evidence is at variance with the contents of these papers and then deals very hardly with the evidence of Plaintiff's witness Chandra Kanta. The learned Advocate for the Respondent has been unable to show us where the oral evidence conflicts with the papers, and as for Chandra Kanta it would seem as though any suspicion to which his contradictions may give rise should go against the Plaintiff rather than against the Defendants.

My conclusion is that the learned Judge's judgment must be reversed on each of the grounds mentioned, and that the appeal must be allowed and the suit dismissed with costs in both Courts.

In the view which I have taken, the

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cross-objection preferred by the Plaintiff-Respondent must necessarily be dismissed with costs—hearing-fee, three gold mohurs.

CHAKRAVARTI, J.—I wish only to add a few observations as to the real nature of the *putni* taluks as I understand it and how they differ from ordinary leasehold interest.

Reg. VIII of 1793, sec. 51 recognised the dependent taluks created by the zamindars before the Permanent Settlement and full protection was granted to them subject to the payment of the fixed rent. A number of these taluks were given the option of getting themselves separated from the zamindary and directly holding under the Government as owners of separate estates and the rent payable for the zamindary. This emphasises the fact that these talukdars, though in one sense lessees, were looked upon as the absolute owners of the lands subject only to payment of the fixed rent. There was no restriction on or limitation to their rights as lessees.

It is in this sense it has been said that these taluks were really transfers of the zamindars' interests, the consideration being payable not in a lump sum but by annual payments in the shape of rent. The analogy of a leasehold interest as defined by the Transfer of Property Act is out of place here. There are some features which are common but the distinctive feature cannot be ignored and the existing mode of enjoyment of these taluks disturbed.

The Permanent Settlement imposed a limitation of 10 years' term to all future leases created by the zamindar but this restriction was removed by Reg. V of 1812 and grant of permanent taluks came into vogue and a number of taluks called *putni* taluks were created in the image of

the *istamrari mokarari* taluks as known before the Permanent Settlement. Reg. VIII of 1819 called the *Putni* law was created to grant facilities of the zamindars to create taluks for punctual realisation of rent at stated times with a view to help them to meet the demand of the sun-set law, as the Revenue law was popularly called.

These *putni* taluks were really grants of the zamindars' interest without restrictions unless specially mentioned in the pottah. Even *mokarari* tenure was in some respects treated as not a mere lease—see *Sonet Kowar v. Himmat Bahadur* (2).

It appears to me therefore that it is not possible to apply all the provisions of the Transfer of Property Act by analogy to the *putni* taluks and I have no hesitation in saying that a *putnidar* is competent to use or lease out land for the manufacture of bricks and this is wholly consistent with a *putnidar's* right. The Transfer of Property Act contains a saving clause for the *putni* governed by Reg. VIII of 1819.

The question now at issue is really governed by the case of *Abhiram Goswami v. Shama Charan Nandi* (3). The question as to whether the *putnidar* can by this mode of user destroy the security of the rent payable need not be discussed now. It is not even suggested that the loss of the land used for manufacture of bricks has in the least diminished the value of the *putni* in question.

The clause restricting the digging of tanks cannot be enforced and cannot by analogy furnish a restrictive covenant against brick-making. I agree with my learned brother that the suit should be

(2) L. R. 3 I. A. 92: s. c. I. L. R. 1 Cal. 391 (1876).

(3) L. R. 36 I. A. 148: s. c. I. L. R. 36 Cal. 1003, 14 C. W. N. 1 (1909).

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dismissed with costs as also the cross-objection.

S. C. M.

(CIVIL REVISIONAL JURISDICTION)

RULE No. 231 OF 1925.

GREAVES, J.
B. B. GHOSE, J.
1925,
19, June.

SATYA NERANJUN SHAW
and anr., Petitioners,
v.
THE KARNANI INDUS-
TRIAL BANK, LTD.,
Opposite Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 15 - Tenant whose lease has been validly terminated, if may apply for standardization of rent—Decree for ejectment passed on a subsequent date - Position of tenant during interval that of trespassers—High Court's power of revision.

Where the landlord served a notice on the tenant on 15th August 1923 terminating the lease on the ground of breach of covenants in the lease, and his suit for ejectment on the ground was decreed on 24th April 1925:

Held—That an application for standardization of rent made by the tenant on 1st December 1923 was incompetent and the order of the Rent Controller, dated 11th March 1924, fixing the standard rent was without jurisdiction. The position of the applicant on 1st December 1923 was that of a mere trespasser. The fact that the decree in ejectment was passed after the order of the Controller did not make any difference as the decree did not terminate the tenancy but on the other hand decided that the landlord was justified in terminating the tenancy on 15th August 1923.

The fact that the order of the Rent Controller did not admit of revision by the President of the Tribunal did not preclude interference with the order in revision by the High Court.

This was a Rule granted, against an

order of the President, Calcutta Improvement Tribunal, dated the 31st January 1925, rejecting an application for revision of the order of the Rent Controller, dated the 11th March 1924.

The facts of the case will appear from the judgment

Dr. S. C. Basak, Mr. R. C. Sen and Mr. P. C. Sen for the Petitioners.

Dr. D. N. Mitter, Mr. J. N. Roy and Mr. H. L. Ganguly for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

B. B. GHOSE, J.—In this Rule we are asked to set aside an order of the Rent Controller fixing standard rent with regard to certain premises, dated the 11th March 1924. The lease is dated the 7th October 1920. On the 15th August 1923 the landlords who are the Petitioners before us served a notice on the Opposite Party determining the lease on the ground, it seems, of breach of covenants in the lease. On the 10th September 1923, the Petitioners brought an action in ejectment on the Original Side of this Court. During the pendency of the suit, on the 1st December 1923, the Opposite Party applied to the Rent Controller under the Rent Act for standardization of rent. The Rent Controller fixed standard rent on the 11th of March 1924, as I have already stated. The Opposite Party vacated the premises on the 24th January 1924. The Petitioners applied for revision of the order of the Rent Controller to the President of the Tribunal on the 22nd March 1924. The duration of the old Rent Act expired on the 31st March 1924. The President rejected the application of the Petitioners by his order, dated the 31st January 1925; following the case of *Kundemul Dalima* v.

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Dyer (1), on the ground that the new Act does not authorise him to revise the order of the Rent Controller with regard to the premises in question. The ejectment suit on the Original Side of this Court was decided on the 24th April 1925 in favour of the Plaintiffs decreeing ejectment and the order of the learned Judge was that the Plaintiffs were entitled to recover rent till the 15th August 1923 when the tenancy was terminated by notice to the Opposite Party, and from after that date the position of the Opposite Party was that of trespassers and the Plaintiffs were entitled to mesne profits from the date till possession was delivered to the Petitioners. With regard to the rate of rent the learned Judge did not come to any decision but having regard to the pendency of this Rule, he directed that the rent fixed by the Controller should not be taken by him to have been finally determined as the rent payable in respect of the premises in question. The Petitioners support their application mainly upon the ground that the Opposite Party were not tenants on the 1st December 1923 with regard to the premises in question and, therefore, they were not in a position to present an application for fixing standard rent under sec. 15 of the Rent Act. They, therefore, maintain that the petition was incompetent as the Rent Controller had no jurisdiction in this case to fix a standard rent and, therefore, the decision of the Rent Controller is without jurisdiction and ought to be set aside. Their further objection was that this case does not fall within the ruling in the case of *Kundamul v. Dyer* (1) referred to above.

We find that the High Court in its judgment on the Original Side in the suit in ejectment found that the tenancy had

terminated on account of the breach of conditions in the lease on the 15th August 1923. It is contended on behalf of the Opposite Party that there was some sort of statutory tenancy under the provisions of sec. 11 of the Rent Act. But that section provides only for the continuance of the tenancy if the tenant performs the conditions of the tenancy and in such a case there could not have been a decree in ejectment. As it has now been found in the suit that the Plaintiffs had legally terminated the tenancy on the 15th August 1923 it cannot be said that the Opposite Party continued to remain on the land as tenants after that date. The question is not affected in the least by the fact that the decree of the High Court was passed after the order of the Rent Controller fixing a standard rent, because the decree does not terminate the tenancy. The judgment of the Court only shows that the Plaintiffs were justified in terminating the tenancy on the 15th of August 1923. That being so, the Opposite Party were not entitled under sec. 15 of the Rent Act to make the application for fixing the standard rent when their possession of the premises was that of mere trespassers. This question has been decided by us recently in *Civil Revision Case No. 1202 of 1924**. There on a petition for fixing a standard rent by a person whose tenancy had determined the decision of the Rent Controller was held to be without jurisdiction.

It has been contended before us by the Opposite Party that the petition of the landlords before the President of the Tribunal being incompetent this Court has no jurisdiction to entertain the application for revision. But the jurisdiction

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of this Court is not conferred by the Rent Act. This Court exercises its jurisdiction under sec. 115 of the Civil Procedure Code and sec. 107 of the Government of India Act, and there cannot be any doubt that this Court has the power to revise an order passed by a subordinate tribunal without jurisdiction in the exercise of its revisional powers. That being so, the order of the Rent Controller must be set aside.

In this view, it is not necessary for us to say whether this case falls within the ruling of *Kundamul v. Dyer* (1).

The Petitioners are entitled to their costs of this Rule. We assess the hearing-fee at five gold mohurs.

GREAVES, J.—I agree.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 6 OF 1925.

NEWBOULD, J.	HARI MATI DAS,
B. B. GHOSE, J.	1st party,
1925,	v.
17, March.	HARI DAS DAS,
	2nd party.

Criminal Procedure Code (Act V of 1898), sec. 147, cl. (2), as amended by Act XVIII of 1923—Order directing the doing of an act, if legal.

The change in the wording of sec. 147 was made with a view to make it clear that the Magistrate has only the power 'to issue a prohibitory order restraining any person from doing any act interfering with the right of another when the Magistrate finds that it exists, but the Magistrate has no jurisdiction to make an order in the nature of a mandatory injunction directing a party to perform a certain act.

This was a Reference under sec. 438, Cr. P. C., from the District Magistrate of Howrah (Mr. S. C. Mukherjee), dated

(1) 20 G. W. N. 281 (1924).

the 7th January 1925, recommending that so much of the order passed by the Deputy Magistrate of Howrah (Moulvie A. F. M. Mohsin Ali), dated the 12th December 1924, as directed, under sec. 147 (2), Cr. P. C., the second party to demolish the new wall within a period of one month from the date of the order, be set aside for the reasons set forth in the Reference.

The LETTER OF REFERENCE was as follows :—

" This is a case under sec. 147, Cr. P. C. A petition was filed by Hari Mati Dasi, 1st party, alleging that the 2nd party Hari Dasi Dasi had erected a wall blocking the westernmost window on the northern side of the Petitioner's house, thereby shutting out light and ventilation. On receipt of the police report the Town Magistrate, before whom the petition had been filed, took action under sec. 147, Cr. P. C., and directed both parties to appear and put in their written statements. Subsequently the case was made over to F. M. Mohsin Ali, 1st class Magistrate, for disposal. After taking evidence the trying Magistrate decided the case against 2nd party and directed her to demolish the wall within a month of the date of order and not to put up another wall blocking the windows, till adjudgment by a competent Court as to her right to do so.

The grounds upon which the order should be reversed—

1. This portion of the order does not appear to come within the terms of sub-sec. (2) of sec. 147, Cr. P. C., and should therefore be set aside. It is doubtful how far, under the terms of sub-sec. (2), the Magistrate could order the demolition of a wall which had already been put up. Several other grounds had been put forward in the application under sec. 435,

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Cr. P. C., before me but it is unnecessary to go into them."

Babu Panchanan Chowdhury for the 1st Party.

Mr. Narendra Kumar Bose, Babus Probodh Chandra Chatterjee and Sudhanu Sekhar Mukerjee for the 2nd Party.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference under sec. 438 of the Criminal Procedure Code, by the District Magistrate of Howrah, recommending that an order passed by the Deputy Magistrate under sec. 147 (2) of the Code be set aside.

The facts are that the first party complained that the second party had raised a wall on her own land blocking the windows in the house of the first party and thereby shut out light and air from the western room in that house. The Deputy Magistrate found that the first party was enjoying the right of access to light and air through the windows in question for the last two years, and as the putting up of the wall by the second party was admitted he held that it was not necessary for him to discuss the evidence in the case. The only point that he considered to be important was whether there was likelihood of a breach of the peace and he held under the circumstances, although there was no direct evidence in support of his finding, that there was likelihood of a breach of the peace. In conclusion he made an order to this effect:—"I therefore direct that the second party Hari Dasi Dasi do demolish the new wall within the period of one month from this date and that she shall not put up another wall blocking the windows in the north wall of Hari Mati's house till she has been adjudged by a competent Court to have the right to do

so." The learned Magistrate does not find that the first party had acquired a right of easement under the law to light and air over the land of the second party through the windows in dispute.

The question, however, is whether having regard to the provisions of sec. 147 (2), Cr. P. C., the Magistrate had jurisdiction to order the second party to demolish the wall which she has raised on her own land. The learned vakil for the first party contends that in view of certain rulings of this Court the Magistrate had such jurisdiction, and it is sufficient for us to refer only to the first of the cases cited, *Pasupati Nath Bose v. Nanda Lal Bose* (1), in support of his contention. In that case it was held that an order directing that an obstruction to the right of taking water by one of the parties by the erection of a *bandh* should be removed was within the competency of the Magistrate having regard to the words in sec. 147 of the Code of 1898, that the Magistrate could "direct that such things shall not be done." There is some divergence of judicial opinion on the question to which it is unnecessary to refer, as sec. 147 has been amended by Act XVIII of 1923, and the language has been altered. We have to construe the section as it now stands. Sub-sec. (2) of sec. 147 runs thus:—"If it appears to such Magistrate that such right exists he may make an order prohibiting any interference with the exercise of such right." It appears to us that these words do not give the Magistrate any power of directing one of the parties to do a positive act by way of mandatory injunction as has been done in this case by directing the second party to demolish the wall that has been built by her. It seems that the

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power given to a Magistrate under sub-sec. (2) of sec. 147 is analogous to the power of a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but that this sub-section does not authorise the Magistrate to make an order in the nature of a mandatory injunction directing a party to perform a certain act. The order of the Magistrate under that section may be declared to be erroneous by a Civil Court. Sub-sec. (4) of sec. 147, Cr. P. C., runs thus:—"An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction." If we are to hold that the Magistrate has the jurisdiction to pass an order by way of mandatory injunction the party against whom such an order is made would be driven to the Civil Court for establishing the right that he is not bound to perform the act directed by the Magistrate. In the present case if the order of the Magistrate were to stand the second party would have to bring a suit for a declaration that she had the right to re-build the wall after demolishing it in obedience to the order of the Magistrate, which would be a suit of a somewhat novel character in which even if successful the Plaintiff can get no relief for the loss caused by the demolition. A Civil Court grants a mandatory injunction with great care and caution and we think that it was never intended that a Magistrate should exercise the power of making such an order by a summary procedure. We may also refer in this connection to Form No. 24 in the 5th Schedule of the Code which gives a form of the order under sec. 147, Cr. P. C., which merely contains a direction that the person against whom the order is made shall not do certain things. We are therefore of opinion that this change in the wording

of sec. 147 was made with a view to make it clear that the Magistrate has only the power to issue a prohibitory order restraining any person from doing any act interfering with the right of another when the Magistrate finds that it exists and we hold that the Magistrate has no jurisdiction to direct the second party to demolish the wall.

On these grounds we accept the Reference and direct that the order passed by the Deputy Magistrate, dated the 12th December 1924, be set aside.

S. C. M.

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R&V. No. 357 OF 1925.

SANDELLSON, C. J.	MOHAMED KESHAB,
PEARSON, J.	Petitioner,
1925,	v.
22, July.	THE KING-EMPEROR,
	Opposite Party.

Opium Act (I of 1878), sec. 11—Confiscation of conveyance used in the illegal removal of opium—Opportunity to owner to show cause, when should be given.

Sec. 11 of the Opium Act in enacting that the conveyance in which opium liable to confiscation shall be found shall be liable to confiscation leaves it to the discretion of the tribunal which is trying the case to decide whether having regard to the facts of the particular case the conveyance used in carrying the opium should be confiscated and in cases where there is no improper conduct imputed to the owner and where during the course of the case nothing is proved to show improper conduct on the part of the owner it would be advisable for the Magistrate who is trying the case to give the owner an opportunity of being heard before he comes to the conclusion that the conveyance should be confiscated.

This was a Rule granted against an order of confiscation of a boat under sec.

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11 of Act I of 1878 (Opium Act) made by the Chief Presidency Magistrate of Calcutta, dated the 27th March 1925.

The facts of the case will appear from the judgment.

Babus Satindranath Mukerjee and *Saroj Kumar Dutt* for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a Rule granted by my learned brother Mr. Justice Panton and me, calling upon the District Magistrate to show cause why the order complained of should not be set aside, altered or modified and the boat restored to the Petitioner on grounds III and IV.

Ground III was : "That the liability to confiscation of a conveyance arises only when the owner of such conveyance uses the same for transportation and there being no evidence to that effect in this case the order is bad and fit to be set aside."

Ground IV was : "That the said order which was passed without giving an opportunity to the Petitioner who is the owner of the *dinghee* to show cause is improper and without jurisdiction."

Hanumia Majhee, who was recorded as the Majhee of the boat, was not arrested, but three of the crew were arrested and they were tried before the learned Chief Presidency Magistrate and convicted under sec. 9 of Act I of 1878. At the same time the learned Presidency Magistrate made an order confiscating the boat and the opium under the provisions of sec. 11 of the above-mentioned Act.

The material part of sec. 11 is as follows : "In any case in which an offence under sec. 9 has been committed," the opium and other matters "shall be liable

to confiscation. The vessels, packages and coverings in which any opium liable to confiscation under this section is found, and the other contents (if any) of the vessel or package in which such opium may be concealed, and the animals and conveyances used in carrying it, shall likewise be liable to confiscation."

It is to be noticed that the Act does not say that the conveyance used in carrying the opium *shall be confiscated*, but the Act provides that the conveyance "*shall likewise be liable to confiscation.*" In my judgment that leaves it to the discretion of the tribunal which is trying the case to decide whether, having regard to the facts of the particular case, the conveyance used in carrying the opium should be confiscated.

The Petitioner in this case had no opportunity of being heard upon the question whether the boat should be confiscated.

The learned Magistrate in his explanation upon this part of the case said, "There is nothing in the section requiring that the owner should be given an opportunity to show cause. If it was intended that this should be done, there was nothing to prevent it being explicitly laid down in the section."

I am of opinion that in cases like this where there is no improper conduct imputed to the owner and where during the course of the case nothing is proved to show improper conduct on the part of the owner it would be advisable for the Magistrate who is trying the case to give the owner an opportunity of being heard before he comes to the conclusion whether the conveyance should be confiscated.

I am not prepared to make the Rule absolute upon ground III, but I am of

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opinion that the Rule should be made absolute on the ground that, having regard to the facts of this case, the owner should have had an opportunity of being heard before the order for confiscation was made.

In my judgment, therefore, the Rule should be made absolute: and, the boat, or the sale proceeds, if the boat has been sold, and if the money realized by such sale is still in the hands of the authorities, should be handed to the Petitioner, the owner of the boat.

PEARSON, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEALS FROM THE CHIEF COURT OF LOWER BURMA.]

LORD SUMNER.

LORD PHILLIMORE.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1924,

Heard, 4, 6 and

7, November.

Judgment,

5, December.

BAIJNATH SINGH,
Appellant,

v.

HAJEE VALLY
MAHOMED HAJEE
ABBA, Respondent.

Indian Evidence Act (1 of 1872), preamble, sec. 92—Shares, transaction in—Bought and sold notes passed—Transaction, whether sale or mortgage—Surrounding circumstances, references to, to prove ostensible sale a mortgage— Chattel mortgage—Redemption after default, if permissible.

Sec. 92 of the Evidence Act merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances.

BALKISHAN DAS v. IEGGE (1) and sec. 92 of the Evidence Act held not applicable to the present case in which in view

(1) L. R. 27 I. A. 88; s. c. I. L. R. 22 All. 149; 4 O. W. N. 153 (1899).

of the surrounding circumstances certain bought and sold notes passed in respect of certain shares were held to be mortgages and not sales out and out of the shares.

These were consolidated appeals (Nos. 21, 31 and 32 of 1923) from two decrees of the Chief Court of Lower Burma, dated the 23rd May 1919, varying two decrees of that Court in its original jurisdiction, dated respectively the 28th February 1917 and the 15th March 1917.

The suits were instituted by Baijnath Singh for the redemption of shares in the Nath Singh Oil Co. on the footing that certain transactions entered into between the Plaintiff and the Defendant, Hajee Mahomed Jamal, were mortgages.

Hajee Abba was an assignee from that Defendant and was substituted for Jamal during the pendency of the litigation. In suit No. 60 of 1916 Hajee Abba was the original transferee and Defendant.

The Defendant contended that the transactions were, as they purported to be, absolute sales to the original Defendant followed by contracts for the resale of the shares to the Plaintiff; that time was of the essence of the contract and that the right to repurchase had been extinguished.

Both Courts in Burma decided that the shares were redeemable and that time was not of the essence of the contract.

The facts and the nature of the various transactions are fully set out in the judgment of the Judicial Committee.

Mr. Horace Douglas for the Appellant Baijnath Singh.

Messrs. Stuart Bevan, K. C. and W. A. Jolly for the Respondent Mahomed Abba in Appeals Nos. 31 and 32 of 1923.

Mr. E. B. Raikes for the Respondent Mahomed Abba in Appeal No. 21 of 1923.

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Their LORDSHIPS' JUDGMENT was delivered by

SIR LAWRENCE JENKINS.—These are consolidated appeals from two decrees of the Chief Court of Lower Burma, dated the 23rd of May 1919, varying two decrees of that Court in its original jurisdiction, one dated the 28th of February 1917, in suit No. 62 of 1916, and the other dated the 15th of March 1917, in suit No. 60 of 1916.

Both suits were brought by Baijnath Singh for the redemption of shares alleged to have been mortgaged by him.

Suit No. 60 of 1916 is against Hajee Vally Mahomed Hajee Abba. Suit No. 62 of 1916 was originally against Hajee Mahomed Jamal, but the plaint was amended by adding the Defendant Abdul Kareem Abdul Shakoor Jamal. Later, during the pendency of the suit, Hajee Vally Mahomed Hajee Abba was substituted as Defendant in their place, and he is now the sole Defendant in both suits.

The Plaintiff's right to redeem is denied on the ground that the several transactions on which the Plaintiff relies were not mortgages, but sales with a right of repurchase that has expired.

The trial Judge upheld the Plaintiff's contention in both suits. On appeal, the Chief Judge decided that the transactions were mortgages. Ormond, J., held that they were sales with contracts for repurchase, but that time was not of the essence of the contracts. In the result a decree was passed by the Appeal Court in each suit that on payment by the Plaintiff of the sum found due the shares claimed should be transferred to the Plaintiff.

Of the disputed transactions one (which will be called the Abba transaction) is the subject-matter of suit No. 60 of 1916, the others (which will be called the Jamal

transactions) are the subject-matter of suit No. 62 of 1916.

They have been conveniently tabulated in the judgment of the Chief Judge in the following form :—

No. of shares transferred.	To—	On—	Amount paid by transferee.	Series.
80,000	Abba	16th January 1912 ..	Rs. 60,000	J series of exhibits.
70,000	Jamal	16th November 1912 ..	180,000	A do.
10,000	do.	10th December 1913 ..	20,000	B do.
17,000	do.	31st January 1918 ..	42,500	C do.
80,000	do.	18th March 1918 ..	75,000	D do.
8,520	do.	6th January 1914 ..	21,000	E do.

The first transaction, it will be seen, was in January 1912.

At that time, Baijnath owned 181,020 fully paid shares of Rs. 10 each in the Nath Singh Oil Company, Ltd. The certificates of these shares had been lodged with the Bank of Bengal as security for a cash credit account, and in November 1911, the shares had been transferred, still by way of security, into the names of two nominees of the Bank. In January 1912, the sum due from Baijnath to the Bank was two lacs and ten thousand rupees, and the Bank was pressing for reduction of this debt.

The case alleged in the plaint is that Baijnath approached Abba for a loan and Abba offered to lend and advance to Baijnath for payment to the Bank a sum of Rs. 60,000 on the security of 30,000 of the Oil Company's shares, with interest at the rate of 75 per cent. per annum up to 17th May 1912. It is further alleged that Baijnath agreed to these terms; that Abba at Baijnath's request paid a sum of Rs. 60,000 to the Bank of Bengal in part payment of Baijnath's indebtedness to the Bank; and that as security for the loan the Bank, on the 17th January 1912, handed over the certificates for the shares to Abba and executed a transfer of them in his favour. In the 5th paragraph of

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the plaint it is said that prior to the transfer Abba represented to Baijnath that being a Mohammedan it was contrary to the precepts of his religion to lend money at interest, and that as he was anxious it should not be known that he was charging interest at the rate of 75 per cent. per annum, Baijnath and Abba should execute bought and sold notes by which it would be made to appear that Abba had sold and Baijnath had bought 30,000 fully paid up shares for Rs. 75,000, delivery on or before the 17th of May 1912. Though Abba does not admit the correctness of this version, it is not disputed that there was an arrangement between him and Baijnath which resulted in the first transaction of January 1912. In performance of it the sum of Rs. 60,000 found by Abba was paid to the Bank on Baijnath's account; 30,000 of the Oil Company's shares held by the Bank's nominees as security for Baijnath's cash credit were transferred to Abba, who knew that the shares were mortgaged to the Bank; and the bought and sold notes were executed.

These notes purported to be a sale by Abba and a purchase by Baijnath of the 30,000 shares at the rate of Rs. 2/8 cum all rights and dividends, delivery on or before the 17th of May 1912, at buyer's option.

The rate thus stipulated came to Rs. 75,000, made up of the sum originally paid and interest thereon at 75 per cent.

On the 17th of May, Baijnath was unable to pay this sum and so a renewal was arranged at the same rate of interest, and bought and sold notes were executed for the sum of Rs. 95,625 for delivery on the 31st December 1912.

On the 14th of January 1913, a further sum of Rs. 4,375 was paid by Abba and this, with the sum alleged to be due on the 31st of December 1912, amounted to

one lac. The rate of interest was reduced to 30 per cent. and bought and sold notes were executed providing for the repurchase of the 30,000 shares on the 22nd of December 1913, at the price of Rs. 1,30,000, or in other words, a lac of rupees and a year's interest on it at 30 per cent. On the due date, fresh bought and sold notes were executed providing for the purchase on the 22nd December 1914, at Rs. 1,78,750, that is to say, the sum of Rs. 1,30,000 with interest to the 22nd of December 1914, at 37½ per cent. to which the rate was then enhanced. No further bought and sold notes were executed in connection with this transaction. According to Baijnath, this was in consequence of an oral agreement in November or December 1914, providing for the reduction of interest to 9 per cent. The proof of this agreement will be considered later.

In both the lower Courts it was contended by Abba that this transaction was a sale and repurchase, and that time being of the essence of the contract, Baijnath's right to repurchase had expired. The decision was against this contention and Abba appealed to His Majesty in Council. But he has withdrawn that appeal, stating that he no longer objects to the redemption of the shares. In suit No. 60, therefore, the decision that Baijnath is entitled to redeem the shares in the Abba transaction stands and cannot be controverted.

Abba maintains that this cannot affect his contention that the Jamal transactions, to which suit No. 62 relates, give Baijnath no right of redemption. The learned trial Judge, however, points out that the transaction of the 16th of January 1912, was the commencement of a series of similar transactions, that a certain course of procedure was then settled,

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and that this influenced and possibly accounted for the procedure adopted in the later transactions.

Having regard to the part Abba took in arranging the later transactions, and his pecuniary participation in two of them, their Lordships agree with this view.

The first of the Jamal transactions was on the 15th of November 1912, and in form, it follows precisely the lines of the Abba transaction of January 1912.

The number of shares transferred was 70,000, the transferee was Jamal, the amount treated as paid was Rs. 1,30,000, and the transfer was from the nominees of the Bank of Bengal by whom (to the transferee's knowledge) the shares were held as security for Baijnath's cash credit. Though Abba's name does not appear, he was interested in 27,500 of the 70,000 shares transferred.

Of this sum of Rs. 1,30,000 the amount then advanced was one lac; the balance of Rs. 30,000 represented a sum already due from Baijnath to Jamal.

Bought and sold notes were executed as in the case of the Abba transaction, the date of delivery was the 15th November 1913, the rate of interest was $37\frac{1}{2}$ per cent., and the purchase price was Rs. 1,78,750. On renewal, further bought and sold notes were executed in November 1913, the date of delivery being the 15th November 1914. The price was Rs. 2,45,781-4-0, which represented the previous amount of Rs. 1,78,750 with interest for one year at $37\frac{1}{2}$ per cent. calculated from the expiration of the previous bought and sold notes. There were no further renewals and this is attributed, as in the Abba transaction, to the agreement for reduction of interest.

It is true, as was laid down in *Balkishan*

Das v. Legge (1), that under sec. 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case the section and the ruling have no application to it.

The preamble to the Evidence Act recites that "it is expedient to consolidate, define and amend the Law of Evidence"; and sec. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. To these circumstances their Lordships will briefly advert.

At the date of their transfer the shares were held, as the transferee knew, as security for Baijnath's debt to the Bank, and it does not appear that the transfer was effected in exercise of any power of sale in the Bank. The money paid on that transfer went in reduction of the Bank's debt and there is nothing to indicate that the transferee acquired a greater right than was vested in the transferor. The amount paid by the transferee was Rs. 1,30,000, a sum which, as the Chief Judge remarks, had no relation to the market price of the shares, but was made up of Rs. 1,00,000 advanced at the time at $37\frac{1}{2}$ per cent. interest and Rs. 30,000, a debt already due. The same remark applies to the purchase price in the succeeding bought and sold notes, the price being made up of that entered in the preceding notes with the addition of interest calculated in advance to the new date for delivery. Then, again, the recognition of Baijnath's claim to dividends, whether

(1) L. R. 27 I. A. 58; s. c. I. L. R. 23 All. 149; 4 C. W. N. 153 (1899).

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he paid the price in the notes or not, points, if anything, to the shares being held by the transferee as a security and not as a purchaser, as does the fact that the transfer fees were paid by Baijnath and that no brokerage was paid.

These are all indications of the true nature of the transaction; they may properly be taken into consideration and their effect is to favour Baijnath's contention.

Of the other Jamal transactions, three only are now in dispute, for the 30,000 shares transferred on the 18th March 1913 have been retransferred to Baijnath: these three need not be separately examined, for it is not suggested that they can be differentiated from the first, which has been discussed in detail.

Over and above the several matters to which attention has been drawn as indications that the Jamal transactions must, like the Abba transaction, be treated as a mortgage, in support of Baijnath's contention, great reliance is placed on two documents, Exs. F and G.

Ex. F is an instrument of the 12th June 1913, made between Baijnath of the one part and Jamal and Abba of the other part. After a recital that Baijnath had transferred several wells and well sites to the Oil Company, for which he had not been allotted shares, it was agreed that in consideration of Rs. 1,000 paid as earnest money, Baijnath would sell and transfer to Jamal and Abba every share which might be allotted to him at any time thereafter in the Oil Company for any well or well sites transferred by him at the price of one rupee per share.

The genuineness of this agreement is not disputed and it is common ground that it was entered into for the purpose of preventing Baijnath from flooding the market with new shares. The draft was handed to Baijnath. He took it to his

legal adviser, Mr. Halkar, who told Baijnath "that it would not be good to sign the agreement." The reason is obvious. By the terms of Ex. F, Baijnath bound himself to transfer shares that might be allotted to him in the Oil Company at Re. 1 each, though at the time he was buying back 30,000 shares at Rs. 4-5-4 per share. The agreement was unqualified and did not even contain a provision for repurchase, though, admittedly, the object was merely to protect the value of the shares that had been transferred in the several transactions. In accordance with his advice, Mr. Halkar prepared another draft. Baijnath deposes that it was given to Abdul Sattar, and after being kept by him for a day was returned with the assurance that it was all right and could be typed. The draft was accordingly typed by Mr. Halkar and the typed copy is Ex. G.

It is expressed to be dated the 12th June 1913, and to be between Jamal and Abba of the one part and Baijnath of the other. After recitals that Baijnath had transferred his 1,57,000 shares of the Oil Company to the names of Jamal and Abba as security for a loan on account, and that the shares were in their possession and names on which they had a lien for the amount advanced, and that Baijnath was to get a further allotment of shares in the Company which were to be sold by him to Jamal and Abba, in the witnessing part it is declared that Jamal and Abba had a mere lien on the shares and were not the owners of the shares, and that they should retransfer the shares to the name of Baijnath on his repaying the loans.

On the document are what purport to be the signatures of Jamal and Abba as executants and of A. H. N. Jamal, otherwise known as Abdul Sattar, as an attesting

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witness, and their close resemblance to the genuine signatures of these three persons is not contested. Baijnath swears to the execution of the document, but Jamal and Abba declare it is a forgery. Abdul Sattar, whose name appears as the attesting witness, is a son of Jamal, and though he came with his father to Court, he did not go into the witness box to deny his signature.

The trial Judge held the signatures of Jamal and Abba and of the attesting witness to be genuine.

The learned Judges on appeal came to a different conclusion. The Chief Judge was not satisfied that Jamal and Abba signed Ex. G and thought it probable that the document was concocted not long before the filing of the suit in 1916. Ormond, J., thought it was prepared after Jamal had taken up the position that the shares could no longer be redeemed or repurchased because the due dates had expired.

In their Lordships' opinion the view of the Appellate Court as to the time at which the document was prepared is disproved by the evidence of Mr. Halkar. He deposes that he prepared the document in June 1913, in the circumstances already stated, and he is able to identify it by a correction in it initialled by him at the time. In suit No. 60, he gave evidence to the effect that he actually had a conversation with Abba about this agreement in June 1915. Their Lordships are satisfied that Ex. G was prepared in June 1913, and that the Appellate Court's view as to the date and purpose of its preparation is erroneous.

The Chief Judge, in arriving at his conclusion, adverse to the execution of Ex. G, remarks on the fact that while in Ex. F the signature of Abba has the word Mohamed in full, in Ex. G it has

only the first syllable. But it has been shown in the argument that on other documents Abba has written his signature as in Ex. G, so that the Chief Judge's comment loses its force.

The learned trial Judge examined the evidence given before him with critical care. After commenting on the manner in which it was given and weighing the probabilities, he came to the conclusion that the denial before him of the signatures was not true, with the result, as he expresses it, that he was entirely satisfied that Jamal and Abba did execute G. The judgments in the Appellate Court disclose no sufficient ground for disturbing the first Court's appreciation of the evidence, and the finding that Ex. G was duly executed will therefore stand.

Apart from Ex. G their Lordships would be prepared to hold that the transactions in suit are mortgages; if this document be accepted this conclusion is placed beyond controversy.

But then it has been contended that even if the transactions were mortgages the English rule of law that a mortgage is redeemable after default has no application to mortgages of chattels or choses in action by Hindus and Mohammedans and that consequently the right of redemption was lost. Even if this were a correct statement of the law in Burma (a point on which their Lordships express no opinion), the lower Courts have rightly held that in the circumstances of this case the period for redemption cannot be held to have expired.

The only other point is as to the rate and period of interest to be allowed. Para. 26 of the plaint in suit No. 62 of 1916 alleges that about the end of 1914 Baijnath was desirous of paying off the amount of his indebtedness by borrowing from other persons; that the Defendant

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requested Baijnath not to make any definite arrangement to raise loans as the Company had commenced to pay large dividends, and that the amount due would shortly be repaid out of the dividends; but the Defendant undertook to charge Baijnath after the periods agreed to between the parties interest at 9 per cent. per annum for further interest and agreed to credit all interest received by him towards the amount due; and that Baijnath agreed to the Defendants' proposal and consented to allow the amount due to be repaid at Baijnath's convenience.

The plaint in suit No. 60 of 1916 contained allegations to the same effect. In both suits there was an issue as to whether there was any such agreement, and, if so, what was its effect. The first Court decided this issue in Baijnath's favour: the Appeal Court decided against him.

The Judge of the trial Court on the evidence found that Baijnath could have raised the money at 9 per cent. per annum, and he gives an account of how this part of the case was treated before him, which leaves no doubt as to the correctness of his finding.

Accepting it as their Lordships do, it is inconceivable that Baijnath would have continued his liability for the extortionate interest payable under the original transactions, and the finding of the first Court must prevail.

Baijnath has objected that as the delay in payment off of the mortgages was due to the wrongful repudiation of his right to redeem, Abba is not entitled to subsequent interest. The answer is that this objection is opposed to the decision of the first Court, and from that decree no appeal was preferred by Baijnath. Therefore, the objection cannot now be entertained.

The result, then, is that Abba has failed

in his contention that the transactions in suit No. 62 are not mortgages, and also so far as interest in excess of 9 per cent. per annum was awarded from the date of the agreement for reduction of interest. Payments have been made into Court by Baijnath under the decrees of the lower Court, but it does not appear clearly how the money has been dealt with or whether any further account or payment by way of restitution or otherwise is necessary. These are matters for determination (if necessary) by the Court in Burma.

Their Lordships are of opinion that the decrees of the Appellate Court must be set aside and that the appeals from the Court of first instance ought to have been dismissed with costs by the Appellate Court, and they will humbly advise His Majesty accordingly. Abba will pay the costs of these consolidated appeals.

Solicitor: *Mr. A. M. Bramall* for the Appellant Baijnath Singh.

Solicitors: *Messrs. Henry Hilbery & Son* for the Respondent Abba in Appeals Nos. 31 and 32 of 1923.

Solicitors: *Messrs. Stoneham & Sons* for the Respondent Abba in Appeal No. 21 of 1923.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ATKINEON.

LORD SHAW.

LORD DARLING.

1921,

Heard, 7 and

8, May.

Judgment, 15, June.

LIEUT. JACOB,
Appellant,

v.

DAVID ALEXANDER
WILLS, Respondent.

Breach of promise of marriage—Onus to prove contract discharged—Promise to marry lady of German extraction—Marriage deferred till termination of war—Silence till then, if sufficient to discharge contract.

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In a suit for damages for breach of promise of marriage, if the contract of marriage is proved, it is for the defence to establish that the contract was rescinded and dissolved by agreement of both the parties to the contract. In certain circumstances silence, absence, conduct, expressions in letters may be amply sufficient to lead a Court of Law to such a conclusion, but silence for years, in the extraordinary circumstances of the present case, was held not to be sufficient.

This was an appeal (No. 120 of 1924) from a decree, dated the 5th January 1923, of the High Court in Calcutta in its Appellate Jurisdiction, which reversed a decree, dated the 11th August 1922, of the said Court in its Ordinary Original Civil Jurisdiction.

The suit out of which the appeal arose was instituted by the Appellant claiming damages for breach of promise of marriage.

The Respondent admitted that he promised to marry the Appellant and the question for determination on the appeal was whether at the date of the alleged breach the Appellant had exonerated or discharged the Respondent from the performance of his promise.

The Appellant was of German extraction but came to England at the age of 17 and shortly afterwards in 1892, she was married to a European British subject named Jacob, with whom she lived as his wife until her husband's death in 1918.

In the year 1915 the Appellant was in Simla and in June 1915 the Respondent proposed marriage to her and was accepted, and it was arranged that the marriage should take place at Simla on the 9th October.

In July 1915 the Appellant was notified by the Government of India that they

intended to repatriate her to Germany, and in the following September she was interned at Belgaum. Correspondence between the parties was continued up to November 1915 when the Respondent wrote to the Appellant in the following terms :—

“ It was unfortunate that your first letter was addressed to the office. I had previously announced my engagement to you to my office men and they were acquainted with your handwriting from the letters you sent me from Simla. I had not told them that you were interned and they promptly commented on my receiving a letter from Belgaum and they enquired if the letter was from you and if you were interned. When I am in the office all letters received come directly to me which is the reason they were not aware of your other letters from Belgaum. In reply to my office men I had to tell them the letter was not from you and that you were not interned. I am sorry that I had to tell this untruth but the feeling of late and it is becoming worse from day to day against anyone even distantly connected with Germany is very very bitter more specially so since the dastardly murder of Miss Cavell. Had I visited you at Belgaum, it would have confirmed the present suspicion that you are interned and I am much afraid that this would have come back on me in some manner. I had therefore to think long before definitely deciding to visit you and I think you will now understand my reasons for not doing so.

“ I have now come to the position that I really do not know what to do. To continue corresponding with you will confirm that you are interned. Perhaps you are not acquainted with the manner your envelopes reach me. I send one herewith from which you will see the publicity

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given as to the source of the letter. In writing you so fully I know that you will understand the awkward position in which I am placed. I have no desire to hurt you dearest but I feel that you would prefer I am straightforward with you by putting all the facts before you rather than cease corresponding altogether and make no explanations.

"In view of the above I have been thinking daily, nay hourly, as to what is to be done, but I will first await your reply before deciding definitely. It is my wish to keep my promise to you but it seems to me that in doing so I will have a hard fight with the rest of mankind."

At Christmas of that year the Appellant received the following telegram in answer to one that she had sent to the Respondent:—

"To Mrs. Jacob,
Civil Camp,
Belgium.

Many thanks for kindly Greetings which I heartily reciprocate. Trust New Year will bring both you and my heart's desire. Wrote you early November. Why don't you reply this suspense is awful?

Wills."

No further communication between the parties was proved to have taken place until November 1920 after the Appellant was released from internment and had been compensated by Government for being illegally detained.

The Respondent had then been married in England and was unable to perform his promise.

The Appellant contended that the parties had mutually agreed to postpone their marriage until the war between Germany and England was at an end.

The Respondent submitted that he was justified in considering that the en-

gagement was at an end from the long continued silence which subsisted between X'mas 1915 and November 1920.

In August 1921 the Appellant instituted her suit which was heard and decided in August 1922 by Buckland, J., who awarded the Appellant Rs. 35,000 damages.

An appeal was preferred and was decided by Sanderson, C. J., and Richardson, J., in favour of the Respondent. They were of opinion that the correspondence showed that there was no definite agreement to marry after the war and that the conduct of the Appellant showed that she herself considered that the engagement had been broken off.

From the decree of the appeal Court the Appellant obtained special leave to appeal *in forma pauperis* to the Privy Council.

Messrs. L. DeGruyther, K. C. and E. B. Raikes for the Appellant.

Messrs. Barrington Ward, K. C. and Nissim (with them Mr. S. Ilyam) for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DARLING.—This appeal arises out of an action to recover damages for breach of a promise to marry. Mr. Justice Buckland, the Judge at the trial, decided in favour of Plaintiff and awarded damages against Defendant. This decision was reversed on appeal by the High Court of Calcutta, on the ground that the parties to the contract had expressly, or by their conduct, rescinded the contract and had released each other from its performance.

The Appellant, a German by birth, had in 1892 become a British subject by reason of her marriage with Mr. Jacob, a barrister. He died in England in 1913.

The Respondent and Mrs. Jacob, the

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widow, in May of 1915 engaged to marry one another, and it was contemplated that the wedding should take place in October 1915.

Difficulties arose owing to the Indian Government insisting on treating Mrs. Jacob as a suspected person and an alien. It was proposed to send her to Germany, but in September 1915, she was interned at Belgaum; and there she was detained until the end of March 1920.

In the course of their engagement many letters passed between Mrs. Jacob and Mr. Wills. The last letter received by her from him is dated the 3rd November 1915, but he sent her a telegram at Christmas of that year.

Mrs. Jacob gave evidence to the effect that she believed she had telegraphed in reply, explaining that she did not write for reasons already known to Mr. Wills; that is, lest she should prejudice him in his business and social relations.

Respondent did not produce any letters or telegrams received from Appellant, but said that he had destroyed them all. On the 21st August 1920, whilst ignorant that Appellant had been released from internment, he had married in England, thus—were his promise to marry Mrs. Jacob still binding—putting it out of his power to perform it.

Although useful, the oral testimony in this case is of less importance than the correspondence which passed between the parties.

Appellant maintains that, when it appeared that Respondent's marriage to her might prejudicially affect his business in India, they agreed to postpone it until the war between Germany and England was at an end. This contention is supported by the letter of Respondent to Appellant, dated the 31st July 1915, especially by this passage in it :—

"If it is a fact that the officials are prohibited from associating with you, I am afraid the only alternative left to us is to get married after the war. I am agreeable to wait all my life for you. Oh, but it will be so hard that I do not like to look upon the coming years. Will my darling wait for me also? I have not lost hope of marrying you this October, as I still think you have not correctly understood what took place at this interview."

She had misunderstood nothing of that matter, as her subsequent treatment proves, and in her evidence (p. 8) she states that she agreed to wait "all Eternity." This answer, although hyperbolic, as is usual in the language of lovers, amounts to an assent to Respondent's proposal. In Appellant's letter to Respondent, dated the 20th December 1920, she states the position thus :—

"I have received none of the letters you say you have written me later on. We had agreed to wait with being married until the war was over. You said you thought it would last three or four years in one of your letters, and I believed that then impossible, but you were right. It lasted just that time."

It seems likely that she here alludes to this passage in his letter of the 28th July 1915 :—

"I have already told you, darling, that I think the war has only just begun, and it will be a few years before it ends. Well, until it ends I must avoid all temptations so as not to betray your trust. Being a man, I have set myself a hard task, but I am sure that my darling's prayers added to mine will assist me. Is my meaning quite clear to you, dear heart?"

The meaning of this can hardly be other than that he desires and hopes to lead a life of chastity pending the interval between the date of that letter and the end of the war—when he and Mrs. Jacob will marry.

It further appears to have been agreed between the parties that the marriage should be postponed so long as Mrs. Jacob was subject to the imputation of being a German subject. The evidence of Mr. Wills as to the period to which the marriage might be relegated is not definite. But he was asked (Question 123) whether

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he would have felt bound by his engagement had Mrs. Jacob, whilst still a prisoner of war, written asking him to come to Belgaum and to marry her. His answer was :—

"That would be contrary to her own wishes—absolutely contrary to her own wishes; she was very magnanimous, and she admitted that so long as she had this slur on her it would do irreparable harm to my business to marry her."

Question: "And you agreed?" Answer: "Yes."

Further questions and answers satisfy their Lordships that Respondent regarded the contract as binding upon him until Appellant should be "free of the slur": which he agrees was not until her release in March 1920.

Their Lordships are of opinion that Mr. Wills and Mrs. Jacob had agreed to marry one another when the war was over, provided she was then "free of the slur," so likely to be injurious to him in his business, of her being suspected by the Indian Government of being a German subject.

This suspicion was not dispelled until March 1920, at the earliest, when Mrs. Jacob was released from internment; and perhaps was not fully removed until November of that year, when the Government admitted that she had been wronged, and paid her a considerable sum as compensation.

Since the Respondent had in August 1920, by marriage to another, rendered the performance of his contract with Appellant impossible, it is the opinion of their Lordships that she is entitled to succeed in this appeal, unless it be proved that the mutual promises of Mr. Wills and Mrs. Jacob had been withdrawn by each of them, and the contract to marry rescinded by consent. The burden of proving this rests upon the Respondent.

He contends that the silence of Appellant, lasting during practically the whole

term of her seclusion, from December 1915, to the 24th November 1920, justified him in thinking that she had released him from his promise, and much stress was laid by his Counsel upon this telegram of the 28th December 1915 :—

"To Mrs. Jacob, Civil Camp, Belgaum. Many thanks for kindly greetings, which I heartily reciprocate. Trust new year will bring both you and my heart's desire. Wrote you early November. Why don't you reply? This suspense is awful.—Wills."

From this it is evident that Respondent did not anticipate an early arrival of the time when he and Mrs. Jacob might marry. He explains in his evidence (see Questions 255-265) that the words "this suspense is awful" refer to the illness of Mrs. Jacob, of which he had become aware at the end of October 1915.

After this there is no correspondence between the parties until Mrs. Jacob, being then free, wrote her letter of the 24th November 1920. The explanation of Mrs. Jacob is given in her evidence at p. 21, and is to the effect that, although surprised and grieved by the silence of Respondent, she had "come to the conclusion that Wills was quite content with the agreement made between us. . . . He had accepted and I had agreed, and I abided by that."

On the 24th November 1920, Appellant wrote to Respondent a letter containing these words :—

"My dear Alic, I am free to do as I please again at last. You must have wondered, the war having finished so long ago, why you have not heard from me before. The reason is I had to wait all this time until my case against the Government was settled. It was only settled last week. I have been declared to be a British subject, and have received damages from the Government for their attempt to repatriate me. . . . I nearly sent you a wire, but I thought it might be too great a shock. And now Alic, what do you wish me to do with regard to the rings. I am still in a state of bewilderment, therefore I can't write any more. . . ."

To this letter Respondent, on the 14th

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December 1920, sent his reply, in which occurs this passage :—

" Then in 1916 I wrote you either two or three letters—I cannot quite remember the number. To all of these letters I had no reply, and as is usual in cases of this sort I assumed the worst had happened to you, more especially as your last letter conveyed the news of your serious state of health. On the signing of the Armistice in 1918, and the whole of 1919 passing and still no news from you, I was more than ever convinced my assumption was correct."

He then announces that he had married in August of 1920.

To this letter Appellant replied on the 20th December 1920, and used the expressions already quoted, and she added :—

" But why, oh, Alic, should you have thought I was dead when an ordinary letter to any one here in this place (Belgaum) would have given you that news about me. Why I did not get your letters I do not know. . . . It may interest you to know I had two offers of marriage during my stay here. Of course I told each of them I was engaged to you, and both accepted my answer as final."

It appears to their Lordships unnecessary to deal minutely with the arguments addressed to them by Counsel, and founded upon various expressions used in the letters between the parties; nor need they comment upon the considerations which appear in the judgments of the Court of first instance and in the Court of Appeal, considerations which led those Courts to opposite conclusions.

All that their Lordships have now to decide is whether the Respondent has proved—as it was for him to do—that the contract made between him and the Appellant was rescinded and dissolved by the agreement of them both. In certain circumstances silence, absence, conduct, expressions in letters may be amply sufficient to lead a Court of Law to such a conclusion. But here is a case whose circumstances are altogether extraordinary. The parties to this suit were entangled, and embarrassed—like so many others

during the war—by difficulties not of their making, and quite beyond their control. The situation in which the Respondent found himself seems to have been beyond his strength to endure, as he himself had come near to foreseeing.

But, when every allowance for the weakness of human nature has been liberally accorded, there remains the legal liability to perform the contract of marriage if it were subsisting. It must never be forgotten that to prove that this contract was rescinded by mutual agreement is a burden of which the Respondent must discharge himself, if he is to succeed in this appeal. It is a mere question of fact whether he has done so; and their Lordships cannot find proof of this. Therefore his obligation remains—but as he cannot, because of his marriage, fulfil it, he must make amends to Mrs. Jacob.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the decree of the High Court in appeal set aside with costs and the decree of Mr. Justice Buckland in favour of Appellant restored.

The Appellant, having been granted special leave to appeal *in forma pauperis*, will have the costs of the appeal, to be taxed upon the scale usual in such cases.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitors : *Messrs. Sanderson Lee & Co.* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 25, OF 1923.

SCHRAWARDY, J. } BRAJABALLAV GHOSE
MUKERJI, J. and anr., Defendants,
1925, Appellants,

Heard, 13 and v.

16, November. AKHOY BAGDI and ors.,
Judgment, *pro forma* Defendants,
16, November. Respondents.

Evidence Act (I of 1872), sec. 33—Requirements laid down in section—Proviso 2, scope and effect of—Suit to recover possession by party dispossessed under sec. 145, Cr. P. C.—Evidence given in the criminal proceeding by one of the Defendants as a witness for the other Defendant, if admissible under sec. 33—Admission made in the previous deposition, if may be used against co-Defendant—Sec. 18, effect of—Koblin, purporting to deal with property in suit, not completed and registered—Legitimate purpose for which such document may be admitted in evidence—Sec. 91.

The Plaintiff sued to recover possession of property from which he had been dispossessed by the Defendant by virtue of an order under sec. 145, Cr. P. C. In that proceeding one U, a co-Defendant in the present suit, was examined as a witness on behalf of the Defendant and a certified copy of his deposition was put in by the Plaintiff at the time of the argument and admitted in evidence. On behalf of the Plaintiff a kobala purporting to have been executed by the Plaintiff's vendor in Defendant's favour in respect of the property in suit valued at Rs. 99 but which was not completed and registered was also put in evidence :

Held—That notwithstanding that the value of the property which the document purported to convey was less than Rs. 100, a sale of the property if it was made by a document could only be made by a registered instrument under sec. 54 of the Transfer of Property Act, but having regard to sec. 91 of the Evidence Act, it might be used as evidence of the

nature and terms of the transaction which fell through to corroborate the Plaintiff's story that the Defendant negotiated for the purchase of the property from the vendor of the Plaintiff who had title to the property.

That a certified copy of the deposition of a witness would not come in by itself; in any case it would be necessary to adduce evidence proving the identity of the person who gave the deposition.

Evidence is admissible under sec. 33 of the Evidence Act only when the requirements of that section are fulfilled. The mere fact that a witness did not appear as a witness when cited on behalf of the Plaintiff or that he appeared as a witness on behalf of the Defendant on one occasion but was not examined, it being found that he was not kept out of the way by the Defendant, would not be a ground for admitting the deposition under sec. 33 of the Act.

The conditions laid down in sec. 33 being absent and the second proviso to that section to the effect that the adverse party in the first proceeding should have had the right and opportunity to cross-examine the witness not having been satisfied the deposition could not go in under the section.

The admission made by U in the proceeding under sec. 145, Cr. P. C., when examined as a witness therein is evidence against him as a piece of admission but as to the admissibility of the admission against the co-Defendant the words of sec. 18 of the Evidence Act were perfectly clear and inasmuch as U made the statement when he had parted with his interest in favour of his co-Defendant in the present suit, the admission made by him could not be treated as evidence of admission as against the co-Defendant.

This was an appeal preferred on the

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12th of December 1922 against the decree of Babu Nani Gopal Mukherji, Additional Subordinate Judge of Zillah Burdwan, dated the 6th September 1922, affirming the decree of Babu Gajanan Banerjee, Munsif, 1st Court at Katwa, dated the 22nd December 1921.

The facts of the case will appear from the judgment.

Mr. Bankim Chandra Mukherjee and *Babu Charu Chandra Ganguly* for the Appellants.

Babu Gopendra Nath Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—The Defendant No. 1 is the Appellant in this appeal. The appeal arises out of a suit to recover possession of a tank and some paddy land on a declaration of the Plaintiff's title thereto. The Plaintiff's case was that he had purchased the same from the Bariks who were *pro forma* Defendants in the suit and that after such purchase he was dispossessed by the principal Defendants on the strength of an order obtained by them in their favour in a proceeding under sec. 145, Criminal Procedure Code. The defence of the principal Defendants was that the property did not belong to the Bariks and neither they nor the Plaintiffs were in possession thereof. The Courts below have decreed the suit.

On behalf of the Defendants-Appellants two grounds have been urged in support of the appeal. The first ground relates to the reception in evidence of a *kobala*, dated the 21st Joistha 1326. It is contended on behalf of the Appellants that this document requires registration and that inasmuch as it was not a registered document, it was not admissible in evidence. It appears that the document

purports to have been executed by the Plaintiff's vendor in favour of the Defendant but that for some reason or other it was not completed nor was it registered. The case of the Defendant is that negotiations in connexion with this transaction fell through and therefore the document was left unregistered. There is some oral evidence on this point and the document, as far as we can make out from the proceedings, was proved in the case for the purpose of corroborating the oral evidence. The value of the property which the document purported to convey was Rs. 99; still a sale of the property, if it was made by a document, could only be made by a registered document under the provisions of sec. 54 of the Transfer of Property Act. The sale, however, never took place and the document was proved only to corroborate the Plaintiff's story that the Defendant negotiated for the purchase of the property from the Plaintiff's vendor, a fact which would suggest that the latter had title to the property. The learned Subordinate Judge states in his judgment that he agrees in the appraisal of the evidentiary value of this document as made by the learned Munsif and the learned Munsif in one part of his judgment states that the *kobala* is not at all a strong piece of evidence of the Plaintiff's vendor's title. The real use therefore that has been made of the document is not to show the Plaintiff's vendor's title but to prove the nature and the terms of the transaction which as a matter of fact was not completed but fell through. That is a legitimate use that may be made of this document. As has been laid down in the case of *Sheikh Juman v. Mohammad Nobineoaz* (1), such a document does not confer title and is merely evidentiary, but

(1) 21 C. W. N. 1140 (1917).

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having regard to sec. 91 of the Evidence Act, it may be used as evidence of the nature and terms of the transaction. This ground therefore is of no substance and must fail.

The other ground taken by the learned Advocate appearing on behalf of the Appellants is of much substance. That ground relates to the reception in evidence of a certified copy of the deposition of one Umapada who was not examined as a witness in the present suit but was examined as a witness in the criminal proceedings under sec. 145, Cr. P. C., to which I have already referred. Umapada was a *pro formâ* Defendant in the present suit. In the proceeding under sec. 145, Cr. P. C., the Defendant No. 1 (the Appellant before us) was the first party and the Plaintiff was the second party. Umapada was examined as a witness in those proceedings on behalf of the present Appellant. In the present suit, Umapada was cited as a witness by the Plaintiff but he did not appear. Subsequently as appears from a *hajira* to be found on the record, his name was put forward as being present on a particular day as a witness on behalf of the Defendant-Appellant. He was, however, not examined; and at the time of the argument a certified copy of the deposition of Umapada as given by him in the proceedings under sec. 145, Criminal Procedure Code, mentioned above, was put in on behalf of the Plaintiff and was marked as an exhibit in the case. The Appellant contends that the learned Subordinate Judge was wrong in considering this deposition as a piece of evidence in the case. The learned Judge, as appears from his judgment, has relied upon this piece of evidence a good deal and in fact the major portion of his judgment deals with the admissibility and evidentiary value of

the deposition of Umapada. He has held that this evidence is admissible under sec. 33 of the Evidence Act and that even if it be conceded that it does not come under that section then it may be used in evidence as an admission as against the present Appellant. Before dealing with those two matters I should like to observe at the outset that whatever view may be taken of them, the deposition has not been proved at all. A certified copy of the deposition of a witness would not come in by itself. In any case it will be necessary to adduce evidence proving the identity of the person who gave the deposition. That does not appear to have been proved in the present case and it was only in the course of the argument that a certified copy was put in and marked as an exhibit. Now turning to the learned Judge's reasoning that the deposition is admissible under sec. 33 of the Evidence Act, I find that the learned Judge seems to be of opinion that although it has not been proved that Umapada had been kept away by the Defendant-Appellant his evidence is admissible under that section because he actually appeared on behalf of the Defendant as a witness on one particular occasion and that therefore it should be inferred that it would be useless for the Plaintiff to have spent money in order to bring Umapada to Court as a witness. Sec. 33, however, is perfectly clear on the point. Evidence will be admissible under sec. 33 of the Evidence Act, when the witness is dead, when he cannot be found, when he is unable to give evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expense which the Court considers unreasonable. The requirements of none of these clauses mentioned in sec. 33 of the Evidence Act have been satisfied in the present case. The

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mere fact that he did not appear as a witness when cited on behalf of the Plaintiff or that he appeared as a witness on behalf of the Defendant on one occasion but was not examined when it has been distinctly found that he was not kept out of the way by the Defendant would not be a ground for admitting the deposition under sec. 33 of the Evidence Act. As regards the question of expense what the learned Subordinate Judge says with reference to it does not show that the presence of Umapada could not be obtained without an amount of expense which would be considered unreasonable by the Court. Then again there are three provisos to that section. The second proviso is to the effect "that the adverse party in the first proceeding should have the right and opportunity to cross-examine the witness." Umapada had been examined in the proceedings under sec. 145 as a witness on behalf of the Defendant who was the first party therein. The Defendant had no opportunity nor the right to cross-examine Umapada; and, in these circumstances it is impossible to hold that this proviso has been complied with in the present case. I am clearly of opinion therefore that the deposition of Umapada could not go in under the provisions of sec. 33 of the Evidence Act. The learned Subordinate Judge then says that even if sec. 33 did not apply, the deposition could be used as evidence of admission as against the present Appellants. Umapada is a co-Defendant in the present suit with Defendant No. 1 (Appellant). The admission made by him in the proceeding under sec. 145, Criminal Procedure Code, when examined as a witness therein is undoubtedly evidence as against him. In the case of *Soojan Bibi v. Achmut Ali* (2), Sir Richard Couch, C. J., dealt with this

question and observed as follows:—

"Sec. 33 does not apply to the deposition of a witness in a former suit when the witness is himself a Defendant in the subsequent suit, and the deposition is sought to be used against him, not as evidence given between the parties one of whom called him as a witness, but as a statement made by him, which would be evidence against him whether he made it as a witness or on any other occasion. It is used against him as an admission; sec. 33 has no application to such a case as the present. The sections of the Evidence Act which do apply are the sections relating to admissions." The same view has been taken in the case of *Ali Mahommed Khan v. Sheikh Moharaj Bepari* (3), where it has been laid down that such a statement can be evidence against the maker of it as a piece of admission. The question that next arises is whether when the statement may be used as an admission as against Umapada it may not also be used as against Umapada's co-Defendant, viz., the present Appellant. That question has been considered in several cases decided by this Court of which I shall refer to two. In the case of *Meajan Matubar v. Alimuddi Mian* (4), when dealing with the question of admissibility of an admission as against a co-Defendant it was laid down that when several persons are jointly interested in the subject-matter of a suit, an admission by one of them is receivable in evidence not only against himself but also against the other Defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is made by the declarant in his character of a person jointly interested with the

2 (3) 26 C. L. J. 186 (1921).

(4) I. L. R. 44 Cal. 180: s. c. 20 C. W. N. 1216 (1916).

(2) 14 B. L. R. App. 3 (1874).

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party against whom the evidence is tendered. In a later decision of this Court in the case of *Ambar Ali v. Lutfe Ali* (5), it was pointed out that in such a case it was absolutely necessary that the admission should relate to the subject-matter in dispute and that it should be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered and that the requirement of the identity in legal interest between the joint owners is of fundamental importance. It was further pointed out that to hold otherwise would be to permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admission. Indeed, it is not necessary to refer to any cases on the point because the words of sec. 18 of the Evidence Act are perfectly plain. They are these:— "If they are made during the continuance of the interest of the persons making the statements." In the present case Umapada made the statements when he had parted with the interest in favour of the lessee, the Defendant No. 1. In this view of the matter I am not prepared to accept the reason given by the learned Subordinate Judge that the statement of Umapada as contained in the aforesaid deposition can be treated as evidence of admission as against the present Appellant.

The learned vakil for the Respondents has argued that even if this evidence be held to be inadmissible we should not interfere with the decision of the learned Subordinate Judge. He has referred us to the observation which is to be found in the portion of the learned Judge's judgment which runs in these words: "I only wish to mention here that even if this

deposition be entirely thrown out of the Court, my finding would remain unchanged. Only what can be easily held on this tangible admission will have to be based on the balance of other evidence and probabilities of the case." We have considered this argument of the Respondents very carefully; but having regard to the fact that the major portion of the judgment of the learned Judge is based upon the deposition of Umapada and also to the fact that the learned Judge does not state what the balance of other evidence is nor what the probabilities of the case are and further because we find that the learned Judge in point of fact based his decision mainly, if not entirely, upon this deposition of Umapada, we are unable to hold that this is a case in which we should decline to interfere merely because at the conclusion of the judgment the learned Subordinate Judge has recorded the observation to which I have referred. I am clearly of opinion that this is a case in which we should interfere. Accordingly I set aside the decree passed by the learned Subordinate Judge and remit the appeal to his Court so that the deposition of Umapada may be excluded and a decision arrived at on the appeal on the other materials on the record and in the light of the observations made above. The costs will abide the result.

SUJRAWARDY, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 674 OF 1923.

SUHRAWARDY, J. R. M. SAJJ RAI and anr.,
 MUKERJI, J. Defendants, Appellants,
 1925, v.
 Heard, DAKSHINESWAR RAI and
 11, November. ors., Plaintiffs,
 Judgment, Respondents.
 13, November.

Limitation—Title by adverse possession for over twelve years—Usufructuary mortgagee, possession of—Usufructuary mortgagee, if can retain possession after payment of his mortgage money in full before the expiry of the period.

The suit land was mortgaged to one Rooke in 1876 then to Khelaram in 1888 by way of usufructuary mortgage to retain possession till April 1908 and then to Respondents' father in 1889 who bought it in February 1901, paid Khelaram the entire mortgage money found due to him up to April 1908 and entered into possession then. The Appellants dispossessed the Respondents in December 1917 and alleged title by purchase from the transferees of Rooke who had in 1891 bought under his own mortgage decree, to which Khelaram was no party. At the time of Rooke's purchase and thereafter the land was in Khelaram's possession. Rooke never obtained possession:

Held—That the Respondents acquired title to the disputed land by adverse possession from February 1901 till dispossessed by the Appellants in December 1917.

The usufructuary mortgage terminated in 1901 when the mortgagee Khelaram was paid off in full. Khelaram had no right to retain possession since February 1901 when the usufructuary mortgage was redeemed upon payment in full of the mortgage money; adverse possession as against Khelaram, Rooke and his transferees began in February 1901 and not from April 1908.

RAM NARAIN SAHOO v. BANDI PRASAD
 (1) distinguished.

Per MUKERJI, J.—A paper-book containing translations of the Appellants' documents of title relied upon by them was not itself secondary evidence of their contents, but if a proper case were made out for the reception of such evidence then in conjunction with the requisite oral evidence it would prove the said contents.

Correct practice in dealing with such evidence when tendered, indicated.

This was an appeal preferred on the 8th of February 1923 against the decree of Babu Bejoy Gopal Chatterjee, Subordinate Judge of Asansol in Zillah Burdwan, dated the 4th of November 1922, affirming the decree of Babu Gopal Chandra Basu, Munsif of Asansol, dated the 17th of December 1921.

The land in suit belonged to one Rakhul who mortgaged it to Rooke in 1876 then to Khelaram in 1888 by way of usufructuary mortgage under the terms whereof the mortgagee was to remain in possession till April 1908 and then to the Plaintiffs' father Chintaram in 1889 who bought it from Rakhul on 25th February 1901 in satisfaction of the debt due to himself by Rakhul under his mortgage of 1889. Chintaram paid to the usufructuary mortgagee Khelaram in February 1901 the entire amount found due to the latter till April 1908 and got possession thus. The Plaintiffs remained in possession of the suit land from February 1901 till their dispossession by the Defendants in December 1917.

On this finding both the trial and the lower Appellate Courts decreed the Plaintiffs-Respondents' suit for recovery of possession.

The point for decision in second appeal was whether the Respondents' possession

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was adverse from February 1901 or from April 1908 till their dispossession by Appellants in December 1917.

The contention of the learned Advocate for the Appellants was that the Plaintiffs-Respondents' adverse possession could not run as against Rooke or the Defendants his transferees or Khelaram so long as Khelaram's usufructuary mortgage subsisted, i.e., till after April 1908. Plaintiffs' possession was not adverse from February 1901 but from after April 1908.

Khelaram having been no party to Rooke's mortgage suit his rights of redemption under his usufructuary mortgage remained unaffected; and Plaintiffs' possession was not adverse as against him till after April 1908.

Ram Narain Sahoo v. Bandi Prasad (1) and *Bunwari Jha v. Ramji Thakur* (2).

All necessary facts appear from the judgment.

Mr. Bankim Ch. Mukherji and *Babu Charu Chandra Ganguli* for the Appellants.

Babu Jyotis Chandra Sarkar for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—In this case the Defendants are Appellants. Both the Courts below decreed the Plaintiffs' suit which was one for establishment of their title to and recovery of possession of 15 cottahs of the land in suit. The property originally belonged to one Rakhal. The Plaintiffs' case is that on the 25th February 1901 the Plaintiffs' father purchased it along with other plots from Rakhal. The *kobala* recites that the property was sold in order to pay off a mortgage executed by Rakhal in favour of the Plaintiffs' father in 1889.

It further appears that in 1888 Rakhal had mortgaged this plot to one Khelaram by way of usufructuary mortgage and put him in possession of it under which the mortgagee was to remain in possession up to 1314. The Plaintiffs' father, after having purchased the land, paid off Khelaram and entered into possession of it in 1901. The Plaintiffs allege that they were in possession all along from that date till December 1917 when they were dispossessed by the Defendants. There were proceedings started under sec. 145, Cr. P. C., which terminated in favour of the Defendants and hence this suit. The Defendants' case is that the property in suit belonged to Rakhal who in 1284 mortgaged it to one, e.g., Rooke who obtained a decree on the mortgage and purchased the property in 1891. In 1892 Rooke sold it to Dinesh from whom Ramesh, who held a *mokunari* interest in the property bought by Rooke, purchased it in 1900. Ramesh mortgaged the property to one Bhowni Ranjan Sen who obtained a decree on the mortgage and in execution of the decree the property was purchased by one Harmukh Marwari from whom the Defendants purchased it on the 28th Kartick 1313 and since then they are in possession of it. The Defendants did not produce their documents of title but stated that they were filed in a certain case in the High Court. No attempt was made to call for the documents from the High Court but the paper-book prepared in the High Court in which translations of those documents were inserted was put in on behalf of the Defendants. The Plaintiffs objected but the trial Court marked the paper-book as an exhibit in the case with the remark "after objection." At the hearing the trial Court did not take into consideration the documents in the paper-book as the original documents were not

(1) T. L. R. 31 Cal. 737 (1904).

(2) 7 C. W. N. 11 (1902).

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placed before it. On appeal the Subordinate Judge held that the paper-book was not admissible in evidence but he looked into the paper-book and on a consideration of certain facts he found against the Defendants.

The first point that is argued before us is that when the Court below was of opinion that the paper-book should not have been admitted in evidence, the Defendants should have been given an opportunity of producing the original documents. They allege that the trial Court having admitted the paper-book they did not consider it necessary to produce the original documents and the Appellate Court being of opinion that the original documents should have been produced and that the paper-book was no evidence, opportunity should have been given to them to produce the original documents. This question raises a question of some intricacy inasmuch as the paper-book is, in my opinion, no evidence at all, either primary or secondary. It may be, however, conceded that in the interest of justice, one Court having committed a mistake in admitting the document, another Court when it was of opinion that such a document should not have been admitted should have given an opportunity to the Appellants to produce the original documents. It is not necessary to enter into this matter further as in my opinion the appeal fails on the ground of limitation. It is found that the Plaintiffs came into possession of this land in 1901. They were dispossessed in 1917. On these facts the Munsif found that the Plaintiffs succeeded, irrespective of the title which they have proved, in proving adverse possession against the Defendants and their predecessors. The learned Subordinate Judge is also of opinion that the evidence of possession aduced on behalf of the Plaintiffs is pre-

ferable to that produced on behalf of the Defendants and he has found that the land was in possession of the Plaintiffs from 1901 till their dispossession in 1917. In view of these findings he dismissed the appeal. In this connection, it is argued before us, that the Plaintiffs' possession in 1901 need not be adverse against Rakhai and therefore against the Defendants who derived their title from Rakhai. It is said that in 1901, the property was in possession of Khelaram by virtue of the usufructuary mortgage executed in his favour by Rakhai. Rakhai and his successors in title, the Defendants or their predecessor, were therefore not entitled to take possession of the property until the termination of the usufructuary mortgage in favour of Khelaram until the end of 1314 or April 1908. I am unable to accept this contention. The Plaintiffs' father redeemed the mortgage in favour of Khelaram and took actual possession of this property by virtue of his purchase. According to the Defendants' case in 1901 when Rakhai sold this property to the Plaintiffs' father he had no interest left in it. The Plaintiffs' father was then for all intents and purposes a trespasser so far as the Defendants were concerned. He came into possession of the property as a trespasser and by paying off Khelaram he obtained actual possession of it. Khelaram's mortgage having come to an end in 1901, he being paid off, Rakhai or the Defendants who allege to have derived their title from him, cannot say that they had no right at all to take direct possession of the property in 1901. The only bar to their taking *khas* possession of the property was the usufructuary mortgage executed in favour of Khelaram. When that mortgage was extinguished or the operation of it terminated, by any means whatsoever, the Defendants cannot say

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that Khelaram was still entitled to possession and their title to *khas* possession was delayed till the entire period of usufructuary mortgage. In this view of the matter, the finding of the Courts below being that the Plaintiffs were in possession from 1901 to 1917, it must be held that they acquired a good title by adverse possession against the Defendants. I am accordingly of opinion that this appeal fails on the second ground mentioned above and should be dismissed with costs.

MUKERJI, J.—I agree that the appeal should be dismissed with costs and desire to add a few words.

But for the opinion which I have formed on the question of possession I should have felt bound to remand the case to enable the Defendants-Appellants a further opportunity of adducing documentary evidence. They put in a High Court paper-book in a certain first appeal as secondary evidence of the contents of some documents. The paper-book by itself would not be secondary evidence of the contents of those documents, but if a proper case were made out for the reception of such evidence then in conjunction with the requisite oral evidence it would prove the said contents. Objection to the reception of the paper-book in evidence was taken on behalf of the Plaintiffs but that objection was not dealt with at the time. The paper-book was marked as an exhibit with the endorsement that it was objected to. The order sheet contains a simple order that it was marked as an exhibit, while the list of exhibits shows that it was admitted subject to objection. It will be observed that the column provided for the remarks in the said list is headed "whether admitted after or without objection." This is as it should be, for all objections as to the admissibility of evidence should be dealt with at the time of its reception

or at any rate at the earliest possible opportunity,—a rule which has been repeatedly enjoined in reported decisions. The reason of the rule is that if the Court allows the objection, the party tendering the evidence may take such steps as he may be advised to get the *lacunæ* remedied. The expression "subject to objection" means that the objection remains undecided. It may be that in some cases, evidence has to be received subject to objection in anticipation of other evidence which, it is hoped, will be forthcoming and which if produced will remove the objection. In such cases a final decision on the objection must be recorded before the Court proceeds to judgment. Omission in this respect is likely to prejudice the party producing the evidence by letting the matter remain in a dubious state and then depriving the party tendering the evidence of an opportunity of making up the defects which in many cases he would be ready to do if he is told that the objection is allowed. In the present case it is only in the judgment of the trial Court that there is any indication that the Court is not satisfied as to the admissibility of the evidence. This is a procedure which deserves to be condemned.

On the question of possession, however, I am decidedly against the Appellants' contention. The mortgages in order of sequence were as follows :—(1) Simple mortgage in favour of Rooke, (2) usufructuary mortgage in favour of Khelaram and, (3) simple mortgage in favour of the Plaintiff's father. At the date of the suit on Rooke's mortgage the other two mortgages were in existence, but the said mortgages were not made parties to the suit and the right of the puisne mortgagees who were not parties to the suit remained unaffected by the decree and

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the proceedings in execution thereof. The Appellants' chief contention is that so long as the usufructuary mortgage in favour of Khelaram subsisted, adverse possession could not run as against Rooke or his transferees—the Appellants being such transferees—and as an authority for this proposition reliance is placed upon certain decisions, notably that of this Court in the case of *Ram Narain Sahoo v. Bandi Prasad* (1), in which it is observed that a first mortgagee in possession under a prior sale may always shield himself under his mortgage and his purchase, although his right to possession may be defective and that the puisne mortgagee's right is limited to a right of redemption or sale of the mortgaged premises subject to the lien of the first mortgagee or auction-purchaser on a decree obtained by the latter. If Rooke could obtain possession under his purchase the rights of the parties would have been regulated by this rule. The findings of the Courts below indicate, and indeed it is stated to be one of the admitted features of the case, that the property was at the time of Rooke's purchase and thereafter in the possession of Khelaram, the usufructuary mortgagee. The Plaintiffs' father treated this decree as a nullity, ignored the rights of Rooke, purchased the property in satisfaction of his own mortgage, and also paid off Khelaram and came into possession. He acquired no title under his purchase and came in as an outsider and possibly a trespasser; and the fact that he chose to pay off Khelaram makes no difference. From the point of time that he came to be in possession, he was in adverse possession. This was in 1308, and from that time till 1324 when the Plaintiff was dispossessed, the Plaintiffs' father and then the Plaintiffs were in possession adversely

to the Defendants. What rights Rooke had after his purchase as against Khelaram and the Plaintiffs' father as puisne mortgagees is a question which has hardly any bearing on the question of possession.

H. D. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

NO. 2743 OF 1923

WITH

RULE NO. 671 OF 1924.

SRINATH BHATTACHARYA

and ors., Defendants,

Appellants,

v.

GREAVES, J.

MUKERJI, J.

1925,

26, February.

JATINDRA MOHAN CHAT-

TERJI, Plaintiff,

Respondent.

Minor—Contract for sale by guardian to pay off debts, if specifically enforceable—Contract, if enforceable against adult parties in respect of their interest.

Although a sale by a guardian of a minor of the latter's property to pay off the debts of his father is binding on the minor, a contract for such a sale stands on a different footing; and a contract by the guardian to sell the minor's property for the payment of his father's debts is not specifically enforceable.

MIR SARWAR JAN v. FAKHRUDDIN MOHAMED CHOUDHURY (1) referred to.

The contract may be enforced with variation in respect of the shares of the adult co-executants, though it fails in respect of the share of the minor.

This was an appeal against a decree of the Additional District Judge of Zillah 24-Perganas (Mr. S. K. Ghosh), dated the 9th June 1923, reversing a decree of the Subordinate Judge, 2nd Court of that District (Babu Kunja Behary Biswas), dated the 18th August 1921.

(1) I. L. R. 39 Cal. 232; s. o. 16 C. W. N. 74 (P. C.) (1911).

(1) I. L. R. 31 Cal. 737 (1904).

SRINATH BHATTACHARYA *v.* JATINDRA MOHAN CHATTERJI.

The facts of the case will appear from the judgment.

Babu Hira Lal Chakervarty for the Appellants.

Mr. Jatindra Nath Sen and *Babu Surendra Nath Bosc (II)* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by the Defendants against a decision of the second Additional District Judge of 24-Perganas reversing a decision of the Subordinate Judge. The suit out of which this appeal arises was a suit by the Plaintiff to enforce specific performance of an agreement for sale of certain premises, dated the 10th December 1919 . . . whereby certain persons agreed to sell premises No. 18, Haldarbagān Lane, as therein mentioned to the Plaintiff for a sum of Rs. 5,000. The contract was entered into by Srinath Bhattacharya, Krishna Lal Bhattacharya, Makham Lal Bhattacharya, Ananta Lal Bhattacharya, Narain Chandra Bhattacharya and Balai Chandra Bhattacharya, a minor, by his guardian Sreemutty Bhajahari Devi who was Balai's mother. The contract was executed by all the parties other than Narain and it was duly registered. Subsequently, an unregistered document was entered into by Makham Lal, dated the 26th of December 1919 whereby he purported to convey his interest in the property to the Plaintiff. The document in form is a conveyance and in the document there is an undertaking to execute a conveyance on proper stamp paper and to get the title-deed registered within certain time. Then there is a further unregistered document, dated the 28th of December 1919, executed by Narain, Ananta and Balai by his guardian whereby they pur-

ported to convey their interest to the Plaintiff. Here again the document in form is a conveyance of sale and contains a covenant to execute the sale-deed on proper stamp paper and to get it registered. The first Court dismissed the suit for specific performance finding that the Plaintiff was guilty of fraud, misconduct and dishonesty as he wanted to take undue advantage over the Defendants who were all illiterate or half literate. The lower Appellate Court has reversed the finding of the first Court and has decreed specific performance in favour of the Plaintiff of the whole property.

Three points have been urged before us on behalf of the Appellants against the decree of the Additional District Judge. First, it is stated that one of the Defendants, namely, Balai was a minor and that the guardian could not bind Balai and that there could be no decree for specific performance against him. Secondly, it is stated that Defendant No. 4 Narain was not bound as he did not sign Ex. 1 and that Ex. 3 being a conveyance of a property worth more than Rs. 100 is not admissible in evidence as it is not registered. Thirdly, it is urged that the contract is one and indivisible and that inasmuch as the share of Balai is not bound and that of Defendant No. 4 also, there could be no decree for specific performance.

So far as the first point is concerned, we think that the point is a good one. There is no doubt that the learned Judge has found in this case that the property was sold for the debts of the father of the minor and there is no doubt that there are decisions of this Court whereby a conveyance, executed by the guardian of a minor in respect of the debts of his father, has been held to be binding on the minor; but a conveyance stands in a different position from a contract for sale. In

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a conveyance the whole matter is complete and there is no doubt that a minor would be bound by a conveyance of property executed by his guardian to pay off his father's debts and that he could not get it set aside merely on the ground of his minority. But different considerations apply with regard to a contract for sale where the transaction is not complete. In cases of this nature there may be a change in the value of the property; and after all, the remedy of specific performance is a discretionary remedy and the Court may well say that having regard to possible fluctuations in value specific performance should never be decreed against a minor. There are decisions in this Court in which specific performance under similar circumstances has apparently been decreed. But those decisions were before the decision of the case of *Mir Sarwar Jan v. Fakhruddin Mohomed Choudhury* (1), where their Lordships of the Judicial Committee laid down that it was not within the competence of the guardian of a minor to bind the minor or minor's estate by a contract for the purchase of immoveable property. In the case of *Mir Sarwar Jan v. Fakhruddin Mohomed Choudhury* (1), the suit was one for specific performance by a minor of an agreement for the purchase and sale to him of certain immoveable property entered into by the manager of the minor's estate and his guardian on his behalf . . . and as I have already stated their Lordships held that there should be no decree for specific performance of the contract because they stated that there was no mutuality. We were asked to distinguish this case on the ground that it deals with an agreement for the purchase of an immoveable property by a minor and it is

stated that the same considerations which apply to a purchase do not apply to a case of this nature where it is sought to enforce an agreement for sale entered into by a minor of his property by his guardian for the purpose of, I assume, payment of his father's debts for which he is liable. We cannot see, however, that there is any such distinction to be found from the perusal of the judgment to which I have referred. The ruling, it seems to us, lays down the law in unequivocal terms and is binding on us. We think therefore that having regard to this decision the first point must prevail and that there could be no specific performance of the contract so far as Defendant No. 6 is concerned.

So far as the second point is concerned, namely, that Defendant No. 4 Narain is not bound we are not prepared to say that this contention is well-founded. Ex. 3 seems to us to be really in the nature of an agreement to sell though in form it is undoubtedly a conveyance. But having regard to the expression therein to which I have already referred, namely, the undertaking to execute a subsequent conveyance we think that it was intended by the parties that it should be treated merely as a contract. The result is that we think that Narain was bound by the agreement of the 10th December 1919.

So far as the third point is concerned, there does not seem to be anything in this. It is difficult to say that because Balai may not be bound the other parties to the contract should not be bound. The Plaintiff states that he is willing to purchase the shares of the parties in the property other than the share of Balai who is not bound by the contract. Accordingly, there will be this variation in the decree of the lower Appellate Court, namely, that we declare that the share of

(1) I. L. R. 39 Cal. 232; s. c. 16 C. W. N. 74 (P. C.) (1911).

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Balai is not bound by the contract of the 10th December 1919 but subject to this the decree of the lower Appellate Court will stand and there will be a decree for specific performance against the Defendants other than Defendant No. 6 in respect of their shares and interests in the property in suit.

We make no order as to costs. The property of the minor will not be bound by any decree for costs that has been passed against him.

MUKERJI, J.—I agree.

N. G.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VISCOUNT FINLAY.

LORD BLANESBURGH.]

SIR JOHN EDGE.

MR. AMEER ALI.

1925,

Heard, 10, July.

Judgment,

10, July.

MAHOMED ALI

| MAMOOJEE, Appellant,

v.

HOWESON BROTHERS,

Respondents.

Indian Contract Act (IX of 1872), sec. 130—Surety for Receiver appointed by Court—Continuing guarantee, if can be discharged by notice—Consent of Court necessary.

Notwithstanding sec. 130 of the Contract Act, it is not competent for a surety to a Receiver appointed by Court, who has been accepted by Court as such, without the consent of the Court to discharge himself from liability for future transactions by merely giving notice to the decree-holder or other person at whose instance or for whose benefit the Receiver was appointed.

RAJNARAYAN MUKERJI v. PHULKUMARI DAS (1) considered in the judgments of the High Court which were affirmed by the Judicial Committee.

(1) I. L. R. 29 Cal. 68 (1902).

This was an appeal (No. 150 of 1924) from an order of the High Court at Bengal, dated the 8th May 1923, which affirmed an order of the said Court, dated the 2nd January 1923, in its Original Jurisdiction.

The said order was made against the Appellant as surety for the payment by him of a sum of Rs. 32,806 found due from the principal debtor, and which the latter had failed to discharge.

The facts which were not in dispute were shortly as follows:—

The Respondents obtained a preliminary mortgage decree against the Harveys on the 29th July 1920.

Under that decree W. S. G. Harvey was appointed Receiver of the mortgaged premises and the Appellant was accepted as his surety and executed a bond in the usual form. On the 22nd July 1921, the Appellant applied to be released from his bond but no order was made on the application.

On the 6th August 1921 the Appellant wrote to the Respondents informing them that he wished to be released from his suretyship. The letter continued—

“ My client accordingly does not desire to continue to guarantee the acts of Mr. Harvey in whom he can therefore place no confidence and desires to be released from further acting; but, of course, will hold himself under the bond already executed for all acts and omissions of the said Mr. Harvey till such date as my client may be released from further acting by order of the Court which my client will now seek to obtain”

On the 12th December Harvey was removed from his appointment as Receiver. An enquiry was held and a report made showing the sum of Rs. 32,806 due from Harvey and an order was made on the 15th July 1922 for the payment of that

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amount within a week. Harvey defaulted and the present application was made on the 4th December 1922 under sec. 145 of the Code of Civil Procedure, 1908, for execution against the Appellant as surety.

The application was opposed on various grounds, of which the most material was—That the Appellant had on the 22nd July 1921 given notice to the Respondents and to the Court within the meaning of sec. 130 of the Contract Act and had thus revoked his liability as guarantor.

This contention was negatived by the trial Judge (GREAVES, J.) who made the order asked for by the Respondent Company.

In his judgment the learned Judge held that the passage in the judgment of Banerji, J., in *Rajnarayan Mukerji v. Phulkumari Dasi* (1) was *obiter dictum* and that the provisions of sec. 130 of the Contract Act had no application to a continuing guarantee given on behalf of a Receiver as in the case before him.

An appeal from this order was heard by a Division Bench of the High Court consisting of MOOKERJEE and RANKIN, JJ., who dismissed the appeal with costs.

In their judgment they stated as follows :—

“ On behalf of the surety, reliance was placed upon sec. 130 of the Indian Contract Act, and the decision in *Rajnarayan Mukerji v. Phulkumari Dasi* (1). This decision was doubted by the Madras High Court in *Subroya Chetty v. Ragammall* (2), which was accepted by the Allahabad High Court as a correct exposition of the law in *Kandhya Lal v. Manki* (3). We are of opinion that the view taken by Mr. Justice Greaves is correct. In *Rajnarayan v. Phulkumari* (1), it was ruled that

sec. 130 of the Indian Contract Act enabled a person who had become surety in an administration proceeding to discharge himself by suitable notice. The judgment of Sir Francis Maclean, C. J., was cautiously phrased and does not support a more extended rule, although the language used by Mr. Justice Banerji seems to go further. We are of opinion that notwithstanding sec. 130, which holds that a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor, it is not competent to the surety for a Receiver, who has been appointed an officer of the Court, to discharge himself merely by notice to the decree-holder, or other person at whose instance or for whose benefit the Receiver was appointed; *O'keefe v. Armstrong* (4). A person does not become a surety till he has been accepted as such by the Court and we cannot hold on principle that he can discharge himself without the consent of the Court. Disastrous consequences may, indeed, result to the estate in charge of the Receiver, if the surety be held competent to relieve himself from the moment he has given notice to the person interested. It is worthy of remark that this extreme position was not at first taken up by the surety in the case before us; as already stated, he realised at quite an early stage of the proceedings that he could secure his discharge only with the consent of the Court. We need not in this view examine the decision in *Subroya v. Ragammall* (2), which is in harmony with *Bai Somi v. Chokshi* (5) and *Kandhya Lal v. Manki* (3) and is supported by the analogy of *Re Stark* (6), *Calvert*

(1) I. L. R. 29 Cal. 68 at p. 72 (1902).

(2) I. L. R. 28 Mad. 161 (1904).

(3) I. L. R. 31 All. 56 (1908).

(3) I. L. R. 28 Mad. 161 (1904).

(3) I. L. R. 31 All. 56 (1908).

(4) [1852] 2 Jr. Ch. Rep. 118.

(5) I. L. R. 19 Bom. 245 (1894).

(6) L. R. 1 P. & D. 76 (1866).

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v. Gordon (7) and Lloyd's v. Harper (8). The case last mentioned does not assist the contention of the Appellant that he was discharged from liability the moment he served notice upon the decree-holder. It may be conceded that a continuing guarantee, not under seal, for future advances or supplies, in consideration of the granting of such advances or supplies, does not become binding until the person to whom it is given acts upon it, and may consequently be revoked before it is acted upon; further, even if it has been acted upon, it may, if it contain no stipulation to the contrary, be revoked as to further transactions; *Offord v. Davies* (9), *Coulthurt v. Clemenson* (10) and *Beckett v. Addyman* (11). The question, however, remains whether when a surety has been accepted as such by the Court, he can free himself from liability without the consent of the Court. We are of opinion that the answer must be in the negative.

The result is that the order made by Mr. Justice Greaves, which is obviously right on the merits, is confirmed and this appeal dismissed with costs."

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellant.

Messrs. A. M. Dunne, K. C. and Douglas McNair for the Respondent Company.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT FINLAY.—In their Lordships' consideration of this case they see no reason for differing from the Courts below.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

(7) 7 B. & C. 809.

(8) 16 Ch. Div. 290 (1880).

(9) 12 C. B. N. S. 748 (1862).

(10) 5 Q. B. D. 42 (1879).

(11) 5 Q. B. D. 783 (1882).

Solicitors *Messrs. Pugh & Co.* for the Appellant.

Solicitors: *Messrs. Sanderson Lee & Co.* for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SUMNER.

SIR JOHN EDGE.

SIR LAWRENCE JENKINS.

1920,

Heard, 24, June and

1924,

[27] 27, 28, November.

Judgment,

12, December.

RAMAGIRJI

NEELAKANTA-

GIKJI, Appellant,

v.

ANNAVAJJHALA

VENKATACHAL-

LAM, Respondent.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 66, 71, 86—Court sale—Sale proclamation containing particulars showing existence of an incumbrance and referring to documents creating same—Purchaser, if has notice of contents of documents—Liability for loss on resale.

A purchaser at a Court sale must be taken to have known the effect of documents bearing on the properties to be sold and mentioned in the sale proclamation as constituting some sort of a charge on the properties whether he actually examined the documents or not. Such a purchaser, should he default in paying the purchase price, makes himself responsible for the loss caused on resale to the decree-holder when such resale has taken place in pursuance of a sale proclamation substantially containing the same particulars.

This was an appeal (No. 4 of 1919), from a decree of the High Court at Madras, dated the 26th October 1917, which reversed an order of the District Court of Nellore, dated the 31st January 1916, dismissing a petition in execution preferred by the present Respondent.

The present Appellant against whom

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the said petition was directed was the successful bidder at a Court sale held in the District Court on the 25th August 1914.

He made the preliminary deposit of a quarter of the purchase money but made default in paying the balance. A resale accordingly became necessary which took place in February 1915 when the property was knocked down for a much smaller sum.

The present Respondent was the holder of the decree, in execution of which the said sales took place, and, his decree not having been satisfied, he preferred the above petition under Or. 21, r. 71 of the Code of Civil Procedure, for recovery of the balance. The District Judge dismissed the application holding that in the circumstances of the case the Petitioner was not entitled under r. 71 or r. 86 to claim the deficit from the Respondent or to claim a right to the deposit paid into Court by the defaulting purchaser.

On appeal to the High Court the Judges differed and an appeal was preferred under sec. 15 of the Letters Patent, which was decided in favour of the Respondent.

The present appeal to the Privy Council was originally heard on the 24th June 1920 by LORDS BUCKMASTER and ATKINSON, SIR J. EDGE and MR. AMBER ALI and stood over pending an appeal against a judgment obtained by the purchaser enforcing his equity of redemption acquired at the second sale.

The facts are fully set out in the judgment of the Judicial Committee.

Mr. H. N. Sen for the Appellant.

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Respondent were not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal

from a decree, dated the 26th October 1917, of the High Court at Madras which reversed an order, dated the 31st January 1916, of the District Judge of Nellore, dismissing a petition which had been made by the Respondent. In order to understand what was the decree of the High Court against which this appeal has been brought, it will be necessary to refer as briefly as possible to the position of the parties to the appeal and to the circumstances under which the decree of the High Court was made. The present Appellant and the present Respondent will hereinafter be referred to respectively as the Appellant and the Respondent.

The Respondent having obtained a money decree against the Zamindar of Kalahasti for a large sum of money in execution of his decree, brought to sale on the 25th August 1914, the rights and interests of the judgment-debtor in certain villages of Pamoor Taluq, in the District of Nellore. Those villages had been, on the 4th August 1908, conveyed by the Zamindar for six lakhs of rupees to a person at Hyderabad, who by an agreement in writing of the same date had agreed with the Zamindar to reconvey the villages to him if the sum of six lakhs of rupees was repaid by the 31st August 1914. That transaction constituted a mortgage by conditional sale. The property mortgaged was attached by an order of the Court, executing the decree, and the rights and interests of the judgment-debtor were by that Court ordered to be sold in execution of that decree. The Court, in compliance with r. 66 of Or. XXI of the Code of Civil Procedure, 1908, caused a proclamation of the intended sale to be duly made. In the proclamation the judgment-debtor's rights and interests in the villages were stated as—

"The right of obtaining a reconveyance under the reconveyance agreement, dated 4th August 1908, exe.

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cuted and given to the Defendant by Raja Bahadur Narasingirji Gyanagirji, residing at Hyderabad, and all the other rights and interests possessed by the Defendant, in these villages."

The deed of sale and the agreement to reconvey of the 4th August 1908 were also mentioned in the proclamation. The agreement to reconvey was No. 3 in the list of documents affecting the property to be sold, and in the column of Remarks it was stated that, "Under deed No. 3 the Defendant has right to have a reconveyance of the said property." The proclamation gave other particulars, and in their Lordships' opinion complied with r. 66 of Or. 21.

The auction sale was held on the 25th August 1914, and the Appellant was declared to be the purchaser; his bid was Rs. 6,90,000, and he, after he had been declared the purchaser, duly paid to the officer conducting the sale, Rs. 1,72,500 as the deposit required by the Code of Civil Procedure, 1908, being twenty-five per centum of the purchase money. He, however, made default in payment within the prescribed period of the balance of the purchase money. The Court declined to grant to him an extension of time to pay the balance, and when the prescribed period for payment of the balance had expired, the Court executing the decree ordered the property to be resold. That Court ordered that the deposit should not be forfeited to the Government, and it, less poundage and other charges, remained in Court.

The Appellant had, by the proclamation, notice of the rights and interests of the judgment-debtor which were to be sold, and he, or any competent lawyer whom he chose to advise him, could have examined the sale deed and agreement to reconvey of 4th August 1908, and he must be taken to have known the effect of those

documents or to have intentionally or negligently omitted to examine them. Doubtless he examined those documents, but whether he did or not is immaterial as he had, by the proclamation, notice of them.

The property was, after the prescribed period, resold by public auction on or about the 22nd February 1915, after a proclamation that it would be sold had been duly made. In the proclamation for the resale the particulars of the property to be sold were correctly stated, the deed of sale and the agreement to reconvey of the 4th August 1908 were mentioned as Documents 2 and 3, with the following comments as to them :—

"Sale deed executed by the Defendant in favour of Raja Bahadur Narasingirji Gyanagirji for Rs. 6,00,000.

"Counter reconveyance agreement executed in favour of this Defendant by the aforesaid Raja Bahadur Narasingirji Gyanagirji. (This Defendant has the right to get possession on a fresh sale deed being executed, of all these villages, on repayment of six lakhs of rupees within the end of August 1914, in accordance with the two documents aforesaid.)

"(1) When in accordance with the conditions of documents Nos. 2 and 3, the Defendant endeavoured to tender six lakhs of rupees within the date fixed therein, Raja Bahadur Narasingirji Gyanagirji Garu evaded the tender with a fraudulent intent and went away; for this reason, as well as for the reason that the transaction contained in those documents amounts to a mortgage from their nature, the said Narasingirji Gyanagirji Garu has the right to recover only the said six lakhs of rupees, and he has no other right in the villages of this Pamoor Taluk. Therefore this property has to be sold subject to the said right as per the said documents."

The proclamation for the resale contained other particulars, and in their Lordships' opinion complied with the orders of the Code of Civil Procedure, 1908. At the resale the rights and interests of the judgment-debtor in the property were sold for Rs. 1,01,000 to one Janakiramayya, who was an agent of the decree-holder.

In November 1914, the Appellant applied to the Court which had executed the

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decree to order a refund to him of the deposit which had been made by him on the 25th August 1914. On the 24th April 1915, the Respondent, alleging that on the resale a deficiency of Rs. 5,89,000 had occurred for which the Appellant was liable, applied by petition to the Court which had executed the decree that it should "issue orders for recovery and payment of about Rs. 1,25,000, the amount due to him as the decree-holder in this execution sale, and also the costs of the petition, by attaching the said deposit amount of about Rs. 1,60,000." After deducting poundage and other charges, the balance of the deposit in Court appears to have been about Rs. 1,60,000. The application was clearly confined to the deposit and did not apply to the general deficiency which was the result of the resale. To that petition the Appellant replied by a counter-petition on the 12th July 1915, in which he denied that he was liable for the deficiency in price realised at the sale (resale) of the properties which was held on the 22nd February 1915, and stated that he "had filed two petitions and an affidavit showing cause against the forfeiture of the deposit made by him on the 25th August 1914, and claiming refund of the amount so deposited."

On the 31st January 1916, the application of the Respondent of the 24th April 1915 was considered by the District Judge of Nellore, and he, holding that "the descriptions in the two proclamations are materially and substantially different, and the character of the property as it stood and as it was described in the first proclamation was literally and juridically different from its character as described in the second proclamation," made an order that the Respondent was not entitled to the amount deposited in the Court and dismissed the application. From that order

the Respondent appealed to the High Court, and his agent filed an affidavit in the High Court in which he stated :—

"2. In the circumstances of the case, it is absolutely necessary in the interests of justice and to safeguard the interests of the Appellant that this Honourable Court should direct that the sum now in deposit in the District Court of Nellore or such part thereof as may be necessary to satisfy the balance still due to this Appellant under his decree, be retained in Court till the disposal of this appeal or be allowed to be drawn out by the Respondent on proper security."

The appeal to the High Court came for hearing before two Judges of the Court who differed, with the result that the appeal was dismissed. From that dismissal the Respondent appealed under the Letters Patent, and his appeal was heard by the Chief Justice and two other Judges, with the result that the appeal was allowed, and the High Court, on the 26th October 1917, made the decree which is now appealed from to His Majesty in Council. By that decree of the 26th October 1917, the appeal was allowed with certain costs, and the District Judge of Nellore was ordered to restore the petition of the 24th April 1915 to its original number in the Register and to dispose of it according to law with regard to the deposit which had been paid by the Appellant. In their Lordships' opinion that was the right decree to make.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors : *Messrs. Chapman, Walker & Shepherd* for the Appellant.

Solicitor : *Mr. Douglas Grant* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1679 of 1923.

GREAVES, J.

PANTON, J.

1925,

24, November.

AJINTULLA SAHA,

Plaintiff, Appellant,

v.

JADAVNATH CHAKRA-

BUTTY and ors, Defend-
ants, Respondents.

*Pre-emption - Sale by Mahomedan to Hindu -
Mahomedan co-owner of vendor, if can exercise
right of pre-emption.*

*Where no local custom exists with re-
gard to pre-emption amongst Hindus
the Mahomedan law of pre-emption does
not apply when the person claiming the
right of pre-emption and the vendor are
Mahomedans and the purchaser is a
Hindu.*

*FURMAN KHAN v. BHURUT CHUNDER (1).
followed.*

*Sec. 9 of Reg. VII of 1832 has been re-
pealed by Act VI of 1871, sec. 24 of which
has been substituted for it, but the change
effected does not make the decision of the
Full Bench in FURMAN KHAN v. BHURUT
CHUNDER (1) inapplicable.*

This was an appeal preferred on the
15th of June 1923, against the decree of
Babu Beharilal Sarkar, Officiating Sub-
ordinate Judge of Zillah Dinajpur, dated
the 16th March 1923, affirming the decree
of Babu Upendra Lal Das Gupta, the
Munsif, 1st Court at that place, dated
the 1st of March 1922.

The facts of the case will appear from
the judgment.

*Babu Jatindra Mohan Chowdhury (for
Babu Mohini Mohan Chakravarty) for
the Appellant.*

*Mr. Sarat Chandra Bose and Babu
Bimal Chandra Das Gupta for the Res-
pondents.*

The JUDGMENT OF THE COURT was as
follows :—

GREAVES, J.—This is an appeal by the
Plaintiff against a decision of the Officiat-
ing Subordinate Judge of Dinajpur con-
firming a decision of the Munsif of the
first Court of that place. The question
that arises in the appeal is whether in the
case of a sale by a Mahomedan co-sharer
of his share to a Hindu the right of pre-
emption attaches thereto so that a Maho-
medan co-sharer of the vendor can exer-
cise that right as against a Hindu pur-
chaser. The learned Officiating Subordi-
nate Judge has dismissed the appeal
agreeing with the decision of the Munsif
and considering that the matter was cov-
ered by a Full Bench decision of this
Court to which I shall presently refer.

The appeal has been argued before us
on behalf of the Appellant on the basis
that the grounds on which the Full Bench
decision, *Furman Khan v. Bhurut Chunder*
(1), was based are no longer
binding and that the matter is really
open. Now, exactly the same ques-
tion that now arises for our decision
arose in that Full Bench case in which
three references on the same point were
before the Court in the case of *Fur-
man Khan v. Bhurut Chunder* (1).
The Court held by a majority of 3 to 2
that where no local custom exists with
regard to pre-emption amongst Hindus,
the Mahomedan law of pre-emption does
not apply when the person claiming the
right of pre-emption and the vendor are
Mahomedans and the purchaser is a
Hindu. The principal judgment on be-
half of the majority was delivered by Mr.
Justice Dwarkanath Mitter and his judg-
ment was really based on the provision of
sec. 9 to Reg. VII of 1832. The section
is set out at page 22 of the report and it is

(1) 4 B. L. R. 184 (F. B.); 13 W. R. F. B. 21
(1860).

(1) 4 B. L. R. 184 (F. B.); 13 W. R. F. B. 21
(1860).

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not necessary for me to set out the exact words of the section. The last words in the section, however, provide that the principles of justice, equity and good conscience are to prevail in the cases with which the section deals and Mr. Justice Dwarkanath Mitter considered at some length whether the demand of justice, equity and good conscience made it necessary in a case of that nature to apply the principles of pre-emption as existing under Mahomedan law and he comes to a conclusion opposite to that, that is to say, he finds that there were no principles of justice, equity and good conscience which compelled him to hold in the case before him that the Mahomedan co-owner is entitled on purchase of a share by a Hindu from another Mahomedan co-owner to exercise the right of pre-emption. But it was urged before us that that decision must be taken as shaken by a subsequent decision by the Allahabad Full Bench in *Govind Dayal v. Inayatullah* (2) and it is further suggested that sec. 9 of Reg. VII of 1832 on which Mr. Justice Dwarkanath Mitter relies has been repealed. That is true, for it is repealed by Act VI of 1871 (Civil Courts Act) and there is substituted for that section sec. 24 of that Act. This section provides that where in a suit or proceeding it is necessary for any Court under the Act to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans and the Hindu law where the parties are Hindus shall form the rule of decision except in so far as such law has by legislative enactment been altered or abolished. Then the section concludes that in cases not provided for by the former part of the section or by any other

law for the time being in force the Court shall act according to justice, equity and good conscience. It seems to me that there is not very much difference in the two sections except that there is omitted from the second section the actual provision that relates to cases where parties are of different religious persuasions, in which cases sec. 9 provides that the principles of justice, equity and good conscience are to prevail. But I do not think that in substance there is any real difference. The first part of sec. 24 deals with cases between Mahomedans *inter se* or Hindus *inter se* and it does not deal with cases where one party is a Mahomedan and the other Hindu and *vice versa*. In those cases, as under the provisions of sec. 9, clearly the principles of justice, equity and good conscience are to prevail and, as I have already indicated, Mr. Justice Dwarkanath Mitter points out in the judgment in *Furman Khan v. Bhurut Chunder* (1) that there was no obligation to apply that doctrine in a case of pre-emption where one party is a Mahomedan and the other a Hindu; nor do I think it possible to say that there has been any alteration effected by sec. 37, Act XII of 1887 (Civil Courts Act). The words in that Act are practically identical with the words of sec. 24 of Act VI of 1871.

The result, therefore, is that I do not think that it is possible to say that *Furman Khan v. Bhurut Chunder* (1) is no longer binding on us by reason of subsequent legislation having affected the provisions of sec. 9 of Reg. VII of 1832. The result, therefore, is that we are bound by the decision in *Furman Khan v. Bhurut Chunder* (1) unless we think that that decision is wrong and

(1) 4 B. L. R. 134 (F. B.), 13 W. R. F. B. 21 (1869).

(2) I. L. R. 7 All. 775 (F. B.) (1885).

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refer it to another Full Bench for decision. The result is, I think, that the matter is concluded so far as we are concerned by the decision in *Furman Khan v. Bhurut Chunder* (1). I should add one word with regard to a decision with which we were pressed in the case of *Sitaram Bhaurao Deshmukh v. Jiaul Hasan Sirajul Khan* (3). The learned vakil who appeared for the Appellant referred us to various observations in the judgment of the Judicial Committee in that case in support of his contention in this appeal, but I do not think that that case can be taken in any way as governing the appeal which is now before us. There, there had been an express agreement in the sale by a Mahomedan co-sharer to a Hindu that the property should be offered to the co-sharer and it was so offered and as is stated in the judgment the parties there had agreed, although one was a Hindu, that the principles of pre-emption should be imported into their transaction. It was not necessary, therefore, for their Lordships to decide whether apart from the terms of the particular agreement which was before them the doctrine of pre-emption must be applied in cases like the present where the purchaser is a Hindu and the vendor a Mahomedan. Consequently, I do not think that that case has any bearing on the question which we have now to decide. As I have already indicated so far as this Bench is concerned, the matter is concluded by the decision in *Furman Khan v. Bhurut Chunder* (1). I am not prepared to say that I disagree with that decision or to refer the matter

to another Full Bench for another decision on the question.

The result, therefore, is that for the reasons which I have indicated the appeal fails and must be dismissed with costs.

PANTON, J.—I agree.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 497 OF 1925.

GREAVES, J.
B. B. GHOSE, J.
1925,

Heard, 23, June.

Judgment,

7, July.

D. D. BARBER,
Petitioner,

v.

W. C. DEBENHAM,
Opposite Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 2 (e)
—“Premises,” if includes fans, lights, &c.—*Intention of parties and nature of agreement are the determining factors—Sec. 15—Standardization of rent.*

It depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether such things as fans and lights are intended to go with and to form part of the premises or building demised:

Held in the circumstances of the case—*That the fans and lights which were attached to the part of the building demised and which were intended to be used with it must be taken, according to the intention of the parties, to be part of the demised building for the purposes of the Rent Act and that it was open to the Rent Controller to fix a standard rent which comprised these.*

This was a Rule granted on the 24th April 1925 against the order of the President of the Tribunal (Mr. S. C. Banerjee), dated the 26th February 1925.

The facts of the case will appear from the judgment.

Sir B. C. Mitter and Babu Suresh Chandra Talukdar for the Petitioner.

(1) 4 B. L. R. 134 (F. B.); 13 W. R. F. B. 21 (1884).

(3) 1. L. R. 45 Bom. 1056; s. c. 26 C. W. N. 241 (P. C.), (1921).

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Dr. Dwarka Nath Mitter (Advocate), Babus Satindra Nath Mukerjee and Hira Lal Ganguly for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—By an agreement in writing contained in two letters, dated respectively the 29th and 31st August 1923, the first of which was addressed by the Petitioner to the Respondent Debenham and the second by Debenham to the Petitioner, the Respondent Debenham agreed to let and the Petitioner agreed to take for a period of 21 months from the 1st September 1923, with an option of renewal as therein mentioned, the lower flat of No. 4, Rawdon Street, comprising the following accommodation, sitting room with one electric fan and lights, three bed rooms with bath rooms, each bed room with one electric fan and lights, also lights in the bath room, south verandah with space under stairs with electric lights and other accommodation as therein mentioned at a rental of Rs. 320 per month inclusive of taxes and without any other extra charge but excluding the cost of electric current. An application was subsequently made to the Rent Controller by the Petitioner to fix the standard rent of the premises and the Rent Controller on the 20th August 1924 fixed the standard rent at Rs. 232 per month holding that the fans, electric lights and fittings formed part of the premises.

An appeal was preferred against this order to the President of the Tribunal who held that a standard rent under the Rent Act could not be made to cover fans, lights or any other thing not forming part of a building or hut.

He arrived at the same figure as the Rent Controller for the standard rent of the premises exclusive of fans, lights, etc.

The decision of the President was based on the definition of premises in sec. 2 (e) of the Calcutta Rent Act and he held that the word premises could not cover fans and lights, etc., as they did not form part of the building.

Against the order of the President of the Tribunal the present Rule was obtained on the 24th April 1925. Premises in sec. 2 (e) of the Calcutta Rent Act are defined as meaning any building or hut let separately for residential, charitable, educational or public purposes or for the purposes of a shop or an office and by sec. 15 of the Act the Rent Controller is empowered to certify the standard rent of any premises.

In *Sewell v. Angerstein* (1), Willes, J., held that gaseliers formed part of the freehold. The finding was arrived at in the case of a lease which was conveyed or assigned by the Defendant to the Plaintiff and included in the conveyance or assignment were the fixtures which were held to include the gaseliers attached by screws to the gas pipes.

In *Smith v. Macbull* (2), Pearson, J., held that gas fittings, gaseliers and a table lamp screwed to a pipe were fixtures and this expression included whatever articles were substantially part of the house so that they could not be removed without depriving the building of that which was intended to be used with it.

I cite these authorities not as authorities for showing what are or are not fixtures, as what are deemed fixtures in England may not be fixtures according to Indian law and *vice versa*, but as showing that it depends on the intention of the parties and on the nature of the agreement to be gathered from the same whether such things as fans and lights are in-

(1) 18 L. T. N. S. 300 (1868).

(2) 32 W. R. 459.

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tended to go with and to form part of the premises or building demised.

I think that in the present case the fans and lights which were attached to the part of the building demised and which were intended to be used with it must be taken according to the intention of the parties to be part of the demised building for the purposes of the Rent Act and that it was open to the Rent Controller to fix a standard rent which comprised these.

The cases of *Wells v. Dickenson* (3) to which we were referred has in my opinion no bearing on the present case. In that case a furnished flat was demised and it was held that although the Rent Controller had jurisdiction under the Act to fix a rent for the premises apart from the furniture he had no jurisdiction to fix a standard rent which included the furniture.

That case is distinguishable as clearly the furniture could by no stretch of imagination have been intended to form part of the building for the purposes of the letting, whereas in the present case the fans and lights which were attached to the building formed part of the building for the purpose of the demise according to the true intention of the parties as indicated in the agreement. I would make the Rule absolute with costs 5 gold mohurs.

The matter will now go back to the President of the Tribunal in order that he may consider what is the standard rent of the premises including the fans and lights.

B. B. GHOSE, J.—I agree.

S. C. M.

(9) 28 C. W. N. 774 (1923).

CRIMINAL REVISIONAL JURISDICTION.]
Full Bench Reference

WALMSLEY, J.
RANKIN, J.
CUMING, J.
B. B. GHOSE, J.
CHAKRAVARTI, J.
1925,
Heard,
10, December.
1926,
Judgment,
5, January.

EMPEROR
v.
COLIN MACKENZIE
MACKAY.

Criminal Procedure Code (Act V of 1898), sec. 476—Chief Presidency Magistrate making complaint against a witness before himself—Transfer of case to Third Presidency Magistrate—Enquiry and commitment to High Court Sessions by latter—Objection to trial overruled—Letters Patent, cl. 26, review under Advocate-General's fiat—Validity of proceedings before Magistrate and of commitment, how may be questioned—"Complaint," "taking cognizance," meaning of—Proper tribunal for questioning legality of commitment—"High Court," meaning of, in sec. 215—Secs. 4 (b), 18 (4), 190, 195, 215, 487 (2), 529, 537—Sec. 537, if applicable under cl. 26, Letters Patent.

Where the Chief Presidency Magistrate made a complaint to himself under sec. 476 (1) of the Criminal Procedure Code and then transferred the same to the Third Presidency Magistrate for disposal, and the latter after having enquired into the case committed the accused to the High Court Sessions for trial:

Held per CURIAM (RANKIN and CHAKRAVARTI, JJ., dissentiente)—That the procedure followed was substantially correct.

Per WALMSLEY, J.—The Chief Presidency Magistrate in taking cognizance of a complaint made by himself and sending it to the Third Presidency Magistrate made a mistake, but a technical one only, not going to the root of the case.

Per CUMING and B. B. GHOSE, JJ.—There was nothing in the Code to prevent

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the Chief Presidency Magistrate from taking cognizance of his own complaint. Taking cognizance of a complaint is not a judicial act.

Semble, per WALMSLEY, CUMING and B. B. GHOSE, JJ.—The legality of the commitment was not open to question before the Court of Sessions. The remedy of the accused was to move the High Court in its Revisional Jurisdiction.

Per RANKIN and CHAKRAVARTI, JJ.—In making a complaint to himself the Chief Presidency Magistrate adopted a course unknown to the law. Further, he either took cognizance of the complaint under sec. 190 contrary to the prohibitions of secs. 195 and 476, Cr. P. C., or laid a complaint before a Magistrate who not being a first class Magistrate had no power to take cognizance of it under sec. 476. The proceedings having been commenced and continued in defiance of the express provisions of the Code and of fundamental principles of law, there was not merely an irregularity but a breach of the public order.

Sec. 537 of the Code is applicable under cl. 26 of the Letters Patent, but there was no question of error, omission or irregularity in the complaint in the present case, for the proceedings were illegal from beginning to end.

The facts of the case will appear from the certificate of the Advocate-General under cl. 26 of the Letters Patent of 1865, which was as follows :—

“ 1. Whereas the accused above-named was tried by the Hon'ble Mr. Justice B. B. Ghose and a special jury at the fourth Criminal Sessions of this Hon'ble Court on the 28th and 29th of July and 3rd August 1925 for offences under secs. 193 and 195 of the Indian Penal Code alleged to have been committed in the Court of

Mr. T. Roxburgh, the Chief Presidency Magistrate of Calcutta, in the course of the trial in the case of *Emperor v. Collin Campbell Rogers and others* being case No. 392 of 1925 and was found guilty by the unanimous verdict of the jury and sentenced to one year's rigorous imprisonment.

2. And whereas it has been represented to me that the accused above-named was a witness for the prosecution in the said case of *Emperor v. Collin Campbell Rogers and others* being case No. 392 of 1925, before the said Mr. T. Roxburgh, the Chief Presidency Magistrate of Calcutta, and gave his evidence on oath on the 30th April 1925.

3. Whereas it has been further represented to me that on the 10th of June 1925 the said Mr. Roxburgh being of opinion that it was expedient in the interests of justice that an enquiry should be made into offences under secs. 193 and 195 of the Indian Penal Code which appeared to him to have been committed by the said Colin Mackay in the said proceedings in his Court and whereas the said Mr. Roxburgh held that no preliminary enquiry was necessary and whereas he further held that it was necessary for him under sec. 476 of the Code of Criminal Procedure to make a complaint in writing and forward the same to himself as the Chief Presidency Magistrate of Calcutta.

4. Whereas it has been further represented to me that the said Mr. Roxburgh on the 10th of June 1925 made a complaint in writing signed by himself and forwarded the same to himself as the Chief Presidency Magistrate and immediately thereafter, on the same day, transferred the said complaint under sec. 193, Cr. P. C. to Mr. A. Z. Khan, the Third Presidency Magistrate, for disposal

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and himself issued summons against the accused under secs. 193 and 195, I. P. C.

5. Whereas it has been further represented to me that the said Third Presidency Magistrate enquired into the said case and committed the accused for trial to the fourth Criminal Sessions of the High Court on charges under secs. 193 and 195 of the Indian Penal Code.

6. Whereas it has been further represented to me that a plea in demurrer was taken on behalf of the accused before the Hon'ble Mr. Justice B. B. Ghose, before the plea of the accused was taken and before the jury was empanelled on the grounds that the commitment was illegal, inasmuch as the said Chief Presidency Magistrate was incompetent to make a complaint to himself under sec. 476, Cr. P. C. and take cognisance of the said case and that the said Third Presidency Magistrate was in consequence incompetent to make the enquiry or to commit the accused for trial before the said Criminal Sessions which he purported to do.

7. Whereas it has been further represented to me that the learned Judge presiding at the said fourth Criminal Sessions overruled the said plea and allowed the trial to proceed with the result as hereinbefore stated.

8. Whereas the facts hereinbefore set out have been certified to me by learned Counsel for the accused, as appears from the certificate hereunder written, and whereas learned Counsel who conducted the said prosecution at the said Sessions has agreed that the said facts have been correctly recited.

Now I, Brojendra Lal Mitter, Advocate-General of Bengal, do, under and by virtue of the powers entrusted to me by the Letters Patent for the High Court of Judicature at Fort William in Bengal bearing date the 28th of December 1865,

certify that in my judgment the questions whether under sec. 476 of the Code of Criminal Procedure the Chief Presidency Magistrate was competent to make a complaint to himself or take cognisance of the said case and transfer the same and whether the said Third Presidency Magistrate was competent, under the law, to commit the accused for trial to the Sessions, should be further considered by the said High Court.

(Sd.) B. L. Mitter,
1st December 1925.

I, the undersigned, defended the above accused at his trial by the Hon'ble Mr. Justice B. B. Ghose at the fourth Criminal Sessions of the High Court on the 28th and 29th July and 3rd August 1925 and was present at his trial throughout and I certify that the facts hereinbefore set out have been correctly stated.

(Sd.) A. K. Basu."

The above matter came up before the Full Bench as constituted on the certificate of the Advocate-General.

Mr. A. K. Basu on behalf of the accused argued that the sec. 190 lays down the general provisions for the initiation of criminal proceedings. The special provision for cases like the present is, in sec. 195, namely, a complaint in writing. But the Chief Presidency Magistrate forwarding a complaint to himself really means taking cognisance on his own knowledge as provided in sec. 190 (c). The intention of sec. 476 is the Court taking cognisance would have to be an independent Court and not the Court that had already formed an opinion in the matter after hearing evidence. There is no complaint as contemplated by sec. 195 and the proceedings are *ab initio* void. [Cited *Barindra v. Emperor* (8)].

(8) I. L. R. 37 Cal. 467; s. c. 14 O. W. N. 1114 (1910).

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Mr. Khan is not a Chief Presidency Magistrate and he cannot assume jurisdiction on a transfer of a case where there is no complaint.

Mr. R. Roy on behalf of the Crown submitted that sec. 476 of the Criminal Procedure Code was complied with. Mr. Roxburgh, who tried the case, thought that one of the witnesses committed perjury and further enquiry was necessary. He made the complaint and forwarded that to himself in his capacity as the Chief Presidency Magistrate. Under the Code, so long as the Chief Presidency Magistrate forwarded it to a first class Magistrate, the law would be complied with. The crux of the whole thing lies in the word "forward" in sec. 476 of the Criminal Procedure Code. If it is an irregularity it can be cured by secs. 532 and 537 of the Criminal Procedure Code. If it is an illegality, the accused must be set at liberty at once.

Mr. A. K. Basu in reply submitted that sec. 537 has no application here. The Bench was constituted under the Letters Patent, it is not an Appellate or a Revisional Court under the Criminal Procedure Code.

Also Mr. Justice B. B. Ghose presiding on an Original Criminal Court could not cure the irregularity under sec. 537.

The absence of complaint goes to the root of the matter and is an illegality not curable under sec. 537.

The JUDGMENT OF THE COURT was as follows :—

WALMSLEY, J.—The Petitioner gave evidence in a case tried by the Chief Presidency Magistrate. Part of his evidence was regarded as false and the learned Magistrate deemed it necessary to take proceedings under sec. 476, Cr. P. C. He accordingly drew up a complaint. This

complaint he preferred in his own Court and then he transferred it to Mr. Khan, Presidency Magistrate, for disposal. The latter issued process, held an enquiry and committed the Petitioner for trial. Objection was taken at the trial that the commitment was illegal, but the presiding Judge, Mr. Justice B. B. Ghose, overruled the objection. The Petitioner was then tried and convicted. The learned Advocate-General under the provisions of cl. 26 of the Letters Patent has granted a fiat certifying that in his judgment the questions whether under sec. 476, Cr. P. C., the Chief Presidency Magistrate was competent to make a complaint to himself or take cognizance of the said case and transfer the same and whether the Third Presidency Magistrate (that is, Mr. Khan) was competent, under the law, to commit the accused for trial to the Sessions, should be further considered by the High Court.

It is worth noting at the outset that one piece of information given to the learned Advocate-General was incorrect; process was issued by Mr. Khan and not by the Chief Presidency Magistrate himself.

The contention on behalf of the Petitioner is that the Chief Presidency Magistrate's proceduro was illegal, and that the commitment and the conviction must necessarily be bad.

As Presidency Magistrates are not Magistrates of the first class under the provisions of sec. 6 of the Code, the wording of sec. 476, Cr. P. C., would present difficulty in a case where the false evidence is given before the Chief Presidency Magistrate himself, if there were only one Chief Presidency Magistrate, but at the time there was an Additional Chief Presidency Magistrate, and appar-

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ently the complaint might have been forwarded to him. That is what I think the learned Magistrate should have done. He did not do so, however, and we have to consider whether the course adopted was such as to vitiate subsequent proceedings.

It is said that there was no complaint, because a person cannot complain to himself. Ordinarily a complaint implies at least three persons, a person complaining, a person against whom the complaint is made and a third person to whom the complaint is addressed. In the Code the word is defined thus: "A complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person has committed an offence." The same implication is contained in this definition, but it is a narrow view to hold that there was no complaint because the Magistrate preferred it in his own Court. It is more important to consider what he did after preferring it: and it is clear that he at once sent the complaint to Mr. Khan for disposal; in other words, the learned Magistrate after making the complaint was careful to abstain from himself making any order adverse to the Petitioner. Then the argument is that he took cognizance of the complaint before transferring it to Mr. Khan. The expression "taking cognizance" is not defined or explained in the Code, and the argument that the Chief Presidency Magistrate took cognizance of the complaint is founded on the words of sec. 192 which imply that a Magistrate can only transfer cases of which he has taken cognizance. This argument appears to be technically correct, and it leads us to this conclusion that the only acts of the Chief Presidency Magistrate to which exception can be taken are that he received

the complaint from himself and forwarded it to Mr. Khan for disposal.

In the hands of Mr. Khan the complaint was like any other complaint, save that a preliminary enquiry under sec. 202 was barred. Mr. Khan had full authority to dismiss it or to issue process: he decided to issue process and there is no reason to suppose that in making that decision he did not apply his mind judicially to the allegations made in the complaint.

The question we have to decide is whether there has been such a failure to comply with the terms of the law as to render the proceedings bad. For the Petitioner it is said that the procedure was illegal, and that the illegality was of such a character as to go to the root of the case.

In my judgment such a description of what was done is extravagant. Technically I think the learned Magistrate made a mistake, but substantially his procedure was correct: he made the complaint and received it, but then he refused to pass any order himself for the issue of process. Another Magistrate decided that process should issue and afterwards held a proper enquiry. It is not seriously suggested that the Petitioner suffered any prejudice. I think therefore that the learned Magistrate committed nothing worse than an irregularity, which may be disregarded.

There is another aspect of the matter. Mr. Justice Ghose observed that if he gave effect to the objection, there would be a fresh enquiry perhaps before the same Magistrate, and he decided to go on with the trial. I doubt whether there was any other course open to him. I am disposed to think that the Petitioner's remedy was to move this Court in its revisional capacity to quash the commitment. I do not, however, rest my judg-

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ment on this view, but on the ground that there was, in substance, compliance with the provisions of the Code.

RANKIN, J.—When the Chief Presidency Magistrate decided to make the complaint in this case to himself, he adopted a course unknown to the law. A document which is not addressed to a person other than the writer is not a complaint either in the ordinary sense or in the sense in which the word is used in sec. 476 of the Criminal Procedure Code. The fact that the word “complaint” appears in the heading or in any other part of the document does not make it a complaint or bring it any nearer to being a complaint. It is not an allegation made to a Magistrate [sec. 4 (1) (h)]. Such a document is not merely irregular or defective as a complaint; it is one of which the general character and governing intention are not those of a complaint. The meaning of sec. 176 is that a judicial officer minded to initiate proceedings for offences therein described must initiate them before another person who is a Magistrate of the first class having jurisdiction and must do so by making and forwarding a complaint to him.

However much or little is meant in the Criminal Procedure Code by “taking cognizance of an offence” or “taking cognizance of any case” or “taking cognizance of an offence or complaint” the mental act of a person scrutinising his own “complaint” and determining to take action thereupon is materially different from anything contemplated by the Code. A complaint under sec. 190 is something received by a Magistrate and “cognizance of complaint” imports and implies this. The course taken in this case is not substantially different from the process of taking cognizance upon the Magistrate’s own knowledge or suspicion

(sec. 190)—a proceeding which secs. 476 and 195 clearly forbid. In another view it is much the same as if Mr. Roxburgh had laid a complaint before Mr. Khan and Mr. Khan had proceeded to deal with it notwithstanding that he is not a Magistrate of the first class.

Again an order whereby a complainant transfers his own complaint to a judicial officer of his own choosing for investigation and disposal cannot be otherwise described than as an illegal order. As against an accused an order of transfer is by itself no foundation of Criminal Jurisdiction, but apart from this consideration, the order in the present case, though not within sec. 556, was such that the accused was not obliged to regard it as conferring jurisdiction upon anyone or indeed as operating anything.

I am not aware of the difficulty of applying or of correctly appreciating new provisions in our lengthy and meticulous Procedure Code, nor of the stress under which the Court of the Chief Presidency Magistrate has to transact a great volume of business. It is not difficult to see that in a case like this the notion of making a complaint to the complainant himself may have seemed a very harmless adaptation of the ordinary course. It may, I think, be conceded that in this very case the same enquiry and the same commitment might and probably would have resulted if the proceedings had been held in accordance with law. Still it remains undeniable that the statute for reasons of policy has laid down—and this partly if not wholly in the interest of accused persons—that no proceedings under sec. 195 of the Indian Penal Code shall be had except upon certain conditions: that these conditions were at no time fulfilled: that no one had any right or duty in their absence to hold any magisterial enquiry

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into the alleged offence of this accused and that Mr. Khan had in law no more valid ground for exercising with regard to it his general jurisdiction as a Presidency Magistrate than any other Presidency Magistrate. The proceedings from beginning to end were illegal in the sense that the statute had expressly forbidden them to be had. Their commencement and continuance was a breach of public order—in principle a grave breach, if not in result.

In these circumstances the accused was committed to the High Court and tried by my brother Ghose and a special jury at the fourth Criminal Sessions of 1925. Before the plea of the accused was taken it was objected by Counsel on his behalf that the commitment was illegal. In the Advocate-General's certificate this is described—with what accuracy I will not stop to consider—as a plea in demurrer. In any case the learned Judge overruled it. The accused was thereupon called on to plead and after pleading not guilty was convicted on the evidence and sentenced to one year's imprisonment.

The certificate of the Advocate-General under cl. 26 of the Letters Patent refers to us these questions—(1) whether under sec. 476 the Chief Presidency Magistrate was competent (a) to make a complaint to himself, or (b) take cognizance of the case, and (c) transfer the same. (2) Whether the Third Presidency Magistrate was competent, under the law, to commit the accused for trial to the Sessions.

It is plain enough that this last question was answered in the affirmative at the trial by the learned Judge. It is not perhaps quite so clear that the other questions—for they are more than one—were answered in the affirmative by the learned Judge. I think, however, that they were, having regard to the argu-

ment for the Crown which his judgment recites and to the fact that the learned Judge was not persuaded that the statute contained any provision applicable to the case of an alleged offence under sec. 195 of the Indian Penal Code, when it is charged as having taken place before the Chief Presidency Magistrate himself.

Most unfortunately the attention of the learned Judge was not called to sec. 18 (4) of the Criminal Procedure Code as it now stands nor to the fact that action had been taken under it to appoint an Additional Chief Presidency Magistrate with power to receive complaints under sec. 476. No doubt but for sec. 18 (4) the Court would have had to choose between the view that persons committing perjury, before the Chief Presidency Magistrate, could not be prosecuted at all and the view that he could make a complaint to himself and himself take cognizance of the case. I must not be understood to express any opinion as to what would have been the correct answer to this dilemma. But now that the whole matter has been cleared up it is manifest that there was no necessity or justification for any departure from ordinary procedure.

In my opinion the answer to all the questions raised by the Advocate-General's certificate is in the negative. The Chief Presidency Magistrate was no more competent to complain to himself than to complain of himself. He was not competent to take cognizance of the alleged offence on his own complaint any more than he was competent to do so on his own knowledge or suspicion. His order of transfer had a separate and independent illegality of its own and conferred no authority of any sort on Mr. Khan. So far as the accused is concerned his right, unless and until something happen-

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ed to abridge his right, was to regard the proceedings before Mr. Khan as being wholly unauthorized by law. Mr. Khan at the time when he made his commitment order was not competent under the law to commit the accused for trial.

On this view there has been error in the decision of these points of law decided by the Courts of Original Criminal Jurisdiction and referred by the Advocate-General to be further considered by the Court. Accordingly under cl. 26 of the Letters Patent this Bench has power to pass such judgment and sentence as to it shall seem right.

In my judgment the correct order is to set aside the conviction, and all the proceedings from the commencement including the so-called "complaint," and to direct that the accused be released.

So far as I understand, the objections to this course are two.

First, it may be said that the learned Judge had no power or duty to enquire into the validity of the commitment and that although he may have proceeded upon erroneous reasons his actual decision to proceed with the trial was correct.

Secondly, it may be said that the defects in this case should be treated as coming within sec. 537 of the Code.

In my judgment effect should not be given to either of these objections. (1) Sec. 215 of the Criminal Procedure Code enacts that a commitment once made under sec. 213 by a competent Magistrate can be quashed by the High Court only and only on a point of law. It is not necessary for the present purpose to decide whether in the case of a commitment to the High Court an application to quash should be made to the Appellate Bench or to the Judge for the time being exercising Original Criminal Jurisdiction. In *Phanindra Nath Mitra v. King-Em-*

peror (1), Brett, J., thought it doubtful whether the Appellate Side of this Court had power to quash such a commitment. On the other hand, Spencer, J., in *Crown Prosecutor v. Bhagavathi* (2) held that the application should be made on the Appellate Side and it was accordingly made and determined before a Divisional Bench. I find from the Minute Books of the Crown office that in the case of *R. v. Chabi* (3), Fletcher, J., sitting at Sessions in May 1919 being of opinion that the alleged offence had been committed, if at all, outside the jurisdiction of the committing Magistrate and of this Court adjourned the case to enable an application to be made on the Appellate Side to have the commitment set aside. Again in February 1912, Stephen, J., sitting at Sessions, on being informed that the evidence against the first of several accused had not been taken by the Magistrate in presence of the first accused held that "the commitment was not legal and must be quashed and the first accused will not be tried with the others at this trial. As the Crown does not proceed against him he is discharged." [*R. v. Mahadev Bhujan* (4)]. It seems to be reasonably clear that if the present case had been committed to a Court of Sessions the Sessions Judge if he thought the commitment bad would have referred it to the High Court.

Now the learned trial Judge having decided that the commitment was not illegal did not have occasion to apply his mind, and so far as I see, did not apply his mind, to the question whether he should proceed on an illegal commitment. His

(1) I. L. R. 36 Cal. 48; s. c. 12 C. W. N. 1014 (1908).

(2) I. L. R. 42 Mad. 83 (1916).

(3) Unreported.

(4) Unreported.

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decision took away all ground for an application that an order like that made by Fletcher, J., or Stephen, J., might be made here. It is nothing to the point to say that the nature of the objection in the previous cases to the order of commitment was distinguishable from the nature of the objection in the present case. I will assume—though I am far from asserting—that a commitment made by a Magistrate clothed under sec. 206 with a general or formal jurisdiction to make commitments, if made in respect of an offence alleged to have been committed within his jurisdiction and to a Court by which such offence is triable, cannot be quashed by the Sessions Judge. I will assume further—though, again, I do not assert—that in such a case no plea to the jurisdiction can be made by the accused in respect of any illegality in the previous proceedings. I will take it also that an accused is not entitled as of right to an adjournment of the trial in any circumstances such as here arose. Even so, in a regular appeal the question and the only question besides the legality of the commitment would have been whether sec. 537 of the Criminal Procedure Code applied to this case and no other question would have arisen even if objection had not been taken at the trial. Now what is the difference of position under cl. 26 of the Letters Patent and upon the present certificate of the Advocate-General? It is only that we cannot interfere unless a point of law referred to us has been wrongly decided by the trial Judge, given that our right and duty in passing judgment is subject to no extraordinary limitations. An error in law which has had no consequences prejudicial to the accused would warrant no interference with the conviction.* But in the case before us I cannot bring myself to doubt that if the

attention of the learned Judge had been drawn to sec. 18 of the Criminal Procedure Code and the provision made thereunder, he would have made short work of any supposed difficulties as to his proper course. Had he thought the magisterial proceedings to be contrary to law and the commitment unauthorized, one may respectfully presume that he would have taken some steps with a view to terminate an illegal prosecution. If he had decided that the legality of the magisterial enquiry and the validity of the commitment were questions that he could not determine, one may respectfully presume that he would at least have considered whether the correct procedure was so clear and the accused's objection so little meritorious that his right to object should be treated as at an end and the trial held. In fact the learned Judge proceeded with the trial because he held the complaint and commitment good. That his decision produced no consequences to the prejudice of the accused is an impossible contention. I do not myself presume to doubt that had he thought the commitment irregular—let alone illegal—he would have exacted from the prosecution the same scrupulous care of the prisoner's legal rights as was shown in the case already referred to before Stephen, J. In that case the evidence of two witnesses which had been taken in the presence of co-accused was read over to the first accused instead of being taken over again. I would point out that Counsel for the Crown thought it his duty to point out this defect, and the Judge thought it his duty to see that the prisoner was not tried. In my opinion that is the right view.

(2) It remains only to deal with sec. 537 of the Criminal Procedure Code. It was argued by learned Counsel for the

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accused that this section cannot be applied under cl. 26 of the Letters Patent. The section, however, is not an enabling section but one which consists of a prohibition. I see no reason to suppose that we are obliged under the Letters Patent to do what this section prohibits a Court of Appeal or Revision to do. It matters nothing in my opinion whether this Bench is sitting on appeal or revision within the exact meaning of sec. 537, but the leading case upon this section [*Subramaniam Ayyar v. King-Emperor* (5)] seems sufficient to show that sec. 537 is applicable under cl. 26 of the Letters Patent.

In my judgment the commitment in this case was not merely irregular but illegal and any Court having jurisdiction to quash it would have erred in law if it had refused to quash it. As the case stands at this moment no Court can take cognizance of the alleged offence because there has been no complaint such as would entitle it so to do under sec. 190 of the Criminal Procedure Code. There is here no question of error, omission or irregularity in the complaint. The proceedings have been had throughout in defiance of the express provisions of the Code and of fundamental principles of law. They have been had *coram non judice*; and save for limited and special purposes which have reference for the most part to persons other than the accused they are not judicial proceedings in any exact sense of the words.

It is true that in the case of *R. v. Khamir* (6) a commitment to the Court of Sessions which was made so far as can be seen in obedience to an illegal order of the Sessions Judge and without any en-

quiry whatsoever was held by a Division Bench of this Court to come within sec. 283 of the Criminal Procedure Code of 1872. "These are, no doubt," says the judgment, "serious irregularities and more especially the first which is a direct transgression of the law; and if they had been brought to the notice of this Court before the trial had taken place the commitment would properly have been quashed." It seems to me to be a serious question whether this decision did not go beyond "the remedying of mere irregularities," to use Lord Halsbury's words in the subsequent case [*Subramaniam Ayyar v. King-Emperor* (5)], but in any event it would be a further and an unwarrantable step to treat the case before us in the same manner notwithstanding the objection made and overruled at the trial.

CUMING, J.—This is an application under cl. 26 of the Letters Patent on a certificate from the Advocate-General asking the Court to review the case of one Colin Mackenzie Mackay who was found guilty at the fourth Criminal Sessions presided over by Mr. Justice B. B. Ghose of offences under sec. 193 and sec. 195, I. P. C., and sentenced to one year's rigorous imprisonment. The facts are as follows:—

The accused Colin Mackenzie Mackay gave evidence in a certain case before Mr. Roxburgh, Chief Presidency Magistrate. The Chief Presidency Magistrate being of opinion that he had given false evidence took proceedings under sec. 476. He drew up a complaint and made the complaint to himself, took cognizance of it and then transferred it for enquiry to Mr. A. Z. Khan, a Presidency Magistrate, who enquired into the matter and com-

(5) I. L. R. 26 Mad. 81; s. c. 5 C. W. N. 866 (P. C.) (1901).

(6) I. L. R. 7 Cal. 662; 10 C. L. R. 8 (1882).

(5) I. L. R. 26 Mad. 81, 97; s. c. 5 C. W. N. 866 (P. C.) (1901).

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mitted the accused to the High Court Sessions. When the case was called on the accused for the first time raised the objection that the commitment was illegal inasmuch as the Chief Presidency Magistrate was incompetent to make a complaint to himself under sec. 476, Cr. P. C. and to take cognizance of the case and therefore the Third Presidency Magistrate was incompetent to make the enquiry or commit the accused for trial. Mr. Justice Ghose overruled the objection, proceeded with the trial and the accused was found guilty and sentenced as above-stated. On an application to the Advocate-General a fiat under cl. 26 of the Letters Patent was obtained. The first point which requires consideration is whether the case falls within cl. 26 of the Letters Patent, in other words, has there been an error in the decision of a point or point of law decided by Mr. Justice Ghose. If there has not, the certificate is misconceived and the High Court has no power to interfere [*King-Emperor v. Upendra Nath Das* (7)]. What is the error of law that is ascribed to Mr. Justice Ghose? The error presumably is that the learned Judge held that the commitment was a legal commitment and proceeded with the trial.

Sec. 215 of the Code provides that a commitment once made by a competent Magistrate or by the Court of Sessions can be quashed by the High Court only and only on a point of law.

It thus requires to be decided whether High Court in sec. 215 includes a single Judge of the High Court sitting in Original Criminal Jurisdiction. Speaking for myself I have considerable doubt whether it does. If then Mr. Justice Ghose had no power to quash the commitment being admittedly made by a Magistrate who had

jurisdiction to commit to the High Court, the correct procedure was to move the Criminal Bench on the Appellate Side in revision. This point, however, was not fully argued before us and I reserve my opinion for some future occasion if it arises.

To deal with the application on its merits. Mr. Basu argues that the commitment was bad, (1) because there was no complaint, (2) that a Magistrate cannot take cognizance of his own complaint, (3) that the complaint could have been made to the Additional Chief Presidency Magistrate who had all the powers of a Chief Presidency Magistrate, (4) that as Mr. Roxburgh could not entertain his own complaint and had no jurisdiction to transfer it to Mr. Khan, so Mr. Khan had no power to commit.

With regard to the first and second contentions the argument would seem to be that it takes two persons to make a complaint—one to complain and one to hear the complaint. That there was a complaint I have not the slightest doubt.

The complaint itself appears on page 13 of the paper-book. Complaint is defined in sec. 4 (2), Cr. P. C., as the allegations made orally or in writing to a Magistrate with a view to his taking action that some persons have committed an offence. The document on page 13 certainly falls within the definition. It certainly is an allegation made to a Magistrate with the view to action being taken and it was made to a Magistrate.

It is argued that a Magistrate cannot take cognizance of his own complaint because a Magistrate when he takes cognizance must consider the case judicially, before transferring it to another Magistrate, and he cannot be held to judicially consider his own complaint. The ex-

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pression "to take cognizance" is nowhere defined in the Code.

Sec. 192 provides that the Chief Presidency Magistrate who has taken cognizance may transfer any case of which he has taken cognizance to any Magistrate subordinate to him. Sec. 203 provides that a Magistrate to whom the case is transferred may dismiss the complaint if he thinks there are no sufficient grounds for proceeding, otherwise he will issue his summons. Thus it is quite clear that the Magistrate to whom the case is transferred must consider the case judicially before issuing process. If that is correct it would seem unnecessary that the Magistrate who took cognizance must judicially consider the case before transferring it to some other Magistrate for trial. If that were so, it would mean that the same question would have to be considered by two persons, viz., whether process should issue or not. I am therefore of opinion that there is nothing in the Code that prevents a Magistrate from taking cognizance of his own complaint. No doubt he could not try the case himself but in view of sec. 487 (2) there would seem nothing to prevent him committing the case for trial. This latter point, however, does not arise in the present case and it is unnecessary to consider it.

Even if it be conceded that he could not have taken cognizance himself then the position is that no cognizance of the case was taken until the case came into the file of Mr. Khan. Mr. Khan is not empowered to take cognizance but his so doing would be an irregularity and not an illegality (sec. 529), and as such curable under sec. 537.

It has not been seriously argued that owing to the procedure followed the accused was in any way prejudiced. It was suggested that if the case had been en-

quired into by Mr. Keays, he, being an Additional Chief Presidency Magistrate, would have taken an independent view, while Mr. Khan being a Subordinate Magistrate might feel bound to carry out the orders of the Chief Presidency Magistrate. The suggestion hardly calls for serious consideration.

It has been contended that there was another Magistrate, Mr. Keays, the Additional Chief Presidency Magistrate, who was empowered to take cognizance under sec. 476. I fail to see how this is of any importance. The presence or absence of another Magistrate who could have taken cognizance makes no difference to the legality or illegality of what Mr. Roxburgh did. I am of opinion that we should not interfere.

B. B. GHOSE, J.—The question that seems to arise in this case is whether on the certificate of the Advocate-General the questions referred to in it can be considered by this Court. Under cl. 26 of the Letters Patent the Advocate-General may certify that a point of law decided by the Court of Original Criminal Jurisdiction should be further considered. The only point referred to in the certificate as decided by me is that I overruled what has been somewhat inaccurately described as a "plea in demurrer" taken on behalf of the accused, and allowed the trial to proceed. The certificate of the Advocate-General does not require that the point decided by me that the trial should proceed should be further considered. It is unnecessary to state what order I should have passed if the facts had been presented to me as they appear to be now. But the question arises as to whether a Judge exercising Original Criminal Jurisdiction has authority, except under specified circumstances, under the Code of Criminal Procedure, to quash a

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commitment made by a Magistrate authorised to do so under the Code. Under sec. 532 (2) the Judge may quash a commitment, but in this case there was no objection taken during the enquiry nor was any injury to the accused alleged. The Judge may also make an entry under sec. 473 that the charge is clearly unsustainable which would have the effect of staying proceedings. If neither of those proceedings can be taken, I think the Judge cannot refuse to go on with the trial. A commitment may be quashed by the High Court under sec. 215, but this refers to its Appellate or Revisional Jurisdiction, and I do not think that a Judge exercising Original Criminal Jurisdiction can quash a commitment on the ground that it was illegal. No step to have the commitment quashed was taken by the accused and so the trial had to proceed. If this is correct, I do not think we can consider the points certified by the Advocate-General, as we are not sitting as a Court of criminal appeal. I do not, however, propose to rest my decision on this ground alone as the question was not argued before us although I invited discussion on it.

The contention on behalf of the Petitioner is that there was no complaint and the Chief Presidency Magistrate acted illegally in taking cognizance of the case, with the resulting consequence that the entire proceedings as also the subsequent trial are void. I think that the document signed by the Chief Presidency Magistrate was a complaint of the offence as contemplated in sec. 476 of the Criminal Procedure Code, and nothing could have been said against it if it had been forwarded to another Magistrate having authority under the section. As it now appears that the Additional Chief Presidency Magistrate was also a Magistrate of

the first class for the purposes of sec. 476 (1), the Chief Presidency Magistrate should have forwarded the complaint to him. But the question is what is the consequence of his omission to do so? It seems to me that taking cognizance of a case under the Code does not involve any judicial act on the part of the Magistrate. If a Magistrate is empowered under sec. 190 and the offence complained of is brought to his notice in the prescribed manner the Magistrate is bound to take cognizance of the case. His judicial act commences from the proceedings to be taken under sec. 200. But in a case like the present the complainant is not required to be examined. The Magistrate to whom the case was transferred could take every judicial action that a Magistrate taking cognizance of the case could do, i.e., postpone the issue of process or dismissing the complaint if he thought fit. The Chief Presidency Magistrate did not take any judicial action in the matter before transferring it to the Third Presidency Magistrate. Moreover, it does not seem to me that taking cognizance of the case by the Chief Presidency Magistrate was illegal. Under sec. 487, sub-sec. (2) he might himself commit the case to the High Court, and this implies that he must take cognizance of the case and take all further steps leading to the commitment. The irregularity in his procedure was that instead of himself committing the case, he transferred it to another Magistrate. The case was not tried by the Magistrate. The principle laid down in sec. 487 appears to be that the Magistrate should not try any person for an offence committed before himself but he may take all necessary steps for the commitment of the case to the Court of Sessions or the High Court if he is empowered to commit. I do not therefore

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think that the commitment or the subsequent trial was illegal and the irregularity referred to would be cured under sec. 532 (1) of the Code of Criminal Procedure. I agree with the decision of Walmsley, J., and Cuming, J.

CHAKRAVARTI, J.—I agree with the conclusion arrived at by my learned brother Mr. Justice Rankin and, as I had the advantage of reading his judgment, I do not think it leaves out anything which I can usefully add.

Mr. N. K. Roy Chowdhury, Solicitor for the Accused.

Mr. G. C. Gooding, Solicitor for the Crown.

P. D.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF
LOWER BURMA.]

LORD PHILLIMORE.

LORD BLANESBURGH.

SIR JOHN EDGE.

1925,

Heard, 16, 17, 20

and 21, June.

Judgment,

22, October.

SAKLAT and ors.,
Appellants,

v.

BELLA,
Respondent.

Parsi endowment—Fire Temple of Rangoon, beneficiaries of, who are—Right of non-Parsi convert to Zoroastrianism to enter and worship in temple—Ceremonies necessary for initiation—Burusknun, if an essential ritual—Person whose mother only Parsi, if a racial Parsi—Stranger, if may be excluded at suit of beneficiary—Trustees, if bound to treat stranger coming to worship as trespasser—Wounding of religious feeling and desecration of temple, if grounds for action in trespass by beneficiaries—Allowing stranger to participate in benefit of trust, when malversation and when not.

Held, upon the evidence—That the trusts of the Fire Temple at Rangoon were intended for the professing members of the Parsi community, i.e., racial Parsis or people deemed after a long lapse

of ages to be racial Parsis, professing the Zoroastrian religion.

As regards the racial claim, maternity is of no importance; and a person whose mother was a Parsi, though actually and validly converted and initiated into the Zoroastrian religion, was not entitled, as of right, to use the Temple or to attend or to participate in any of the religious ceremonies performed therein.

Such a person entering into the Temple may be excluded or extruded from the Temple as a trespasser by the persons in possession, viz., the trustees of the Temple. But a beneficiary or two or three or more of them cannot sue such a person as a trespasser or claim an injunction to restrain the entry by such a person into the Temple on the mere ground that such entry wounds their religious feelings and desecrates the Temple. The beneficiaries as such may not be allowed to recover damages for or restrain such entry as trespass unless, at least, they establish that the intrusion of such a person is so repugnant to their habits of mind that the entrance of such a person must entail their own departure, so that it is as it were trespass to the person.

ANANDRAV BHIKAJI PHADKE v. SHANKAR DAJI CHARYA (3) referred to.

Quare :—Whether the presence of a convert to Zoroastrianism causes desecration of the Temple.

Cases of application by trustees of the funds of a public or charitable trust for persons not objects of the trust stand on a different footing from cases where the benefits of a trust created only for rendering some convenience or service are extended by the trustees to persons other than the lawful recipients thereof. In the former class of cases the act of the trustees

(3) I. L. R. 7 Bom. 323 (1893).

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will be a malversation, for only those who are objects of the trust must have all the benefits they require and if there be a surplus it must be left to the Courts to make a cy-pres application of it; in the latter, the trustees are not bound to exclude persons who have no legal title to share in the benefits or to treat them as trespassers.

REX v. GRUNDON, EXP. DAVISON (2) referred to.

The ritual called Burushnun is not an essential part of the ceremony for initiation into Zoroastrianism.

DINSHA MANEKJI PETIT v. JAMSETJI JIJIBHAI (1) referred to.

This was an appeal (No. 57 of 1924) from a decree, dated the 28th July 1920, of the Chief Court of Lower Burma, which affirmed a decree, dated the 23rd April 1918, of the said Court on its Original Side and dismissed the Plaintiffs' suit.

The Plaintiffs were Parsi residents of Rangoon professing the Zoroastrian religion and they sued on behalf of themselves and all other persons interested in the Parsi Fire Temple in Dalhousie Street for a declaration that the Defendant Bella is not entitled to the use and benefit of the said Temple or to attend or participate in any of the religious ceremonies performed therein and for an injunction restraining her from entering and the second Defendant Shapurji Cowasji, her foster-father, from taking her into the said Temple.

On the 23rd April 1918 the trial Judge (Young, J.) held that the suit was only maintainable by the Plaintiffs if and so far as they could show that their Temple was polluted and their religious susceptibilities wounded by the presence of Bella, that no action for physical trespass lay, and that inasmuch as the Plaintiffs had not proved

that Bella was not duly initiated no action for "moral trespass" could be maintained.

The Appellate Court (Robinson, Acting C. J. and MacGregor, J.) were also of opinion that the Respondent Bella had been validly initiated into the Zoroastrian religion and held that on the true construction of the trust deed relating to the Fire Temple the expression "Parsee population" was not exclusively confined to the Parsis as a race and that the words "Parsi" and "Zoroastrian" were interchangeable.

In their opinion the decision in *Dinsha Manekji Petit v. Jamsetji Jijibhai* (1) was applicable only to the trust fund and properties which were the subject-matter of that suit, and the reasons in that case which were cogent when applied to the wealthy Parsi community of Bombay had not the same value when applied to the small Parsi community of Rangoon.

They accordingly dismissed the appeal.

From that decision the Plaintiffs appealed to His Majesty in Council.

Mr. A. M. Dunne, K. C., Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellants.

Messrs. Upjohn, K. C. and Warwick Draper for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The circumstances of this case are as follows:—

Sometime in 1899 a Goanese Christian named Jones with his wife arrived in Rangoon. They were in humble circumstances, and the wife applied for assistance to a Parsi of good position at Rangoon, Bomanji Cowasji, stating that she too was a Parsi. He befriended her till he went to England in 1900 and then asked his

(1) I. L. R. 33 Bom. 509 (1908).

(2) Cooper's Rep. 318.

(1) I. L. R. 33 Bom. 509 (1908).

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brother Sapurji Cowasji to look after her and the child, to which she had just given birth, the Respondent Bella. The father died and when her mother died shortly afterwards Sapurji, who was a Defendant in this suit, but died pending the appeal, took Bella into his own house, and he and his wife treated her as their own child.

When Bella was nearly 14, it was desired that the initiation ceremony into the Zoroastrian religion called Navjot should be performed for her, but the local Head Priest at Rangoon refused, chiefly because—as it appears from his evidence—he thought it would be unpopular with the Parsi community. Advantage was then taken of the temporary presence of some other priest, who performed the ceremony; and after that invitations were sent by the Head Priest to Bella to come with Sapurji and his wife to the Temple on festival days. Three such invitations were sent, the High Priest said, with the expectation that they would not be accepted; but on the third occasion, being 21st March 1915, Sapurji brought her and put her within the sacred precincts facing the sacred fire, and in such a position that she went through all the ceremonies like other worshippers.

This proceeding gave great offence to a number of members of the Parsi community in Rangoon, and on the 31st March, this suit was brought by three members of the Parsi community, who stated that they brought it not only on their own behalf but on behalf of a large number of members of the Parsi community at Rangoon, against Bella and against Sapurji, stating that the Temple was held on trust for the free and unrestricted use of the Parsi inhabitants in Rangoon professing the Zoroastrian faith, further stating that it was alleged that the mother of Bella was a Parsi, and that Bella had been validly converted or initiated into

the Zoroastrian religion, but denying that this was so or indeed could be so, and averring that the Defendants had by their acts "not only wounded the religious feelings entertained by religiously inclined Parsis, but also caused the desecration of the said sacred Temple."

In another paragraph of the plaint, they stated that only members of the Parsi community professing the Zoroastrian religion were entitled to the use of the Temple, to the access of the sacred precincts and to attend, witness or take part in any religious ceremonies held therein, and that it was never the intention of the Parsi community that the children of non-Parsi fathers should be allowed the use of the Temple. They further said that even assuming that Bella could be duly admitted into the Zoroastrian religion, and assuming that her mother was a Parsi, even then she could not be considered a Parsi or a member of the Parsi population. They prayed for a declaration that Bella was not entitled to use the Temple or to attend or to participate in any of the religious ceremonies performed therein and for injunctions to restrain her from entering the Temple and Sapurji from taking her there.

Sapurji, in his own name and as guardian for Bella, put in their written statement. In this it was contended that the plaint disclosed no cause of action, that the Defendant Bella was entitled to attend the Temple and the ceremonies and caused no desecration by her presence; and it was stated that her mother was a Parsi, that she had been brought up from early infancy as a Parsi and in the Zoroastrian faith, and that she came within the terms of the trust of the Temple.

The following issues were then settled :—

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"1. Whether the plaint discloses any cause of action?

"2. Whether this suit is maintainable?

"3. Who are entitled to the benefit of the Fire Temple Trust?

"4. Is the first Defendant the daughter of a Parsi mother?

"5. Is it possible for the first Defendant, being a daughter of a non-Parsi father to be initiated (a) into the Zoroastrian Religion and (b) into the Parsi Community?

"6. If it was possible, whether the ceremonies adopted for the purpose were defective (the second Defendant to give particulars of the ceremonies performed at the initiation of the first Defendant within one week, and the Plaintiffs to state within one week thereafter whether, and if so, in what respects they contend that these ceremonies were inefficacious):"

and the case was set down for a preliminary hearing on the first and second issues.

The Judge decided these points in favour of the Plaintiffs; and thereupon some oral evidence was taken before the Judge at Rangoon, and a mass of evidence covering 664 pages of the record was taken on commission at Bombay.

It appears that this was not the first occasion in modern times in which the question of the admissibility of a person who was not a racial Parsi, but who had become a convert to the Zoroastrian religion, to participate in the religious services and enter the temples of the Parsis had arisen.

In 1903 a French woman had declared that she had become a convert to the Zoroastrian religion and had married a Parsi gentleman of position at Bombay. Her claim to participate in religious worship had given rise to much excitement in the Parsi community, and seven Parsis, one of whom was the French woman's husband, had brought a suit in the High Court of Bombay against the trustees of the Parsi endowments, first making a general case of ~~some~~ misfeasances requiring the intervention of the Court, and secondly claiming a declaration that the trust deeds

ought to be construed as admitting to their benefits any person professing the Zoroastrian religion whether a racial Parsi or not.

After a prolonged litigation, this suit, except in so far as it prayed for a correction of the general misfeasances, was dismissed; and the Judges, for reasons which will have to be more minutely entered into, held that the various endowments were limited to the use of people who as well as being Zoroastrian were also racial Parsis. But the controversy had not been forgotten, and its echoes are to be heard in the evidence given on commission in the present case.

Young, J., in the preliminary judgment given in the present case, held that the Plaintiffs could not sue for trespass on land or in the Temple, but that they might have a third cause of action which he described as an interference with their right to exclusive worship. He thought that they had sufficiently alleged this right and its infringement, that the right was one which had been often upheld by the Courts, and that the suit could be brought without joining the trustee or without obtaining the consent of the Advocate-General. When he came to his later decision upon the whole case, he described the injury as "an injury to the Plaintiffs' individual right to worship undisturbed by the intrusion of a person not belonging to their faith," and applying his mind to the fifth and sixth issues, he held that Bella could be initiated into the Zoroastrian religion and into the Parsi community; that the ceremonies adopted for the purpose were sufficient, and that therefore there was no intrusion of a person not belonging to the Plaintiffs' faith, and it became immaterial to decide issues three and four. Accordingly he dismissed the suit.

When the matter came before the Chief

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Court, on appeal, the Judges, though apparently they heard one continuous argument, gave two judgments: the first in respect of the preliminary issues. In this they confirmed the actual decision of Young, J., but enlarged the Plaintiffs' cause of action, saying that they might treat it as an injury to themselves, that Bella, even though she were a Zoroastrian, yet not being a Parsi, came to the Temple worship.

This made it necessary for the Judges in the Chief Court to determine the third issue, viz., who are entitled to the benefits of the Fire Temple Trust; and they held that it was a trust for a religion and not for a race. They then held in agreement with Young, J., that Bella could be and was converted or initiated into the Zoroastrian religion, and therefore they concurred with him in dismissing the suit.

The Judges in the Chief Court took the view that the fourth issue might also have been decided in favour of Bella, *v.c.*, that her mother was a Parsi, but that this fact was unimportant, except as leading up to her conversion or initiation. Their Lordships agree with this. In their view it is settled that as regards the racial claim, maternity is of no importance.

The appeal to their Lordships' Board has raised among other questions the actuality and validity of Bella's conversion and initiation; but on this point their Lordships see no reason for differing from the judgment of the Chief Court.

In the great controversy in the Bombay case, *Dinsha Manekji Petit v. Jamsetji Jijibhai* (1), the two learned Judges (one of whom was himself a Parsi) came to the following conclusions thus expressed by the Parsi Judge, Davar, J. :—

"1. That the Zoroastrian religion not only permits

but enjoins the conversion of a person born in another religion and of non-Zoroastrian parents.

"2. That, although such conversion was permissible, the Zoroastrians, ever since their advent into India 1200 years ago, have never attempted to convert anyone into their religion.

"3. That there is not a single instance proved before the Court of a person born of both non-Zoroastrian parents ever having been admitted into the Zoroastrian religion professed by the Parsis in India."

It is true that as regards the quantum of the necessary ceremonial on initiation, Davar, J., expressed an opinion that a piece of ritual called *Burnshnun* was an essential part; but in this matter he was travelling outside anything necessary for the case before him; and their Lordships do not find that Beaman, J., the other Judge, concurred with him as to this, and they think that the evidence given in the present case warranted the decision to which the Chief Court came that this additional ceremonial was not necessary.

It follows therefore that the points which their Lordships have now to determine are whether the trusts of the Temple are for the benefit of all persons professing the Zoroastrian religion or limited to those who, professing that religion, are also racial Parsis in the sense in which that word is understood in the Parsi community; and secondly, whether if Bella, not being a racial Parsi, is not a person within the benefits of the Temple Trust, this fact gives the Plaintiffs any right of direct action against her and against her guardian.

The contention on behalf of the Plaintiffs was the same as that of the contention of the Defendants in the Bombay case, namely, that all these trusts were intended for Parsis in the limited sense, *i.e.* :—

"First.—The descendants of the original emigrants into India from Persia who profess the Zoroastrian religion.

"Secondly.—The descendants of the Zoroastrians in Persia who were not amongst the original emigrants, but who are of the same stock and have since

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that date, from time to time, come to India and have settled here, either permanently or temporarily, and who profess the Zoroastrian religion.

"Thirdly.—The children of a Parsi father by an alien mother, if such children are admitted into the religion of their fathers and profess the Zoroastrian religion."

Now the origin of the Temple, the right to worship at which is in dispute in the present case, is as follows :—

On the 24th November 1868, the Deputy-Commissioner at Rangoon, on behalf of Her Majesty's Government, granted to Bajunji Cowasji and Sapurji Hirji a parcel of land in the town of Rangoon of a certain size "upon trust to build and maintain upon the said parcel of land a temple for the use of Parsi population."

It was provided that the Deputy-Commissioner might nominate new trustees, and that if a Temple was not erected within a year, he might revoke the grant.

On the 14th August 1882—probably because there had been delay in building the Temple—a re-grant was made to new trustees upon trust for the same intents and purposes as the old grant, with like powers to appoint new trustees and a similar power of revocation if no temple was built within a year.

Previously on the 11th January 1859, the then Deputy-Commissioner had granted to two Parsi gentlemen another piece of land upon trust to maintain it "as a cemetery and to the free use of persons of the Parsi denomination." There was a similar power given to the Deputy-Commissioner to appoint new trustees and a power of revocation in case the land was applied to other uses. This grant was again renewed also on the 14th August 1882.

Some disputes having arisen as to the Temple, a suit was brought to have a new trustee appointed, and a scheme of management framed; and on the 20th

March 1889, the Recorder appointed Bajunji Cowasji sole trustee and ordered a scheme to be framed.

About the same time, a similar suit had been brought in respect of the burial ground, and by an order of the same date the same person was appointed trustee and a similar order to frame a scheme was made. The scheme in respect of the Temple gave the trustee charge of the Temple and its appurtenances with duty to manage and improve as funds permitted and power to build a range of shops on part of the trust lands, borrowing money for the purpose. After repayment of monies borrowed the rest was to be applied for the current expenses of the Fire Temple and the Parsi Burial Ground. In this way and to this extent the two properties were brought together.

When the scheme for the burial ground was to be framed, there was a serious dispute with regard to children of Parsi fathers who died without having gone through the ceremonies of initiation, and eventually the scheme was framed in the following words :—

"1. The Burial ground shall be used for burying persons who shall at his or her death be actually professing the Zoroastrian religion and no other.

"EXPLANATION. — No one shall be taken to be actually professing the Zoroastrian religion who has not been duly invested with the Sudra and Kusti, in accordance with the rites prescribed by that religion; provided, nevertheless, that children born of fathers following the Zoroastrian religion, and brought up in that faith, and dying before the age of 14 years and three months, without having been invested with the Sudra and Kusti, may be taken to be actually professing the Zoroastrian religion, but children dying after having attained that age without having been invested with the Sudra and Kusti shall not be taken to have professed the Zoroastrian religion unless his or her investiture was prevented by unforeseen and unavoidable circumstances."

It is suggested for the Defendants that this document shows that the stress of the

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matter was laid upon the religion and not upon the race.

One other document must be mentioned. Apparently it took a long time before the temple or at any rate the present Temple was built, and on the 20th August 1904, Bajunji Cowasji executed a deed of declaration of trust reciting that he and his brother had built at their charge a fire temple upon the trust lands so that the same might form part of the said trusts and be for the use of the Parsi inhabitants of Rangoon, and purporting to declare for himself and his successors-in-office that he held the fire temple "for the use of the Parsi inhabitants of Rangoon free and unrestricted but subject notwithstanding to the tenets of the pure Zoroastrian religion and to the scheme prescribed by the Court."

The Defendants at their Lordships' bar contended that this was an attempt to alter the trust and as such should be rejected, but in their written statement they accepted it as a valid document. So far as it goes, it rather makes in the Plaintiffs' favour, but their Lordships are not disposed to attach grave importance to it.

The Chief Court—as already stated—considered that the effect of these documents was to impose a trust for the benefit of persons professing the Zoroastrian religion and no others.

Their Lordships agree with the latter part of this proposition. Parsis who cease to be Zoroastrians have, in their Lordships' view, no claim. But upon the whole and after much consideration they think that the benefits are confined to persons who possess the double qualification of Zoroastrians and racial Parsis.

The judgment in the Bombay case travelled over much ground—indeed, in their Lordships' opinion, much unneces-

sary ground—but both Judges came to the conclusion that the various trusts in that case must be construed as being confined to persons who were of the Zoroastrian religion and racial Parsis. There were several trusts, and the expressions in the deeds were different; but the word Parsi never appeared in them, and the word Zoroastrian or some equivalent religious word was used. Sometimes the trusts were for the members of the Zoroastrian community of Bombay; other phrases were similar. Nevertheless, both Judges came to the conclusion that they must be read as has been already stated.

Davar, J., thus expressed himself:—

"A Juddin" (that is a Gentile) "may become a Zoroastrian, but how he ever could possibly become a member of the 'Holy Zoroastrian Anjuman of Bombay' or be one of 'the members of the Zoroastrian Community of Bombay' or become one of 'the Anjuman of the Mazdianani faith' passes my comprehension. A Juddin converted to Zoroastrianism had never come into existence. Such a person could not possibly have been within the contemplation of the donors and founders: the possibility of such a being coming into existence would be so new and novel that if the donor ever conceived such an idea and intended to include him in his benefaction, he would certainly designate him separately and specially, and not include him in the general description of the community of his then existing co-religionists and their descendants."

Beaman, J., said:—

"The question is not whether the Zoroastrian religion permits conversion, but whether, when these Trusts were founded, the Founders contemplated and intended that converts should be admitted to participate in them."

In their Lordships' view the same line of reasoning applies to the present case. The Parsi community had grown up to be such a distinct body, and admissions into it from outside had been so very rare, that at the time when these grants at Rangoon were made the Government must have intended that the Temple should be for the benefit of professing members of the Parsi community, i.e., racial Parsis or people

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deemed after a long lapse of ages to be racial Parsis.

But this does not exhaust the matters to be determined on the present appeal. It determines that the Respondent Bella has no right of entering into the Temple and may therefore be excluded or extruded from the Temple by the trustees. They can treat her as a trespasser. But it does not follow that they are bound so to treat her. Still less does it follow that in an action to which the trustees are not parties, and in which therefore no indirect remedy can be obtained, a direct claim can be supported as if for a tort committed by Bella or her guardian.

When property is set apart for public or charitable uses, it will be a malversation to apply any of the funds for persons who are not objects of the trust. Those who are objects of the trust must have all the benefits they require; and if there is a surplus, it must be left to the Courts to make a *cy-pres* application of it. But when the subject-matter of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, their Lordships are aware of no case in which it has been held that the trustees are bound to exclude persons who have no legal title to share. They may do so; they may treat all such persons as trespassers and say: *Sic volo sic jubeo, stet pro ratione voluntas*. But if they choose to admit to the benefit of some park or garden established for a particular district some persons from over the border or to admit to a public library destined for a particular municipality persons from outside, or what is perhaps a nearer analogy, admit to the hearing of a lecture by a University professor persons not members of the University, this of itself furnishes no ground of complaint. If the

numbers admitted are too large or the persons are disorderly or unpleasant in their habits or in any way substantially interfere with the convenience or benefit of those for whom the endowment was created, the trustees may be required to exclude them. But the mere claim of A that B shall not share in such a benefit because B is not within the terms of the foundation is not one that Courts would encourage.

Many illustrations of this doctrine could be drawn from the history of English institutions. The great schools of Westminster, Eton and Winchester arose from small nuclei, namely, a fixed number of endowed and privileged scholars taught by appointed masters. They have become what they are because unprivileged boys in greater numbers have been allowed to benefit by the services of the appointed masters, and to use the school class-room and play-grounds.

The statutes of the colleges in Oxford and Cambridge make provision for the education of a fixed number of students or scholars privileged and endowed. Many, if not most, of them make no provision for the admission of other members in *statu pupillari*. But "commoners," so called, though their legal position is merely that of boarders [*Rex v. Grundon, Exp. Davison* (2)], have been for several centuries admitted equally with the privileged scholars to the benefits of the colleges, particularly to the use of hall, library and chapel.

The intrusion of an unbeliever into a place of religious worship might well be a case of substantial interference with the devotions of worshippers. But the Plaintiffs have failed to make out that Bella was not a Zoroastrian. They suggested indeed that her conversion was impossible,

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or at any rate that it had not been completed by due initiation; but their Lordships agree with the Judge of first instance that this suggestion was not established; while, except in the evidence of one unsatisfactory witness, there was nothing to show that Bella's presence would be thought to cause desecration, if once it was accepted that she was a Zoroastrian.

Also, if it were a question of caste and worshippers of a higher caste would be defiled by the presence of a lower caste, as in *Anandray Bhikaji Phadke v. Shankar Daji Charya* (3) this would be a serious disturbance. As was said in that case:—

"This right is one which the Courts must guard as otherwise all high-caste Hindus would hold their sanctuaries and perform their worship only so far as those of the lower castes chose to allow them."

But this claim is again not established. Indeed, what may be called the quasi-caste claim is not even suggested in the pleadings. It is the wounding of religious feelings and the desecration of the Temple which are put forward.

Their Lordships have now to consider the relief which the Plaintiffs have sought in this suit. They have not sought for a general declaration as to the persons who are objects of the trust. They have not sought for a construction of the scheme, or for any order to be made upon the trustee, nor have they made the trustee a party. For this they would probably have required the consent of the Advocate-General. They pray in the plaint "for a declaration that the Defendant Bella is not entitled to the use and benefits of the Parsi Fire Temple in Dalhousie Street known as 'Captain's Agiary or Dhurraymair' or to the use and benefits of the buildings standing on the said trust land or to attend at or participate in any of the religious ceremonies performed therein."

Then they claim an injunction to restrain the Defendant Bella from entering and the other Defendant, now dead, from bringing her into the temple to attend the religious ceremonies. This is a claim for an injunction to prevent the repetition of an alleged trespass. It must therefore first be established that there was a trespass and one for which damages, though possibly only nominal, could be recovered. But for trespass upon land the only person to bring the action is the person in possession of the land, that is, the trustee. That a beneficiary or two or three beneficiaries of a trust for public purposes may bring a suit for trespass against an intruder is a novel principle of jurisprudence; and the case is not made stronger by the suggestion that several other beneficiaries agree with them.

It may be that in India it would be convenient in some cases to allow such a suit, and the judgment in *Anandray Bhikaji Phadke v. Shankar Daji Charya* (3) may form a precedent. But, if so, the circumstances must be as powerful as in that case. It must be established that the juxtaposition of the two sets of persons is so repugnant to their habits of mind that the entrance of one set into the Temple entails the departure of the other, so that it is as if it were trespass to the person.

As already stated, no such case has been established, and therefore it is not necessary to discuss the principle on which the judgment in *Anandray Bhikaji Phadke v. Shankar Daji Charya* (3) is founded, and which was indeed accepted by the Judge of first instance in the present case. The facts do not warrant the claim, if it be a sound one, and no injunction can be granted.

With regard to costs, the learned Judge of first instance, while giving the Defen-

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dants the general costs of the action, thought that both sides were to blame for the inordinate length of the Bombay commission and made the Plaintiffs pay two-thirds only of the Defendants' costs of the Commission.

If any costs of the action were to be given, some similar provision should be applied. But, upon the whole, their Lordships feel that the Plaintiffs have failed in the greater part of their suit, and that the giving to them of a declaration is an indulgence. They were given the costs of the preliminary issues before Young, J., and the costs of so much of the appeal as related to those issues. These they keep, and the orders against them in respect of other costs in the Courts below will be discharged, and there will be no costs of this appeal. Their Lordships will humbly recommend His Majesty that this appeal be allowed, that the judgment of the Chief Court be varied, and that a declaration be made, namely, that Bella was not entitled, as of right, to use the temple, or to attend or to participate in any of the religious ceremonies performed therein, that except as to the costs awarded to the Plaintiffs in the Court of first instance and in the Chief Court, there be no costs in the Courts below, and that there be no costs of this appeal.

Solicitor: *Mr. A. M. Bramall* for the Appellants.

Solicitors: *Messrs. Waterhouse & Co.* for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM ORIGINAL CIVIL JURISDICTION

No. 174 OF 1924

AND

No. 161 OF 1924.

CHATTU LAL MISSEER

and ors.

v.

THE MARWARI COMMERCIAL BANK, LTD. and ors.

SANDERSON, C. J.

BUCKLAND, J.

1925,

8, June.

Rules of the High Court, Original Side, Chap. XIII A, r. 3—Defendant first appearing in person, then through an attorney—Summons in time, if made within 10 days from the date of the last appearance—Order giving leave to defend on furnishing security, in default decree against the Defendant, a "judgment" within the meaning of cl. 15 of the Letters Patent.

A suit on certain promissory notes was instituted on the 18th of June 1924. On the 11th of July 1924, the Defendant entered appearance in person; on the 21st of July, he again entered appearance through an attorney and on the same day the written statement was filed. On the 22nd of July 1924, a summons was taken on behalf of the Plaintiffs under Chap. XIII A of the Rules of the High Court and it was ordered that the Defendant furnishing security (within a time specified in the order) would have leave to defend, in default a decree should be drawn up against the Defendant for the claim under the promissory notes:

Held—That the order involving an adjudication on the claim was a judgment within the meaning of cl. 15 of the Letters Patent and as such an appeal lay from the order.

SUKHLAL CHUNDERMULL v. EASTERN BANK, LTD. (1) distinguished.

Held further—That though the summons was out of time, if the 11th July was taken as the date from which the 10 days

(1) I. L. R. 42 Cal. 735 (1915).

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ran, the Defendant's attorney by again entering appearance on behalf of the Defendant on the 21st July 1924, gave the Plaintiffs another opportunity and as such the summons was in time as defined by r. 3, Chap. XIII A of the Rules.

These were appeals preferred on the 8th November 1924 against orders, dated the 8th and 27th August 1924, made by Mr. Justice C. C. Ghose, in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment of the Chief Justice.

Messrs. S. N. Banerjee and S. C. Bose/ for the Appellants.

Messrs. B. L. Mitter and A. K. Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

Appeal No. 174.

SANDERSON, C. J.—This is an appeal by Chattu Lal Misser against two orders of the 8th and the 27th of August 1924. The order of the 27th of August 1924 is the material order. It runs as follows : " It is ordered in supersession of the order made in this suit and dated the eighth day of August instant that the Defendants do pursuant to the said order on or before the twelfth day of September next furnish security to the extent of eight lacs to the satisfaction of the Registrar of this Court in unencumbered immoveable property in Calcutta or in the town of Howrah : And it is further ordered that on such security being given within the time aforesaid the Defendants shall have leave to defend this suit : And it is further ordered that the said Registrar be at liberty to extend the time for furnishing such security as aforesaid on good cause being shown therefor : And it is further ordered that in default of the Defendants furnishing security as afore-

said within the time aforesaid or within such further time as may be allowed by the said Registrar as aforesaid a decree shall be drawn up in this suit against the Defendants for the sum of rupees sixty-four lacs ninety thousand and nine hundred annas seven and pies eleven with the costs of this suit."

The suit was brought by the Marwari Commercial Bank, Ltd., which was in liquidation (the Liquidator being one Ranjit Roy who was appointed in April 1923) against Chattu Lal Misser, Bissessar Lal Halwasiya, Luchmi Narain Shroff and Onkarmull Shroff who were alleged to be members of a firm called Binayek Misser & Co. It was based upon three promissory notes, dated the 23rd of May 1922, the 20th of July 1922 and the 5th of September 1922 alleged to have been executed by the Defendant firm in favour of the Plaintiff Bank. The total amount claimed for principal and interest up to June 1924 was Rs. 64,90,900.

It was alleged that the Defendant firm had deposited 3,06,581 shares in the Calcutta Industrial Bank, Ltd., as security for the amount due on the promissory notes.

The plaint was filed on the 18th of June 1924. On the 22nd of July 1924 a summons was issued in accordance with the provisions of Chap. XIII A of the Rules of the High Court.

R. 3 of that chapter provides : " Where the Defendant in any suit which is within the terms of r. 1 has entered appearance the Plaintiff may, as regards any claim which is within the terms of r. 1, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim, apply to the Judge for final judg-

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ment for the amount claimed together with interest, if any, or for the recovery of the land (with or without rent or mesne profits) as the case may be and costs :

" Provided that as against any Defendant who has filed a written statement such application shall not be permissible unless the summons is taken out as in r. 4 mentioned within ten days after the entering of appearance."

The first point, which was taken on the hearing of this appeal, was that appearance was entered by the Defendant Chattu Lal Misser in person on the 11th of July 1924, and the written statement was filed on the 21st of July 1924; and, that, as the summons was not issued until the 22nd of July 1924, the summons was out of time as it had not been issued within ten days of the appearance as provided by r. 3.

It appears, however, that on the 9th of July Messrs. Manuel, Agarwalla & Co. who were acting on behalf of Chattu Lal Misser wrote to the attorneys for the Plaintiff Bank as follows :—

" We understand that you have filed this suit against Pandit Chattu Lal Misser and others. If so, please supply us with a copy of the plaint on the usual terms. We have received instructions from Pandit Chattu Lal Misser to enter appearance on his behalf."

The Plaintiffs' attorneys, having received that letter, were entitled to expect that they would receive notice of the entering of appearance when it was effected by Messrs. Manuel, Agarwalla & Co. for it is provided by Chap. VIII, r. 18 that " the attorney of a Defendant, or a Defendant appearing in person, shall forthwith give notice of his having entered appearance to the Plaintiff's attorney, or if the Plaintiff sues in person, to the Plaintiff himself."

In fact, the Plaintiffs' attorneys asked Messrs. Manuel, Agarwalla & Co., if they had entered appearance, but it is alleged that they received no reply; and, on the 11th of July, as I have already said, Chattu Lal Misser entered appearance in person, but he did not give any notice to the Plaintiffs or to their attorneys of his having entered appearance.

On the 21st of July Messrs. G. C. Chunder & Co. acting as attorneys for Chattu Lal Misser wrote to the Plaintiffs' attorneys as follows: " Please note that we have this day entered appearance to this suit on behalf of the Defendant Chattu Lal Misser who, we understand, appeared in person sometime ago."

In point of fact, Messrs. G. C. Chunder & Co. did enter appearance on that day for the Defendant Chattu Lal Misser and they filed the Defendant's written statement on the same day.

I am not in a position to say whether the course, which was adopted in this case, was taken deliberately with the object of preventing the Plaintiffs taking proceedings under Chap. XIII A for summary judgment within time; but if that was the object, in my judgment, it failed.

No doubt, if the entering of appearance is to be taken as having been made on the 11th of July 1924 the Plaintiffs were out of time with their summons which was issued on the 22nd of July. But, in my judgment, the Defendant's attorneys by entering appearance again on behalf of the Defendant on the 21st of July 1924 provided another opportunity for the Plaintiffs to take proceedings under Chap. XIII A.

It was argued by the learned Counsel on behalf of the Appellant that the course adopted by Messrs. G. C. Chunder & Co. on the 21st of July was not an entering of appearance but was merely a request to

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the Court's officer to record Messrs. G. C. Chunder & Co. as attorneys for the Defendant Chattu Lal Misser. In my judgment this cannot be so regarded. The endorsement on the warrant was in these terms: "Please enter an appearance in our name on behalf of the Defendant Chattu Lal Misser in this suit. Sd. G. C. Chunder, Attorneys-at-law." If the only object of Messrs. G. C. Chunder & Co. had been to file the warrant of attorney on behalf of the Defendant firm, the proper way of doing it would have been to file the warrant and endorse it in the following terms: "To the Registrar. Sir, please file this warrant of attorney on behalf of the Defendant firm." Instead of that course being adopted, as I have already pointed out, Messrs. G. C. Chunder & Co. purported to enter appearance on behalf of the Defendant.

Messrs. G. C. Chunder & Co. having entered appearance on the 21st of July 1924 I am of opinion that the summons which was taken out on the 22nd of July was not out of time even though the written statement of the Defendant had been filed and the terms of the proviso in Chap. XIII, r. 3 were complied with.

The next point urged on behalf of the Appellant was that the affidavit in support of the summons was not sufficient. It appears from the Rule, which I have already read, that the affidavit in support of the summons should be made out by the Plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed.

I am not prepared to hold that the affidavit of the liquidator, affirmed on the 22nd of July 1924, by itself was sufficient to comply with the rule. But, in my judgment, the Defendant Chattu Lal Misser himself supplied the materials

which were necessary to make the case for the Plaintiffs complete.

By the written statement, which was filed, he admitted that the promissory notes were executed by the Defendant firm. The written statement contained a further admission that Chattu Lal Misser was a member of the firm.

It is true that in the written statement there was a denial that any consideration for the promissory notes was received by the firm or any member of it, but certain correspondence was exhibited to the affidavit of the Liquidator, dated the 22nd of July 1924. This correspondence was between the Liquidator and Messrs. Manuel, Agarwalla & Co. who were then acting on behalf of the Defendant firm and it took place in April, June, July and November 1923. The Liquidator on behalf of the Plaintiff Bank was demanding payment of the promissory notes: and, in reply to such demands Messrs. Manuel, Agarwalla and Co. wrote two letters, dated the 3rd of July 1923 and the 9th of November 1923.

The letter of the 3rd of July was as follows:—

"R. S. V. Aiyar, Esqr.,

R. Ray, Esqr.,

Joint Liquidators,

Cltts. Messrs. Binayek Misser & Co.

Dear Sirs,

Your letter, dated the 19th June last, to our clients has been handed over to us with instructions to state in reply as follows:—

As we had been meeting you in person from time to time we did not reply to you in writing about the adjustment of the over-draft account with the Bank. You know the actual position and you know that our clients have got to receive a much larger amount than their over-draft from the Calcutta Industrial Bank,

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Ltd., in respect of the shares which you hold as security against such over-draft. The Liquidators of the said Bank requested you and as a matter of fact according to your desire agreed to authorise you to set off the dividend that our clients have to receive in respect of the said Calcutta Industrial Bank, Ltd., shares against the said over-draft. Our clients are still willing to authorise you to receive payment of all monies that will be paid from time to time by the Liquidators appointed by the Court in the matter of the Calcutta Industrial Bank, Ltd. You know if certain untoward events had not happened there would not have been any difficulty in payment of the over-draft and you would perhaps by now have got payment, but circumstances made it otherwise and we are afraid it may take some time to get the dividend on our clients' holding in the Calcutta Industrial Bank shares and consequently there will be delay in paying you. Under the circumstances we are sure that you will consider the position and will not rush through anything.

The Official Liquidator has been appointed of the Calcutta Industrial Bank and as soon as he has ascertained the position our client may, if necessary, make an application to Court for permission to settle the accounts either by payment of dividends direct to you by Official Liquidator or by making some other arrangement in respect of the said shares held by you as security.

Yours faithfully,

Manuel, Agarwalla & Co."

And, the letter of the 9th of November was as follows :—

"The Liquidator, Marwari Commercial Bank, Limited (in liquidation).

Dear Sir,

Your notice No. 587 has been

handed over to us by Messrs. Binayek Misser and Company with instructions to state in reply as follows :—

Our clients have pointed out to you from time to time the scheme by which you can realise the amount due from them to the Bank. The scheme was put forward in reply to your demand in June and July for settlement of accounts and a copy thereof was sent to your solicitors Messrs. Leslie & Hinds in reply to their letter of the 3rd of July 1923 as an enclosure to our letter of the 4th. Our clients state that they are willing to authorise you to receive payment direct from the Official Liquidator of all dividends and other payments that may be made by him in respect of our clients' holding of the Calcutta Industrial Bank shares which are held by you as security. By that process your money can be realized without any difficulty and our clients also will be relieved of great anxiety.

As Rai Bahadur Halwasiya is away from town our clients would request you to get the meeting adjourned for the present for about a fortnight.

If there be any bar to the course suggested you can make an application to that effect in Court or our clients can request the Liquidator to the Calcutta Industrial Bank, Ltd., to make the necessary application, or if you so desire our clients themselves can make an application to get the necessary order from Court. Under the circumstances our clients hope you will consider this proposal before you pass any other resolution.

Yours faithfully,

Manuel, Agarwalla & Co."

In view of the terms of these letters the conclusion is inevitable, in my judgment, that the plea that there was no consideration for the promissory notes is without any foundation and that it was merely in-

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serted in the written statement for the purpose of delay. It, therefore, appears that the firm executed the promissory notes; the Defendant Chattu Lal Misser was a member of the firm, the Plaintiff Bank made advance to the firm, as stated in the plaint, and as the Defendants' attorneys admitted in the letters to which I have referred, the promissory notes were held by the Plaintiff Bank and were exhibited to the plaint. It therefore seems to me that, so far as the evidence was concerned, the Plaintiffs' case was complete.

One other matter remains to be considered. The written statement alleged that the Plaintiff Bank was a mere *benamidar* of the Calcutta Industrial Bank. But this was never suggested at the time the correspondence took place in 1923; and it, therefore, appears as if it were a mere after-thought and was inserted for the purpose of delay. In short, in my judgment, there seems to be no really triable issue in this case; and I am, therefore, of opinion that the learned Judge's order should be upheld. He gave the Defendants leave to defend on the conditions named in the order and, in default of the conditions being performed, directed that a decree should be made for the amount claimed.

The learned Counsel who appeared for the Plaintiff Bank took a preliminary point that no appeal would lie from the order of my learned brother Mr. Justice C. C. Ghose. My learned brother and I decided that an appeal would lie, but we postponed giving our reasons. The learned Counsel referred to the case of *Sukhlal Chundermull v. Eastern Bank, Ltd.* (1). In my judgment, that is no authority for the proposition which the learned Counsel was urging in this appeal. In the first place, it is to be noticed that the suit was brought under Or. 37 of the

Civil Procedure Code and that the decision was dealing with the provisions of the Code and not with the Rules of the Court, upon which this matter depends. In the second place, it should be noticed that the matter which Mr. Justice Chitty was dealing with was an application by the Defendant under Or. 37 of the Code for leave to appear and defend the suit, and the order which the learned Judge made was as follows: "Upon the Defendant within a fortnight from the date hereof giving security to the satisfaction of the Registrar of this Court to the extent of the Plaintiff Bank's claim in this suit, he be at liberty to appear in and defend this suit." It was held that there was no appeal from such an order.

I have already read the order which the learned Judge made in this case. It is obvious that the terms of it are materially different from the terms of the order which was made by Mr. Justice Chitty. The order in this case was that upon security for a certain amount being given within a certain time, the Defendants should have leave to defend, but the order proceeded that in default of the Defendants giving security as aforesaid within the time aforesaid, a decree was to be drawn up.

The effect of that order was that if the security was not given, as directed, a decree would be drawn up as a matter of course without any further application to the learned Judge.

In my opinion, it was a judgment finally deciding that the Defendant was not to be allowed to defend the suit unless he complied with the conditions contained in the order. It further decided that, if he did not comply with the condition, a decree should be drawn up. For these reasons, in my opinion, the decision of the learned Judge was a "judgment" within the

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meaning of cl. 15 of the Letters Patent and that an appeal did lie from his judgment to this Court.

For the above-mentioned reasons I am of opinion that this appeal should be dismissed with costs (one set) payable to the Plaintiff Bank.

Appeal No. 161.

The Appellant Bisseswar Lal Halwasiya desires to withdraw the appeal. The appeal is allowed to be withdrawn. He must pay the costs of the appeal (one set) to the Plaintiff Bank.

It was agreed upon terms settled by the learned Counsel representing the Plaintiff and Onkermull Shroff that Onkermull Shroff, who appeared in both appeals, having denied that he was a member of the firm of Binayek Misser & Co., should have unconditional leave to defend. There will therefore be an order that Onkermull Shroff do have unconditional leave to defend the suit.

BUCKLAND, J.—This is an appeal from orders made on an application under Chap. XIII A of the Rules of this Court for summary judgment.

The suit was to recover Rs. 64,90,900-7-11 on promissory notes executed by Binayek Misser & Co. in favour of the Plaintiff Bank.

The Defendants are alleged to be partners in that firm.

The Appellant entered appearance in person on the 11th of July 1924.

On the 21st of July 1924, his present attorneys also entered appearance and filed a written statement on his behalf.

On the 22nd of July a summons under Chap. XIII A was taken out by the Plaintiff Bank supported by the affidavit of the Liquidator to which certain correspondence between him and the attorneys for Binayek Misser & Co. was annexed. The Appellant and his co-Defendants filed

counter-affidavits and the Liquidator filed an affidavit in reply and, these with the written statement of the Appellants were the materials before the learned Judge who on the 8th of August 1924 ordered that the Defendants should furnish security to an amount to be fixed by the Registrar of this Court within fourteen days from the date when the Registrar fixed such amount. The learned Judge further made provision for the subsequent proceedings in the suit and ordered that in default of the Defendants furnishing security within the time required the Liquidator should be at liberty to mention the matter before the Court for further directions.

On the 27th of August the matter was mentioned and the amount of the security fixed by the Registrar was modified, and the learned Judge made the second of the two orders appealed against requiring the Defendants to give security to the satisfaction of the Registrar to the extent of 8 lacs of rupees on or before the 12th of September and on such security being given they would have leave to defend the suit, and in default of the security it was provided that a decree should be drawn up against the Defendants for the sum claimed with costs on scale No. 1.

It is against this order that Chattu Lal Misser and Bisseswar Lal Halwasiya appealed. The latter has abandoned his appeal and as regards the Respondent Onkarmull Shroff who has appeared on both appeals, it has been agreed that he, who denies having been a member of the firm of Binayek Misser, shall have unconditional leave to defend. Hence there remains only Chattu Lal Misser's appeal to deal with.

For the Respondent Company it is argued that the order is not appealable and reference is made to *Sukhlal Chunder-*

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mull v. Eastern Bank, Ltd. (1). That was an appeal against an order giving the Defendant leave to defend a suit filed under Or. 37 of the Code of Civil Procedure conditionally upon his giving security. It was held that it was not a "judgment"—there was no adjudication on the claim—and, according to the well-known practice of the Court such suits filed under that order of the Code, whether or not leave to defend is granted, are set down for hearing on a subsequent date.

It has been argued that this order is similar though made under Chap. XIII A, r. 9. But that is not so. An order cannot be taken as having been made under one rule and therefore necessarily excluding reference to others. The conditional leave to defend is referable to r. 9, the judgment in default to r. 3. The latter involves an adjudication on the claim and makes the order a final judgment within the meaning of cl. 15 of the Letters Patent. Without this, were such an order made under Chap. XIII A, I do not know that I should take the same view, but as it is nothing further remained to be done and in default of security a decree would be drawn up as a matter of course.

For the Appellant two points have been argued:—First, that the application offends against the proviso to r. 3 and is out of time, and next that the application is not in the form required by r. 3.

The proviso to r. 3 lays it down in effect that once a Defendant has entered appearance the Plaintiff may take out a summons, (a) without any limit of time if no written statement has been filed, (b) within 10 days of appearance being entered if a written statement has been filed.

If the 11th July is taken as the date from which the 10 days ran the summons

was out of time. But the Appellant's attorneys gave the Plaintiff another opportunity by again entering appearance on the 21st July. It was quite unnecessary and filing a warrant of attorney would have sufficed, but having adopted such a course, the Appellant cannot fairly be heard to say that time ran from the 11th July and not from the date of the later appearance. The fact remains that appearance was entered on the 21st July and the Respondents are entitled to rest their case upon it.

As regards the 2nd point argued I am not prepared to say that the application as presented to the Court in the first instance complied with the rules as to the form of affidavit required.

But at that time the Appellant had not the courage of his later convictions. He might have declined to answer the affidavit and argued that the summons should be dismissed *in limine*, and very likely would have done so successfully. He and his co-Defendants, however, made ample amends for the defects of the Liquidator's affidavit and all lacunæ were fully supplied, and lest more should be required the Appellant has succeeded in establishing his own want of *bona fides* by an affidavit more conspicuous for concealment than for revelation of facts.

The learned Judge had ample materials before him on which to found his order, and to allow this appeal on the ground that the Liquidator's affidavit in support of the summons does not conform to the rules would be to subordinate substance and justice to form and technicality.

I concur in the order to be made.

Messrs. G. C. Chunder & Co., Solicitors for the Appellants.

Messrs. Dutt & Sen, Solicitors for the Respondents.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 170 OF 1924.

NEWBOULD, J.
B. B. GHOSH, J.
1925,
20, August.

AMIR ALI, Judgment-
debtor No. 3,
Appellant,
v.
HARISH CHANDRA DAS
and anr., Decree-
holders, Respondents.

Civil Procedure Code (Act V of 1908), sec. 48 execution of decree against a Defendant more than 12 years after the original decree, but within 12 years of the appellate decree, if barred by limitation, when the said Defendant was not a party to the appeal—The decree of the trial Court, if merged in the appellate decree in respect of the said Defendant.

A decree was obtained against several Defendants, two of whom appealed, but a certain Defendant was not impleaded in the appeal. The appeal was dismissed. After several applications for execution, the decree-holder made the present application for execution more than 12 years after the date of the decree of the trial Court but within 12 years from the date of the decree of the Appellate Court:

Held—That in this case the decree of the trial Court did not merge in the decree of the Appellate Court, as the particular Defendant was not a party to the appeal and as such no order would have been made as against him by the Appellate Court by its decree. Therefore under the provisions of sec. 48 of the Civil Procedure Code, the application for execution, made more than 12 years after the decree of the trial Court, was barred as against the said Defendant.

LOKE NATH SINGH v. GUJU SINGH (1) distinguished.

This was an appeal against the order of J. W. Nelson, Esq., District Judge of Zillah Chittagong, dated the 17th of January 1924, affirming the order of Babu (1925 C. W. N. 78 (19 15).

Dinesh Charan Roy, Munsif, 1st Court, Chittagong, dated the 25th of September 1923.

The material facts will appear from the judgment.

Babus Chandra Sekhar Sen and Gopendra Nath Das for the Appellant.

Babu Charu Chandra Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The only question involved in this case is whether the execution of the decree is barred under sec. 48 of the Code of Civil Procedure. The decree was obtained against several persons including the present Appellant who was Defendant No. 3 in the trial Court on the 7th July 1911. There was an appeal against that decree by two of the Defendants in the case, the present Appellant not being a party to it either as Appellant or Respondent. The appeal of the Defendants Nos. 1 and 2 was dismissed on the 23rd December 1912. Several applications for execution of the decree had been made by the Plaintiff decree-holder for costs against the judgment-debtor. But the present application was made on the 13th July 1923, that is, more than 12 years after the decree passed against the Defendants to which Defendant No. 3, the present Appellant, was a party, but less than 12 years from the decree of the Appellate Court of the 23rd December 1912, to which the present Appellant was no party.

The contention on behalf of the Appellant is that if the decree-holder is executing the decree of the Appellate Court of the 23rd December 1912 it cannot be executed as against him because he was no party to the decree; but if it was the decree of the 7th July 1911 which the decree-holder seeks to execute, then it is barred by limitation under sec. 48, C. P. C.

AMIR ALI v. HARISH CHANDRA DAS.

It seems to us that the contention of the Appellant should be accepted. It is contended on behalf of the Respondent that the fact that there was an appeal against the decree of the 7th July 1911 gives him the right to execute the decree as against Defendant No. 3 counting the period of limitation from the date of the decree passed by the Appellate Court. Reliance has been placed on behalf of the Respondent in the case of *Loke Nath Singh v Guju Singh* (1). But that case proceeded upon the question whether the execution of the decree was barred or not having regard to the provisions of Art. 182 of the Indian Limitation Act. That case is not applicable to the present question as it depends on the provisions of sec. 48, C. P. C.

The only ground on which the Respondent can maintain his plea that the execution of the decree is not barred by limitation is that the decree of the trial Court had been merged in the decree of the Court of Appeal below. But the difficulty in his way is that the present Appellant was not a party to the appeal and consequently no order could have been made as against him by the Appellate Court by its decree. It cannot therefore be said that the decree of the trial Court was merged in the decree of the Appellate Court.

The appeal therefore must succeed and the order of the Court below directing execution to proceed as against the Appellant who was Defendant No. 3 in the original suit must be set aside.

The Appellant is entitled to his costs in all Courts. We assess the hearing-fee at two gold mohurs.

J. N. R.

(1) 20 C. W. N. 178 (1915).

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1570 OF 1923.

JAGADISH CHANDRA
MUKERJI, Plaintiff,
Appellant,

v.

GREAVES, J.
B. B. GHOSE, J.
1925,
8, July.

RASIK MANDAL and
ors, Defendants,
Respondents.

Registration Act (XVI of 1908), sec. 17, sub-sec. (2), cl. (vi)—Registration—Solemnity in a rent suit creating a permanent and transferable right in a holding, if admissible in evidence in a subsequent suit, though unregistered—Solemnity incorporated in substance in the decree, if requires registration.

In a rent suit by a Hindu widow, a solemnity was filed by which a permanent and transferable interest was created in a holding and the suit was decreed at an enhanced rent, the decree stating that the suit be decreed in terms of the solemnity which had been filed. Subsequently on the sale of the holding by the tenant, the reversionary heir brought a suit for ejectment on the ground that the tenant had no transferable interest and that the solemnity purporting to grant a transferable interest to the tenant was inadmissible for want of registration:

Held—That the decree in the previous suit in substance incorporated the solemnity as part of the decree, as the decree could not have been passed without reference to the solemnity. Further, the solemnity, having been used only as an admission by the Plaintiff who had filed it on behalf of the widow, was admissible in evidence without registration.

This was an appeal against the decree of Babu Nagendra Nath Bhattacharjee, Subordinate Judge of Zillah Jessore, dated the 26th of February 1923, affirming the decree of Babu Sarat Chandra Roy Chou-

JAGADISH CHANDRA MUKERJI v. RASIK MA NDAL.

dhury, Munsif, 2nd Court at Magura, dated the 26th of July 1921.

The material facts of the case will appear from the judgment.

Dr. Jadunath Kanjilal and Babu Purna Chandra Chandra for the Appellant.

Babu Prafulla Kamal Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This appeal arises out of a suit for recovery of possession of certain lands on declaration of the Plaintiff's right to *khas* possession. These lands were previously in the occupation of a tenant named Adu Baroi under the owner Bhabani who died leaving his daughter Joy Durga as his heir. After that one Mati Lal purchased the holding of Adu in execution of a mortgage decree in 1900. Joy Durga brought a suit against Mati Lal at an enhanced rate of rent. This suit was compromised between the parties. Under the terms of the compromise the rent was enhanced and it was declared that Mati would have a permanent and transferable right in the land. In the year 1910 Mati sub-let the land to Defendants Nos. 2 and 3. In 1916 Mati sold the land to Defendant No. 1. The Plaintiff who succeeded to the landlord's interest in the property on the death of his mother Joy Durga in 1902 has brought this suit for ejectment on the ground that Mati had no transferable interest. Both the Courts below have dismissed the suit for *khas* possession. It was held by the lower Appellate Court in confirmation of the decision of the trial Court that Mati had a transferable interest. It is argued on behalf of the Plaintiff that this was held with reference to a *solenama* which was ~~Ex-1a~~ but that the *solenama* was not admissible in evidence for want of re-

gistration. The *solenama* was filed in the rent suit brought by Joy Durga against Mati as we have already stated and the question is whether this *solenama* was incorporated in the decree or not. The decree stated that a *solenama* had been filed by the party and the suit was decreed in terms of the *solenama* in favour of the Plaintiff for one rupee. This in substance incorporated the *solenama* as part of the decree as no such decree could have been passed without reference to the *solenama*. If that is so, it was admissible in evidence without registration. Further, the Courts below have held that that document only contains the admission by the landlord. The present Plaintiff filed the petition of compromise on behalf of his mother and had also ratified the transaction and accepted rent in accordance with its terms since the death of his mother in 1902 till the date of the present suit. On these grounds it is not possible to say that the decision of the lower Appellate Court is wrong.

The appeal must therefore be dismissed with costs.

GREAVES, J.—I agree.

J. N. R.

[CIVIL REVISIONAL JURISDICTION]

RULES NOS. 118 AND 1020 OF 1925.

CUMING, J.

B. B. GHOSE, J.

1925,

14, December.

S. G. P. SINGH,
Petitioner,

v.

PROBODH KUMAR D. S.,
Opposite Party.

Calcutta Rent Act (III, B. C., of 1920), sec. 2 (e) — Premises, if can include different blocks—Secs. 5 and 15 (2) (e), prov. (ii)—Standardisation of rent—Improvement made by landlord to be taken into consideration—Landlord, if includes leases from landlord in proceedings between lessees and sub-lessees.

The fact that a building consists of several blocks does not take it out of the definition of premises in sec. 2 (e).

S. G. P. SINGH v. PROBODH KUMAR DAS.

Under sec. 15 the standard rent is to be fixed on the application by the landlord or the tenant and under proviso (ii) of cl. (e) the Controller shall not increase the rent by more than ten per cent. per annum on the amount expended on the improvement or structural alteration of the premises as provided in sec. 5. This implies that the expenditure to be taken into account must be made by the landlord who applies for standardisation of rent or against whom an application for standardisation has been made. Thus in proceedings for standardisation of the rent of premises which have been sublet at the instance of the sub-lessee the improvement made by the superior landlord cannot be taken into consideration.

These were Rules against the judgment of the President of the Tribunal, Calcutta Improvement Trust (S. C. Banerji, Esq.), dated the 13th June 1925, passed on appeal from a decision of the Rent Controller (B. Ganguly, Esq.), dated the 16th May 1924.

The facts of the case will appear from the judgment.

Mr. Amulya Charan Chatterjee and Babu Apurba Ch. Mukerji for the Petitioner in No. 1020 and for the Opposite Party in No. 818.

Babu Hira Lal Ganguly for the Opposite Party in No. 1020 and for the Petitioner in No. 818.

THE JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—These two Rules arise out of the same proceedings taken before the Rent Controller at the instance of a sub-tenant for fixing standard rent with regard to certain premises against his own landlord, the tenant under the superior landlord. These two persons will be called tenant and landlord henceforth.

The Rent Controller fixed the rent of the premises which is called premises No. 6 at Rs. 155 (one hundred and fifty-five) per month including the occupier's share of taxes as the standard rent. The landlord made an application for revision before the President of the Tribunal. The President framed several issues in his Court and he has fixed the standard rent at Rs. 230 (two hundred and thirty) per month inclusive of taxes. The landlord has obtained a Rule against the decision of the President; it is numbered 1020. The tenant has also obtained a Rule against the same decision which is Revision Case No. 818. It will be convenient to dispose of the Rule obtained by the landlord first. The arguments addressed on his behalf by his learned Advocate are three-fold. The first is that the subject-matter of these proceedings cannot be called premises within the meaning of sec. 2 (e) of the Rent Act and therefore standard rent could not be fixed for it. The contention is that the premises referred to does not consist of a building but several buildings. This argument is based upon the fact that on the western portion of the land leased to the tenant an old structure was pulled down to a certain extent and new structures were built in its place. This was done before the lease was given to the tenant. Both the Courts below rejected this argument. The learned President says with regard to one of the blocks that some old doors and windows have been replaced, a small verandah has been constructed and some other changes have been made. And he further says "that the building on the west of the courtyard was constructed on the site of an old structure. The evidence is that the western block has lower rooms than the main building and is used ordinarily as servants' quarters and kitchen." His finding is

S. G. P. SINGH v. PROBODH KUMAR DAS.

that the premises constitute one building and the fact that it consists of different blocks does not take it out of the definition of premises in the Rent Act. With this conclusion I entirely agree. It cannot be said because a house consists of different blocks, consisting of servants' quarters and offices, garage and the main building, that it is not premises within the meaning of the Act.

The second contention of the learned Advocate for the landlord is that the Rent Act does not apply to the premises in question as it was in the course of erection at the time of the commencement of the Rent Act as provided by sec. 15 of the Act. This, as the learned President has observed, is a pure question of fact and he has come to the conclusion upon the evidence that the premises in question was not either erected after the commencement of the Act, nor was it in the course of erection at the commencement of the Act. We cannot interfere with this finding in revision and the decision of the President of the Tribunal must be accepted.

The third point is rather complicated and it arises in this way, that the Rent Controller in fixing the standard rent of the premises in question takes into account the rent assessed by the Municipality in 1915 with regard to the premises in question as well as another holding which is No. 5. This was taken to be Rs. 110 (one hundred and ten). The Rent Controller finds that if in 1915 these two premises had been in the same condition as they are now the rent could have been Rs. 165 (one hundred and sixty-five) inclusive of taxes. Having come to this opinion he takes the fact into consideration that the rent of No. 5 in 1915 was assessed by the municipal authorities at Rs. 25 (twenty-five) and for No. 6, Rs. 85 (eighty-five) per month. Then he cal-

culated that the present rent of No. 5 should be taken at Rs. 27 (twenty-seven) per month. Deducting that amount from what would be the standard rent of the two premises according to his view, which was Rs. 182 (one hundred and eighty-two) per month, he fixed the standard rent of No. 6 at Rs. 155 (one hundred and fifty-five) per month. As against this the tenant did not present any petition for revision to the President of the Tribunal but the landlord did. In disposing of this matter the President of the Tribunal did not take the municipal assessment of rent of Rs. 110 (one hundred and ten) as the basis for fixing the standard rent, but he took the actual rent received by the landlord which was Rs. 95 (ninety-five) for the two premises as the basis and from that he worked out the proportion which should be assessed for No. 6, that is, the premises in question, and he found that it ought to be Rs. 73 (seventy-three) per month; and on that figure the President added Rs. 150 (one hundred and fifty) on account of the expenditure on improvements and thereby he arrived at the figure Rs. 230 (two hundred and thirty) as the standard rent. The objection on behalf of the landlord is that he should have proceeded not upon the basis of the rent actually received in 1917, that is, Rs. 95 (ninety-five), but upon the basis taken by the Rent Controller, as the tenant did not object to that. This would only lead to a difference of Rs. 12 (twelve) per month over the rent fixed, assuming that the principle on which the standard rent has been fixed by the President was correct; but as I am going to state later on why this mode of fixing the standard rent adopted by the President cannot be accepted, it is unnecessary to decide this question. The Rule therefore obtained by the landlord should be dis-

S. G. P. SINGH *v.* PROBODH KUMAR DAS.

charged with costs, hearing-fee being assessed at five gold mohurs.

Now I come to the Rule obtained by the tenant and his objection is based on this :—The owner of the premises who is described as one Dalmia has spent a certain sum of money in making improvements and the President of the Tribunal found that it would amount to about Rs. 18,000 (eighteen thousand). The President was of opinion that this was the expenditure made by the landlord within the meaning of sec. 5 and sec. 15, sub-sec. (3), cl. (e) of the Rent Act and he has added Rs. 150 (one hundred and fifty) per month on the basis of the expenditure made on improvements, on the rent payable by the tenant. The contention on behalf of the tenant is that the expenditure was not made by his landlord and therefore those sections of the Rent Act do not apply to the present case. It seems to me that this contention is sound. The definition of landlord includes a tenant who sub-lets any premises; therefore the person from whom the sub-lessee took his lease was his landlord although he might be himself a tenant of a third person. It has not been found that his landlord has incurred any expense on the improvements and therefore sec. 5 of the Rent Act does not apply to him. It is contended on behalf of the Opposite Party that sec. 15, sub-sec. (3), cl. (e) does not refer to any improvement made by the landlord but refers to a change in the condition of the premises and therefore if any change is made in the condition of the premises by whoever it may be, that should be taken into consideration in fixing the standard rent. That, however, can hardly be a proper construction of the section because the sec. 15 commences with reference to the fact that the standard rent should be fixed on the application by the

landlord or tenant; and also referring to proviso (ii) of cl. (e) it will be found that it is provided that the Controller shall not increase the rent by more than ten per cent. per annum on the amount spent on the improvement or structural alteration of the premises as provided for in sec. 5. This implies that the expenditure to be taken into account must be made by the landlord who applies for standardization of rent or against whom an application for standardization has been made. In my opinion therefore the learned President was not correct in taking into consideration the expenditure made by Dalmia for the purpose of making improvements in the premises in fixing the standard rent.

It is contended by the learned Advocate for the Opposite Party that the superior landlord would be entitled to have the expenditure made for the improvements taken into consideration in an application made by that landlord for fixing the standard rent as against himself and it would lead to anomalous results if the expenditure for improvements is not taken into consideration in fixing the standard rent between himself and his sub-tenants. It is not necessary for us to consider in this case whether the result would be anomalous in any way. It seems to me upon the plain construction of the sections of the Rent Act that the expenditure made by a third person cannot be taken into consideration in fixing the standard rent as between these two contending parties before us. This Rule therefore is made absolute. The standard rent fixed by the President of the Tribunal is set aside and the decision of the Rent Controller fixing the standard rent at Rs. 155 (one hundred and fifty-five) per month including the occupier's share of the taxes is restored. The applicant will be entitled to his costs—
hearing-fee three gold mohurs.

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CUMING, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 85 OF 1921.

GREAVES, J.	}	BECHU MIA, Accused,
DUVAL, J.		Petitioner,
1924,		v.
Heard, 3, April.		ANWAR NABI,
Judgment,		Complainant, Opposite
11, April.		Party.

Criminal Procedure Code (Act V of 1898), sec. 436—Further enquiry, nature of, which can be ordered—Complaint dismissed under sec. 203 after enquiry under sec. 202—Further enquiry after summoning accused, if can be ordered.

Where on receipt of a complaint, a Magistrate holds an enquiry under sec. 202, Cr. P. C., and dismisses the complaint under sec. 203, Cr. P. C., the Sessions Judge under sec. 436, Cr. P. C., can only direct a full and proper enquiry of the same nature as the Magistrate has already held, and cannot direct a further enquiry after summoning the accused.

The practice of allowing accused to be represented in an enquiry under sec. 202, Cr. P. C., has been condemned.

This was a Rule issued on the 28th January 1924 against an order passed in revision by the Sessions Judge of Hoogly (H. C. Liddell, Esq.), on the 19th January 1924, directing the Petitioner (accused) to be summoned under secs. 474, 204, 109 and 114, I. P. C., and be put on his trial before some other Magistrate.

The facts of the case will appear from the judgment.

Mr. Gregory and Babu Narendra Nath Chowdhury for the Petitioner.

Mr. Suhrawardy, Babus Satindra Nath Mukherjee and Sarat Chandra Roy for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

DUVAL, J.—In this matter one Anwar

Nabi made a complaint before the District Magistrate of Howrah against three persons under secs. 474 and 204, read with secs. 109 and 114 of the Indian Penal Code, on the 17th September last. It appears he had previously brought a civil suit against Bechu, accused No. 1, in respect of the price of certain skins and his suit had been dismissed. His allegation in his complaint was that the present accused had kept back the genuine books of account in that suit and had used in the defence of the same fabricated books. He therefore made this complaint and applied for a search warrant. A search warrant was issued and certain books seized; but on the 3rd October the Magistrate after examining the complainant on oath and hearing the parties dismissed the complaint under sec. 203, Cr. P. C. Anwar Nabi then moved the Sessions Judge against the order of dismissal and on the 24th November last the Sessions Judge after hearing Counsel set aside the order and remanded the case for further enquiry, holding that "from the record it seems clear that there is a good *prima facie* case under secs. 204 and 474, I. P. C."

The Magistrate on receipt of this order of remand did not summon the accused but after permitting both parties to examine certain books and hearing their Counsel again dismissed the case under sec. 203 on 14th January 1924. The Sessions Judge was moved again. He held that the delay in issuing process was unjustifiable and on 19th January on an *ex parte* application ordered further enquiry by some other Magistrate after summoning the accused. A Rule was then obtained from this Court on the ground that this order was passed without jurisdiction.

It appears that on both occasions when

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the Magistrate was purporting to be holding an enquiry under sec. 202, Cr. P. C., the accused were before him by pleader, though they had not been summoned, and their arguments were heard—a procedure which has several times been condemned by this Court. Cf. the case of *Bhim Lal Shaha v. Emperor* (1). The only point, however, before us is whether the Sessions Judge can, when ordering a further enquiry in respect of a complaint which has been dealt with by the Magistrate under sec. 202, Cr. P. C., direct that the accused be summoned or whether he is restricted to only making an order for a further enquiry of the same nature as that which has been already made, i.e., in this case a further enquiry under sec. 202, Cr. P. C.

In this connection the law was laid down by the Chief Justice Sir Comer Petheram in the case of *Haridas Sanyal v. Saritulla* (2) as follows :—

“ In cases under secs. 200-203 it would appear that if the Magistrate does not believe the complainant and thereupon without taking any further step dismisses the complaint, the revising officer may, under sec. 437 (now sec. 436) direct that by way of further enquiry he shall cause an investigation to be made, or if one has been made which he considers insufficient or unsatisfactory or if he considers that the complainant has not been sufficiently examined, may order that the complainant be re-called and his examination continued. But it is difficult to see how a further enquiry can be ordered in any but one of these three cases, as it is clear that the enquiry is preliminary to the issue of process and the next step to take, if the enquiry as far as collection

of materials is complete, is the issue of process.” This dictum and the decision in that case appear to me to be authority for holding that the Sessions Judge when he orders a further enquiry can only order an enquiry of the same nature as the Magistrate has already held. In the present case the Magistrate has only examined the complainant and heard arguments as to certain entries in certain books and this is not in my opinion a proper enquiry within the meaning of sec. 202, Cr. P. C. But I do not hold that at this stage the Sessions Judge can direct the accused to be summoned : he can only order a full and proper enquiry under sec. 202 according to law. I therefore set aside the order of the Sessions Judge and remand the matter to him to consider again whether such further enquiry under sec. 202 should be ordered so that the Magistrate may, after the collection of materials is complete, come to a finding whether process shall issue.

GREAVES, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD SHAW.

LORD CARSON.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMEER ALI.

1925,

2, April.

VAITHIALINGA
MUDALIAR and ors.,
Appellants,

v.

SRIKANGATH ANNI and
ors., Respondents.

Hindu law—Widow, decree against, if binds reversioners—Conditions necessary—Dispossession of widow—Suit for recovery, limitation for—Limitation Act (IX of 1871), sec. 129—Act XV of 1877 Art. 141.

A Hindu widow has no power to sell or assign the estate she holds as a limited owner except for necessity so as to bind her husband's reversioners after her

(1) I. L. R. 40 Cal. 444: s. c. 17 C. W. N. 290 (1912).

(2) I. L. R. 15 Cal. 606 (1888).

VAITHIALINGA MUDALIAR v. SRIRANGATH ANNI.

death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent. When the suit was not collusive, it did not make any difference that in resisting the suit she was actuated by a purely personal and selfish object, if she in fact and in law represented the estate as well as her own interest as a Hindu widow.

KATAMA NATCHIER v. THE RAJAH OF SHIVAGUNGA (3) and other cases referred to.

Where the widow made over the estate to a person whom she had adopted as son to her husband in 1862:

Held—That although the adoption was in law invalid, there could be no recovery without displacing the apparent adoption by a suit which under Art. 129 of Act IX of 1871 stood barred after the expiry of 12 years from 1862, i.e., in 1874, long before Art. 141 of Sch. II of Act XV of 1877 came into force.

JAGADAMBA CHOWDHRAIN v. DAKHINA MOHAN (10) followed.

These were consolidated appeals (Nos. 122-130 of 1923) from a decree, dated the 15th November 1916, of the High Court at Madras, which modified a decree, dated the 4th September 1908, of the Subordinate Judge of Negapatam.

The appeals arise out of a suit brought by the Plaintiffs as the reversioners of Arunachala, the last male owner of the Kulikara estate, who died in 1849, claiming possession of the estate on the death of his widow Chokkammal in 1902.

Arunachala died in 1849. In 1862 Chokkammal adopted Alagusundara who entered into possession of the whole of Arunachala's estate excepting certain properties retained by Chokkammal for maintenance.

Alagusundara died in 1864 leaving a widow Murugathal.

Murugathal adopted one Thiagaraja, who enjoyed the properties until 1876, when he appears to have been dispossessed by Arunachala's widow, Chokkammal. Thiagaraja died in 1881, leaving a widow who died in 1882. Murugathal, who then became the heiress of her adopted son Thiagaraja, instituted Original Suit No. 9 of 1887 on the file of the Court of the Subordinate Judge of Negapatam, against Chokkammal and others.

In her plaint, she alleged that her husband, Alagusundara, was adopted in 1849 by the late husband of Chokkammal, that he was in possession and enjoyment of the suit properties till he died in 1864, that, afterwards, her adopted son Thiagaraja enjoyed them till he died in 1881, that Thiagaraja's widow died issueless in 1882, and that she, the Plaintiff, was in possession and enjoyment of the suit properties till 1884, when Chokkammal forcibly took possession of them. She prayed for a decree putting her into possession of the suit properties.

Chokkammal, in her defence, pleaded, *inter alia*, that the Plaintiff's husband was never adopted by her husband, that she was in possession of the suit properties since the death of her husband thirty-eight years ago, that the Plaintiff was never in possession, and that she did not forcibly dispossess the Plaintiff in 1884.

The Subordinate Judge who tried the suit found that Alagusundara was not adopted by Chokkammal's husband in

(3) 9 M. I. A. 539 (1863).

(10) 18 I. A. 84; S. C. I. L. R. 13 Cal. 508 (1896).

VAITHIALINGA MUDALIAR v. SRIRANGATH ANNI.

1849, but that he was adopted by Chokkammal in 1862, that the adoption was invalid under the Hindu law, that Alagusundara, and after his death Thiagaraja, his adopted son, were in possession of the estate to the exclusion of Chokkammal for a period of eighteen years from 1862 to 1881, and that such possession was clearly adverse and conferred a valid title upon Thiagaraja.

On appeal by Chokkammal the High Court confirmed the findings as to the adoption and adverse possession.

Murugathal thereafter retained possession until her interest was sold in execution and purchased by the 3rd Respondent to the present appeal. Chokkammal died in 1902, and the Plaintiffs thereupon claimed possession as reversioners of Arunachala.

The Subordinate Judge made a decree for possession against some of the Defendants, but his decision was reversed by the Madras High Court which held that the claim of the Plaintiffs was barred by limitation. Both Courts in India held that the decision in suit No. 9 of 1887 did not operate as *res judicata*, and the adoption of Alagusundara was invalid.

The facts are fully set out in the judgment of the Judicial Committee and the arguments of Counsel are cited at length.

Sir G. Lowndes, K. C., Messrs. Wallach and Pillai for the Plaintiffs-Appellants.—The Indian Courts have held that the adoption of Alagusundara was invalid but Murugathal was given a decree for possession of certain portions of the estate by the High Court on the ground of adverse possession.

The transferees from Murugathal would only have title during Chokkammal's life-time. Adverse possession could only operate as against Chokkammal. It could not operate against the Appellants who

were all minors when the present suit was instituted, and therefore not in existence when the right to sue to set aside the adoption is said to have become barred.

The present suit is governed by Art. 141 of the 2nd Sch. of the Limitation Act, XV of 1877. It has been held by the judgment under appeal that the suit was barred before the Act of 1877 came into force, under Art. 129 of the Limitation Act of 1871, and that the Appellants' rights are extinguished by sec. 29 of that Act.

But the suit here was not to set aside an adoption. That was unnecessary, for Alagusundara's adoption had already been held to be invalid in the 1887 suit. Under the Limitation Act of 1871 a title could be acquired against the widow by adverse possession but no title was obtained against the reversioners. That is the way in which the 1871 Act differs from the Acts of 1859 and 1877 and it makes cases decided under those Acts inapplicable.

This is not a case of adverse possession by a trespasser but of alienation by a widow; that is clear from the facts found in the 1887 suit. That suit only decided that possession should be restored to Alagusundara's widow, *i.e.*, all it gave her was a right to the property during Chokkammal's life-time.

Under the Hindu law the reversioner is entitled to sue for the estate on the death of the widow and it is submitted that no bar to that right has been interposed by the legislature.

[They referred to the following cases in addition to those set out in the judgment.]

Ram Kali v. Kedar Nath (11), *Hanu-*

(11) I. L. R. 14 All. 156 (F. B.) (1892).

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man Prosad v. Bhagauti Prosad (12), *Vundravandas Purshottamdas v. Cursondas* (13), *Sreeramulu v. Kristamma* (14), *Bijoy Gopal Mukerji v. Krishna Mohishi Debi* (15), *Kalyanadappa v. Chanbasappa* (16) and *Thakur Tribhuvan Bahadur Singh v. Raja Rameshwar Bakhsh Singh* (17).

Mr. Parikh for the 1st Defendant Sri-rangath Anni adopted the above argument.

Messrs. DeGruyther, K. C. and Narasimham for Defendants Nos. 7 and 8, transferees from Murugathal.—The rights of the reversioners to obtain possession were barred before the passing of the Limitation Act of 1877 and no right of suit could be revived by that Act. In any event no such right can exist after the decision in the 1887 suit to which Chokkammal was a party and in which she represented the estate.

This has been laid down in a series of cases ever since the *Shivagunga* case (3).

See Mayne's Hindu Law, para. 643.

The present case is on all fours with the case of *Hurrinath Chatterji v. Mohunt Mothoor M. Goswami* (7), which was not decided under the Limitation Act, 1859.

The fact that the decree binds the estate is a conception of Hindu law quite apart from the statute of limitations.

The estate was in the possession of Alagusundara from 1860 to 1876 under an apparently valid adoption and the rights

of the reversioners became barred under the 1871 Act and could not be revived.

Appasami Oddayar v. Subramanya Oddayar (18).

The reversioners are barred not through anything done by the widow but owing to their own failure to assert their title.

Mr. Lowndes, K. C. in reply.—Admittedly there was no bar of adverse possession against the reversioners under the 1859 Act because 12 years had not been completed under that Act when the 1871 Act came into being.

Once that Act becomes law adverse possession against the widow does not affect the reversioners. The contention that if adverse possession has crystallised into a decree and therefore the reversioners are bound is an anomaly and is contrary to justice, equity and good conscience.

The *Shivagunga* case (3) is only applicable where a question of title is being litigated.

The act of Chokkammal in putting Alagusundara in possession was a voluntary act and was tantamount to an alienation by her.

Time cannot run against the reversioner until the death of the widow because then only can the reversioner be ascertained.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are nine consolidated appeals from a decree, dated the 15th November 1916, of the High Court at Madras, which varied a decree, dated the 4th September 1908, of the Subordinate Judge of Nagapatam.

The suit in which these appeals have arisen was brought in the Court of the

(3) 9 M. I. A. 539, 603, 604 (1883).

(7) L. R. 20 I. A. 183 (1893).

(12) I. L. R. 19 All. 357, 365 (1897).

(13) I. L. R. 21 Bom. 646 (1897).

(14) I. L. R. 26 Mad. 143 (1902).

(15) L. R. 34 I. A. 87, 91; s. c. I. L. R. 34 Cal 329; 11 C. W. N. 424 (1907).

(16) L. R. 51 I. A. 220, 227; s. c. I. L. R. 48 Bom. 611; 28 C. W. N. 666 (1924).

(17) L. R. 33 I. A. 156; s. c. 10 C. W. N. 1065 (1903).

(3) 9 M. I. A. 539 (1883).

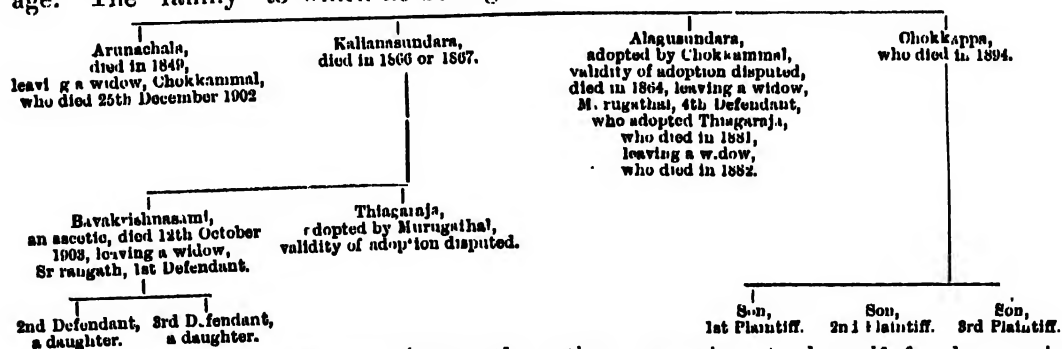
(18) L. R. 15 I. A. 107 (1888).

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Subordinate Judge on the 2nd July 1905, by three Plaintiffs, who were reversioners of Arunachala Mudaliar, against thirty-eight Defendants for the possession of lands which were alleged by the Plaintiffs to be lands of the Kulikara estate in the District of Tanjore and for mesne profits. The title of the Plaintiffs to sue was denied by the Defendants on various grounds, of which those which are now important and have to be considered are whether the suit was not barred by the result of a litigation which began in 1887 and ended with a final decree in 1892, and whether the suit was not otherwise barred by the law of limitation.

The Kulikara estate admittedly belonged to Arunachala when he died in 1849. He was then about twenty-two years of age. The family to which he belonged

were Hindus of the Sudra caste. He had been adopted by Vithialinga Mudaliar, a relation, who was descended from an ancestor from whom Arunachala also was descended. The Plaintiffs are the three sons of Chokkappa Mudaliar, who was the youngest of three brothers by birth, that is, natural brothers, of Arunachala. Arunachala died childless, leaving a widow, Chokkammal, who died on the 25th December 1902, within twelve years before this suit was instituted. She was a Defendant to the suit with which the litigation of 1887 commenced. It will be necessary to refer at some length to that litigation. The following pedigree will show Arunachala and his natural brothers and some other persons :—



Arunachala, as whose reversioners the Plaintiffs claim to be, had before his death directed his wife Chokkammal to adopt as a son to him his natural brother Alagusundara. In 1862 Chokkammal did as a fact adopt Alagusundara as a son to her late husband. Alagusundara was a younger natural brother of Arunachala, and at the time of the adoption there was no one living who could give him in adoption. As a matter of Hindu law the adoption was invalid.

In 1862 Chokkammal, having adopted Alagusundara, put him in possession of the immoveable property now in ques-

tion, reserving to herself for her maintenance some of the immoveable property to which she was entitled as the widow of Arunachala. With the property which she reserved for her maintenance this suit is not concerned. There can be no doubt that in 1862 Chokkammal did put Alagusundara in possession of the property now in question. In March 1862, she presented an undated petition to the Tahsildar of Nannilam, the Revenue Officer, in which she stated that, with the consent of her husband, she had adopted Alagusundara, his natural younger brother, and, with the exception of cer-

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tain villages which she named, she had made him proprietor of all the land and other properties, etc., standing in her name, and prayed that, with the exception of the three villages, "the *mīras*" (ownership) might be transferred to him and all the *sircar* proceedings might be passed in his name.

Alagusundara continued to be in possession of the property of which Chokkammal had put him in possession in 1862 until he died in 1864, and had dealt with the property which had been transferred to him as an absolute owner would have done. Upon his death in 1864 his elder brother Kalianasundara, on the 18th July 1864, presented a deed of consent to the Tahsildar of Nannilam praying for the transfer to the name of Thiagaraja of the property which stood in the name of Alagusundara, and the *mīras* was transferred to him. Thiagaraja was by birth a son of Kalianasundara and had been adopted by Alagusundara. He was in 1864 about two years of age.

From the 18th July 1864, Kalianasundara, until he died in September 1876, was referred to in all documents relating to the property as the guardian of Thiagaraja, who was in possession of the property in question from 1864 until he died in 1881, and during that time the management of the affairs of the family was carried on solely in his name. Upon the death of Thiagaraja in 1881 the *mīras* which had stood in his name was altered to the name of his widow Kamalath, a girl of about 12 years of age, who died in 1882. Upon the death of Kamalath in 1882, Murugathal, the mother by adoption of Thiagaraja, took possession of the property in question for a Hindu widow's interest and held it until 1884, when Chokkammal forcibly ejected her.

On the 9th February 1887, Murugathal

brought a suit in the Court of the Subordinate Judge of Nagapatam against Chokkammal and others, in which she claimed a decree for the possession of the properties now in question, alleging in her plaint that her husband Alagusundara had been the adopted son of Arunachala, and that the properties which she claimed belonged to him as such adopted son, and had been enjoyed by him from 1862 until he died in 1864; that after his death her adopted son Thiagaraja had enjoyed them until he died in 1881, and after him his widow, Kamalath, got them according to Hindu law and she died childless in 1882, and since her death she, Murugathal, got them under Hindu law and enjoyed them until 1884, when Chokkammal forcibly took possession of them and enjoyed them adversely to her. Chokkammal in her written statement in that suit denied Murugathal's title, alleged that she, Chokkammal, had been in possession of the property in question for 38 years from the death of her husband Arunachala in 1849, and denied that Alagusundara had been adopted. Several issues were framed by the Subordinate Judge in that suit, who found that Alagusundara was adopted as a son to Arunachala in 1862 by Chokkammal, who had the authority of her husband to make the adoption, that the adoption was invalid according to Hindu law, that Thiagaraja was adopted by Murugathal under the authority of her husband, but that the course of conduct of Chokkammal and the change of position of Alagusundara as the result of his adoption made it inequitable to hold that he had not title to the property, and that the putting him in possession of the property in question and allowing him to manage it for his own purposes substantially operated as a gift of the property to

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him. The Subordinate Judge in that suit also held that Murugathal's claim of adverse possession of the miras for twelve years was established, and on the 18th December 1889, he gave her a decree for possession of the property which she claimed. From that decree of the Subordinate Judge the suit of 1887 went on appeal by Chokkammal to the High Court at Madras. The learned Judges of the High Court held that Alagusundara's adoption was invalid, but holding that Murugathal's claim of adverse possession for twelve years was established, by their decree of the 17th August 1892, dismissed Chokkammal's appeal. Chokkammal did not appeal from that decree of the High Court, and it became final.

It is necessary to consider what was Chokkammal's position as a Hindu widow and how far her acts could, according to Hindu law, bind the reversioners to her husband. On Arunachala's death in 1849 she became entitled to the full beneficial enjoyment of the estate which had been his at the time of his death. As Mr. Mayne, in para. 605 of his "Hindu Law and Usage" correctly, in their Lordships' opinion, said:—

"It was at one time common to speak of a widow's estate as being one for life. But this is wholly incorrect. It would be just as untrue to speak of the estate of a father under the Mitakshara law as being one for life. Hindu law knows nothing of estates for life, or in tail, or in fee. It measures estates, not by duration, but by use. The restrictions upon the use of an estate inherited by a woman are similar in kind to those which limit the powers of a male holder, but different in degree."

The Hindu widow has not power to make a gift of the estate. Handing over the possession of the estate to a son whom she has validly adopted to her deceased husband is not making a gift of the

estate to him. The estate became his on his adoption if he was validly adopted. She has no power to sell or assign the estate except for necessity, so as to bind her husband's reversioners after her death. But she represents the estate in suits brought by her or against her for possession of the estate or any part of it, and she and the reversioners are equally bound by any final decree which a Court makes in such a suit provided that the suit was fought out according to law and was not collusive or fraudulent.

In the suit of 1887 Chokkammal was no doubt personally interested to defeat Murugathal's claim for the possession of lands which had been in her own possession as the widow of Arunachala from 1849 until 1862, but although her object in resisting Murugathal's claim was probably a purely personal and selfish object, she did, in fact and in law in that suit, represent the estate as well as her own interests as a Hindu widow. The suit of 1887 was not a collusive suit; it was regularly and according to due procedure at law fought out in the Court of the Subordinate Judge and in the High Court.

A protracted argument was submitted to the Board on the question whether under Hindu law adverse possession against a widow in possession of an estate for a Hindu widow's interest bars the reversioner. While it is not necessary in the view which will later be announced by the Board on the question of limitation in this case to make any formal pronouncement upon this point, it may be convenient to say that the authorities referred to were as follows:—In *Goluckmonee Dabee v. Degumber Dey* (1), which was decided in 1852, Sir Lawrence Peel, who was the Chief Justice of the Supreme Court at Calcutta, said:—

(1) Unreported. Decided in 1852.

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"It has been invariably considered for many years that the widow" (speaking of the widow as heir) "fully represents the estate, and it is also settled law that adverse possession which bars her, bars the heir after her, which would not be the case if she were a mere tenant for life, as known to the English law." [See the reference to that case in the judgment of Sir Barnes Peacock, C. J., in *Nobin Ch. Chuckerbutty v. Issur Chunder Chuckerbutty* (2)].

In *Katama Natchier v. The Rajah of Shivagunga* (3), which was decided by the Board in 1863, the Board, consisting of Knight Bruce, L. J., Sir Edward Ryan, and Turner, L. J., the assessors being Sir Lawrence Peel and Sir James W. Colville, all being eminent lawyers, and three of them having had judicial experience in India, Lord Justice Turner delivered the considered judgment of the Board, and in it said, at page 603, as follows:—

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in *Anga Mootoo Natchier's* lifetime, would have bound those claiming the *Zemindari* in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the *Zillah* Court by any person claiming in succession to *Anga Mootoo Natchier*. For, assuming her to be entitled to the *Zemindari* at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who

would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindoo widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

The declaration as to Hindu law which their Lordships have quoted from the considered judgment of the Board, which was delivered by Lord Justice Turner in 1863, has in the present appeal been objected to on the ground that it was *obiter*. The following cases however were referred to as showing that the doctrine there set forth was in accord with the course of judicial decisions.

Their Lordships will first refer to the case, *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (2), which came before a Full Bench of the Calcutta High Court, 1867, in which the declaration of the Board in the *Shivagunga* case (3) to which their Lordships have referred was accepted as a correct statement of the Hindu law to which it related and was applied to the case before the Full Bench. The facts of the case before the Full Bench are not fully stated in the order of reference to the Full Bench, but they were as follows: One Ramdoollub Chuckerbutty died possessed of an estate consisting of lands leaving two sons, two daughters and his widow, Dhone Mala. The two sons died without issue in the life-time of the widow, and upon their death the widow, Dhone Mala, became entitled to the possession of the respective estates of the sons, but the Defendant in that suit, a stranger, and as a trespasser, took possession of the estate

(2) 9 W. R. Civil Rulings 505 at p. 507

(F. B.) (1868).

(3) 9 W. R. Civil Rulings 505 at p. 507

(F. B.) (1868).

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more than twelve years before the suit, and the widow never obtained possession. Upon the death of the widow, sons of the daughters, who were the reversioners to their uncle's estate, brought the suit for possession, which was before the Full Bench in second appeal. The first Appellate Court had dismissed the suit as not brought within time, that is, within twelve years from the time when the Defendant had wrongfully taken possession, and the question before the Full Bench was whether the suit was barred by limitation or whether the reversioners could sue upon the death of the widow, Dhone Mala. The Full Bench held that the cause of action arose when the Defendant had taken possession and that the suit was time barred. The Full Bench was an exceptionally strong Bench of Judges, who had much experience in cases involving considerations of Hindu law. Their Lordships will give extracts from the judgments which were delivered in the Full Bench, as those judgments appear to their Lordships to confirm the declaration as to Hindu law which they have quoted from the judgment of the Board in the *Shivagunga* case (3) and to have a direct bearing on the appeal before the Board, and are very instructive.

In delivering his judgment in that Full Bench case, with which Seton-Karr, J., concurred, Sir Barnes Peacock, C. J., after referring to Sir Lawrence Peel's judgment already mentioned, said:—

"It was also held by the Privy Council in the *Shivagunga* case (3), that in the absence of fraud or collusion a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs. . . . If the female heir in the present case had sued the wrong doer, and without fraud or collusion had failed to make out her case to turn him out of

possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir."

Farther on Sir Barnes Peacock said:

"It is said that the reversionary heirs could not sue (for possession) during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred."

Jackson, J., in his judgment, said:

"I entirely concur in the opinion of the Chief Justice that the Plaintiff (the reversionary heir) was barred in the present case. . . . It has been distinctly held by the Privy Council in the *Shivagunga* case (3), that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the cases to which his Lordship the Chief Justice has referred."

Phear, J., in his judgment, said:

"I too desire to avoid pledging myself to all the illustrations which have fallen from the Chief Justice; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice Jackson. I will add that it seems to me that when a reversionary (Hindu) heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though doubtless she was fettered in a way that he is not, with regard to the dealings

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with the property, viz, her alienations are often liable to be avoided by him when he succeeds to the right of succession."

Macpherson, J., in his judgment, said :

"I also concur in the proposed answer. But a very great difference exists between the case immediately before us and the case in which a mother or other Hindu female having an estate similar to that of a childless widow has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow) at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and therefore a suit to recover possession, by whomsoever it may be brought, is barred unless instituted within twelve years from the commencement of the adverse possession."

In *Aumirtolall Bose v. Rajoneekant Mitter* (4), the decision of the Full Bench at Calcutta in *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (2) was cited in argument, and Sir Barnes Peacock, in delivering the judgment of the Board, affirmed that decision.

In *Jugol Kishore v. Maharajah Jotindra Mohun Tagore* (5), which was before the Board in 1884, where a Hindu widow's right, title and interest in property had been sold in execution of a money decree, the Board, without a suggestion of dissent from the ruling, said, at page 73,

"It was held in the *Shivagunga* case (3) that although a widow has for some purposes only a partial interest, she has for other purposes the whole estate vested in her; and that in a suit against a widow in respect of the estate the decision is binding upon the reversionary heir." The Board also said :

"If the suit is simply for a personal claim against the widow, then merely the widow's qualified interest is sold (in execution of the decree) and the reversionary interest is not bound by it (the sale). If, on the other hand, the suit is against the widow in respect of the estate, or for a cause which is not a mere personal cause of action against the widow, then the whole estate passes."

In *Partab Narain Singh v. Trilokinath Singh* (6), which was before the Board in 1884, the Board said, at page 207 :—

"It is sufficient for the present purpose to hold that, until she had appointed another to be owner and representative, the Maharanee's estate in the taluk was sufficient to constitute her the full representative of it in the former suit. Her estate was at least as large as that of a Hindu widow in her husband's property. What was said by this Board of the widow's estate in the *Shivagunga* case (3) is applicable to hers."

In *Hurrinath Chatterji v. Mohunt Mothoor Mohun Goswami* (7), which came before the Board in 1893, it was held that the rule in the *Shivagunga* case (3) to the effect that an adverse decree against a Hindu widow binds those claiming in succession applies equally to the case of the daughter. It had been argued in that case that the adverse title alleged was founded on something which was independent of limitation, and that the Limitation Act, XV of 1877, let the reversionary heir sue within twelve years from the time when his right to possession

(3) 9 W. B. Civil Rulings 505 at p. 507 (F. B.) (1868).

(4) 1, B. 2 I. A. 113 (1875).

(5) 11 I. A. 68 (1884).

(3) 9 M. I. A. 539 (1868).

(6) 11 L. B. 114 I. A. 197 (1884).

(7) L. B. 120 I. A. 122 (1893).

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accrued. With reference to that argument, Lord Watson, at page 188, said :—

“ But you must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by decree.”

Owing to the fact that it did not appear from the judgment of the Board when Pearimoni, who was the second wife of Ramahundun Goswami, had died, beyond the fact that she was living when he died in 1847, there was some hesitation in referring to that case in the argument of this appeal. Mr. DeGruyther has, however, shown from the Appeal Record of that case, which is preserved in the Privy Council Office, that Pearimoni died in 1855.

In *Chaudhari Risal Singh v. Bulwant Singh* (8), which was before the Board in 1915, Chaudhari Risal Singh, alleging that he was the reversionary heir of Jagat Prakash Singh, brought a suit against Bulwant Singh for possession of immoveable property known as the Landhaura estate. The property there claimed had belonged to Raja Raghubir Singh until he died childless in 1868. Raghubir Singh left a widow, Rani Dharam Kunwar, who bore to him a posthumous son, Jagat Prakash Singh, who died in 1870. Rani Dharam Kunwar had the authority of her husband to make successive adoptions. In 1877 she adopted to her husband a boy who died within three years after he had been adopted, and then she adopted another boy, who died in 1885, and in 1890 she adopted Bulwant Singh, the Defendant to the suit. She continued in possession of the property, alleging that her husband Raghubir Singh had by his Will left it to her for her life. After a time Rani Dharam Kunwar and Bulwant Singh

quarrelled. She was claiming a right to manage the property during her life; he was claiming his full rights as an adopted son. The result was that, on the 7th January 1905, Rani Dharam Kunwar brought a suit in the Court of the Subordinate Judge of Saharanpur against Bulwant Singh, in which she claimed to have it declared that she had no power to adopt Bulwant Singh and had never validly adopted him, and to have her registered deed of adoption, in accordance with which she had adopted him, declared void and ineffectual against her. He alleged that Rani Dharam Kunwar had power to adopt him, and had validly adopted him. The Subordinate Judge, holding that Rani Dharam Kunwar was estopped from denying that she had validly adopted Bulwant Singh, dismissed her suit. She appealed to the High Court at Allahabad, and the High Court, also holding that Rani Dharam Kunwar was estopped, dismissed her appeal. Thereupon she appealed to His Majesty in Council. The Board in that appeal considered the evidence in that suit, and having come to the conclusion that Rani Dharam Kunwar had validly adopted Bulwant Singh and that her appeal should be dismissed, advised His Majesty accordingly. In the judgment the Board, at page 178, said :—

“ There can be no doubt in their Lordships' opinion that Rani Dharam Kunwar in her suit against Bulwant Singh did, notwithstanding the personal estoppel under which she laboured, represent the estate on the question of fact as to whether Bulwant Singh had or had not been validly adopted, and that she represented the estate within the meaning of the rule in *Katama Natchier v. Rajah of Shivagunga* (3). The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Banerji, J., in his judgment in this case,

(8) L. R. 45 I. A. 166 (1915).

(3) 9 M. I. A. 539 (1863).

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thus: 'Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir.' It cannot be said that there had not been a fair trial by the Board in 1912 of the right in the suit of Rani Dharani Kunwar against Bulwant Singh. The right in that suit was his right to the estate as a son validly adopted to Raja Raghunath Singh."

Upon the other side it was asserted the principle of the *Shivagunga* case (3) might have been applied and had not been applied in the case of *Runchordas Vandrawandas v. Parvatibhai* (9), which came before the Board in 1899. The suit in that case was brought on the 21st December 1888, against Vandrawandas and the Advocate-General of Bombay by Cursondas Govindjee as the heir-at-law of Kallhanji Sewji, who had died on the 6th January 1869, leaving two widows - Cooverhai, who died 1871, and Nenavahoo, who died in 1888. Kallhanji Sewji had made a Will, which was proved on the 2nd March 1869, by three executors, who were trustees, of whom the first Defendant to the suit was at the date of the suit the sole survivor. The three trustees were appointed by the testator as trustees for dharam—that is, to make gifts for charitable or religious purposes. The Will contained the following clause: "As to the estates which have been given by me to my wives, they are to enjoy the rent of the said estates during their natural lives, and on the death of my wives the said estates are to revert to my dharam, and whatsoever income may be derivable from the said estates is to be expended for my dharam." The main question in the suit

was whether the gift for charitable or religious purposes was void for vagueness and uncertainty, and the High Court at Bombay and the Board in appeal held that it was void and that the trustees took no interest under the Will. The suit was brought after the death of Nenavahoo.

It appears to their Lordships that part of the property claimed by the reversioner had been property of the respective widows as their *stridhan*, as to which there was some question as to the "rights of the heir." and that other parts of the property claimed was property which had been in the possession of the widows, to which the reversionary heir, the Plaintiff, in the ordinary course, was clearly entitled and that the Board was considering how an account, which the Courts below had ordered to be prepared, should be worded so as to show those two classes of property.

The defence of limitation was raised, but the Board held that it did not apply, saying:—

"It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the Plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his."

It has been maintained that the Board was not intending to discredit the rule in the *Shivagunga* case (3). What the Board was considering was the wording of an account which the Appellate Court and the first Court had ordered to be prepared. The judgment of the Board was delivered by Sir Richard Couch in 1899, who in 1893 had delivered the judgment of the Board in *Hurrinath Chatterji v. Mohunt Mothoor Mohun Goswami* (7), which expressly approved of and applied as sound Hindu law the rule in the *Shiva-*

(3) 9 M. I. A. 539 (1893).

(9) L. R. 21 I. A. 711; a. c. 3 C. W. N. 621 (1899).

(3) 9 M. I. A. 539 (1893).

(7) L. R. 20 I. A. 183 (1893).

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gunga case (3). What was said by the Board in 1899 at the conclusion of the judgment makes it plain what the Board was considering. It is there said :—

“ The decree of the first Court, dated the 27th July, 1896, should not have been varied as it has been. It is for an account of the moveable property left by Cooverbai and Nenavahoo at the time of their deaths distinguishing between such of it as was their *stridhan* and ‘ as such ’ formed part of the estate of the testator. ‘ As such ’ appears to be an error for ‘ such as. ’ With this alteration their Lordships think the decree will be right.”

As altered by the Board the account which was to be taken was an account of the moveable property left by Cooverbai and Nenavahoo, the widows of the said testator respectively at the time of their deaths distinguishing between such of the said property as was the *stridhan* of the said Cooverbai and Nenavahoo and such as formed part of the estate of the said testator.

It does not appear to their Lordships how the rule in the *Shivagunga* case (3) could have been applied in the case then before the Board. What the Board, at the stage of the suit which was then before the Board, the Board having decided against the trust to the trustees, was considering was what was the account which was to be taken, and the Board directed that the account should separately show what had been the *stridhan* of the widows, and what was the property to which the heir might ordinarily be entitled. Their Lordships are unable to see what was the estate, within the meaning of the *Shirz-gunga* case (3), which the widows had represented, or to what the rule in the *Shivagunga* case (3) could have been applied. The title of the trustees to the property devised or bequeathed to them

for charitable or religious purposes by Kallianji Sewji was not questioned until the survivor of the two widows died in 1888, and that property had never been represented by the widows or either of them. It had been in the exclusive possession of the trustees under the Will of Kallianji Sewji from 1869 until the Court in the suit which was brought on the 21st December 1888, after the death of the last surviving widow, had decided that the gift for charitable or religious purposes was void.

The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga* case (3) as sound Hindu law where that rule was applicable.

It also appears to their Lordships that the suit is barred by limitation. The Plaintiffs could not be entitled to a decree for possession without displacing the adoption of 1862 of Alagusundara by Chokkammal. It was held by the Board in *Jagadamba Chowdhraïn v. Dakhina Mohun* (10), that Art. 129 of the Second Schedule of Act IX of 1871 relates to all suits in which the Plaintiff cannot succeed without displacing an apparent adoption by virtue of which the Defendant is in possession. That article prescribed twelve years as the period of time within which a suit “ to establish or set aside an adoption ” might be brought, and that such period of twelve years should begin to run from “ The date of the adoption, or (at the option of the Plaintiff) from date of the adoptive father’s death.”

Act IX of 1871 did not give to a reversioner whose right to sue for possession

(3) 9 M. I. A. 539 (1863).

(10) L. R. 13 I. A. 84: s. c. I. L. R. 13 Cal. 308 (1886).

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accrued upon the death of a Hindu widow any further time than the twelve years given by Art. 129 to any Plaintiff. That Act was in force until the 19th July 1877, when Act XV of 1877, the Indian Limitation Act, 1877, came into force, and by Art. 141 of the Second Schedule of Act XV of 1877 a Hindu entitled to the possession of immoveable property on the death of a Hindu female might bring his suit for possession within twelve years from the time when the female dies. In the present case the period of limitation allowed by Art. 129 of Act IX of 1871 expired in 1874.

The person who at the date of the adoption in 1862 was entitled to sue to set aside the adoption must have been a reversioner to Arunachala, and looking at the pedigrees he must have been either Kalianasundara or Chokkappa, and it has not been pleaded or otherwise alleged that they were at the time of the adoption under the age of 18 years so as to entitle them to an extension of the period allowable to a minor under sec. 7, Act IX of 1871, to bring a suit. It is obvious, looking at the facts and dates in the present case, that Kalianasundara and Chokkappa must have arrived at full age long before Act IX of 1871 expired and that that Act applied.

In the present suit the Subordinate Judge found that the question as to the adoption of Alagusundara was *res judicata*, but Sir John Wallis, C. J., and Mr. Justice Burn, in the appeal to the High Court, decided that the principle of *res judicata* did not apply. On that subject their Lordships do not consider it necessary to express an opinion.

It has been arranged by the parties through their respective Counsel and their respective solicitors in the best interests of their clients that the Plaintiffs' appeal,

No. 124 of 1923, and the first Defendants' appeal, No. 128 of 1923, which relates to the village of Enkan, should be dismissed, and that there should be no order as to costs in either of these appeals in which other Respondents have not appeared. It has also been arranged by the parties through their respective Counsel and their respective solicitors in the best interests of their clients that the Plaintiffs' appeal, No. 125 of 1923, should be dismissed without costs on either side, the Plaintiffs having admitted that the late husband of the first Defendant was not disqualified from inheriting along with the Plaintiffs. Except as above arranged by the parties it appears to their Lordships that all the appeals should be dismissed with costs, and their Lordships will so accordingly humbly advise His Majesty.

Since the hearing of these appeals some of the parties, their Lordships understand, have entered into compromises. On production of the proper evidence, effect to these compromises will be given in the Order in Council confirming this report.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellants in Appeals Nos. 122, 123, 124, 125 and for the Respondents in No. 129 of 1923.

Solicitors : *Messrs. Chapman, Walkar & Shephard* for Srirangath Anni.

Solicitors : *Messrs. Douglas, Grant* for Somasundaram Chettiar, 3rd Respondent.
G. D. M.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 1 of 1921.

SANDERSON, C. J. CHANDRA SEKHAR
RICHARDSON, J. MULLICK and anr.
1921, v.
26, May. GONESH CHANDRA DE
and ors.

Suit commenced by the next friend of an infant, not for his benefit—Court's jurisdiction to dismiss the suit on an application.

Where it appears clearly upon affidavit that a suit has been commenced by the next friend to promote his own views and not for the benefit of the infant, the Court has jurisdiction to make an order summarily dismissing the suit, without an enquiry into its propriety.

SALE v. SALE (1) followed.

This was an appeal preferred against the judgment of Mr. Justice Buckland in the exercise of Ordinary Original Civil Jurisdiction.

The facts of the case have been fully set out in the judgment of the learned Chief Justice.

Mr. B. N. Ghosh for the Appellant.

Messrs. S. R. Dass, Pankridge and S. Ghosh for Mr. Douglas.

Messrs. R. C. Bonnerjee and A. N. Chaudhuri for the Official Receiver.

Mr. M. N. Bose for Gopessur Mullick and Gorachand Mullick.

Mr. S. N. Banerjee for G. C. Dey.

Mr. P. N. Ghose for Messrs. Cook & Co., Ltd.

Mr. R. S. Pandit for the Defendants Nos. 6 and 13, Doyal Ch. Mullick and S. C. Mullick.

C. J.

1. Mr. M. N. Bose submits that he is entitled to a separate set of costs in the appeal.

2. Mr. Pankridge submits that his

client is entitled to separate costs in the appeal.

3. Mr. P. N. Ghose submits that his client Messrs. Cook & Co., Ltd., are also so entitled.

4. Mr. R. S. Pandit for G. C. Dey submits that his client is entitled to separate costs in the appeal.

5. Mr. R. S. Pandit makes the same submission on behalf of his clients D. C. Mullick and S. C. Mullick.

Mr. R. C. Bonnerjee submits that he files no affidavit that Official Receiver is entitled to a separate set of costs.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Buckland. It was given with respect to a petition which was presented to the Court by Gopessur Mullick and Gorachand Mullick, two of the Defendants in the suit.

The petition asked that the suit might be dismissed with costs or that an enquiry might be held by the Court to ascertain whether the suit was for the benefit of the infant Plaintiffs and whether Surendra Nath Banerjee was a fit and proper person to act as the next friend of the infant Plaintiffs in the suit and there were other usual prayers.

The decision of the learned Judge was that the suit should be dismissed with costs.

The suit was brought by Chandra Sekhar Mullick and Nanda Kishore Mullick as *shebait*s of an idol, both minors, by their next friend Surendra Nath Banerjee and there were 15 Defendants.

The main prayer in the suit was for a declaration that an indenture of lease, dated the 18th of October 1919, was invalid and for an order cancelling the said

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lease. There were other incidental reliefs prayed for.

The lease which it was desired to set aside was in respect of certain premises Nos. 78 and 80, Lower Chitpore Road. The facts with regard to the question, which is now before us, are fully set out in the judgment of my learned brother and I propose to read the relevant paragraphs in his judgment which are as follows :—

“ The property was dedicated in the year 1820 by one Chitra Dassi who died in the year 1855. In the year 1876 a suit No. 442 of 1876 was filed in this Court by one of the then *shebait*s against the others for construction of the instrument whereby the property was dedicated and of the Will of Chitra Dassi, and to have the trusts carried out. On the 4th December 1878 a decree was made in that suit and the Official Receiver was thereby appointed and still is the Receiver of the property dedicated.

On the 26th April 1915 under an order made in this suit the Official Receiver granted a lease of Nos. 79 and 80, Lower Chitpore Road to the grandfather of the Plaintiffs and to Defendants Nos. 7 and 8; since then the Plaintiffs' grandfather has died leaving them as his heirs.

On the 18th August 1919 the *shebait*s offered and the 4th Defendant Mr. George Douglas agreed to accept a building lease of this property subject to the sanction of the Court of the terms being obtained. One term was that the Defendants Nos. 7 and 8 and the Plaintiffs should surrender their rights under the lease of the 26th April 1915. A week later on the 25th August 1919 Hashim Ebrahim Sallayjee offered to take a building lease of the same property upon the terms set out in a letter from his attorneys to Babu Pannalal Dey, the attorney for

the Defendants Ashutosh Mullick, Monilal Mullick, Manik Lal Mullick and Sarat Chandra Mullick, but on the 27th August the Official Receiver approved the proposed lease to Mr. George Douglas as being for the benefit of the estate.

Therefore on the 1st September 1919 the Defendants Nos. 7 and 8 applied to Rankin, J., with the consent of all the *shebait*s for sanction to the proposed lease to Mr. George Douglas. On that application the infant Plaintiffs were represented by their mother Kadambini Dassi for whom Messrs. G. C. Chunder & Co. were acting. Babu Pannalal De, who was instructed to consent to the order, brought to the notice of the Court the offer made by Sallayjee and Rankin, J., accordingly adjourned the matter so that the parties could have an opportunity of considering that offer.

On the 5th September the application was renewed and on that occasion Babu Pannalal De put forward two offers, one of them Sallayjee's, in terms differing slightly from those of his previous offer. The partners, however, said they preferred to accept the offer of Mr. George Douglas and with their consent an order was made sanctioning the proposed lease to him.

On the same day Babu Pannalal De on behalf of the Defendant Ashutosh Mullick gave notice to the partners that he would apply on the 9th September that the order of the 5th might be reconsidered and in support of that application an affidavit of Ashutosh Mullick was filed in which he stated his wish that the offer of Sallayjee made on the 5th should be accepted.

“ The matter came on again before the Court on the 9th September when the application was dismissed and it was directed that the draft lease should be settled

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by senior Counsel and that the draft lease, if settled, should be sanctioned by the Judge in Chambers. This was done and the lease was executed on the 18th October 1919 and the lessee went into and now is in possession of the property." Those are the material facts about which there is no dispute.

The suit contained allegations that there was no necessity for the lease to Mr. Douglas, that it was not for the benefit of the estate, that the Court had no jurisdiction to make the order sanctioning the lease, and there were various charges of fraud, misrepresentation and conspiracy against some of the parties, the allegation being that the Court had been misled.

The learned Judge upon considering the points which were argued before him came to certain findings. He pointed out first that in the petition of the applicants it is alleged that the application made on behalf of Ashutosh Mullick on the 9th of September 1919 was really made on behalf of Sallayjee, that is, the application to set aside the order of Mr. Justice Rankin sanctioning the lease to Defendant Mr. Douglas and that in support of this charge reference was made to a petition for leave to defend a suit which had been brought by Ebrahim Sallayjee & Co., against Ashutosh Mullick, and in that suit Ashutosh Mullick alleged that he had been instigated by Sallayjee to make the application to set aside Mr. Justice Rankin's order.

The learned Judge then said that it was alleged that Surendra Nath Banerjee was a man of no substance, that as far as the Petitioners could ascertain, he was an employee of Sallayjee whose brick-field he managed. In this Court it has not been disputed that Surendra Nath Banerjee is an employee of Sallayjee. The

learned Judge then referred to an affidavit which was put in by the mother of the infant Plaintiffs to the effect that she had been advised by competent solicitors and that she and her solicitors considered the offer of Mr. Douglas and had come to the conclusion that it was more beneficial to the estate than the offer of Sallayjee and that she and the other *shebaitis* objected to let out the premises to a Mahomedan for the reasons which are set out in the affidavit.

As I have already said, in this Court the facts that I have referred to were not really disputed nor was it seriously disputed that the learned Judge had jurisdiction to make the order dismissing the suit. But it was argued by the learned Counsel for the Appellants that he should not have made the order without a previous enquiry for the purpose of ascertaining whether the suit was really brought for the benefit of the infant Plaintiffs, or to put it shortly, without an enquiry into the propriety of the suit.

The principle is correctly laid down in my judgment in Daniell's Chancery Practice, Vol. I, page 103, to this effect—"Where it appeared clearly upon affidavit that the action was commenced by the next friend to promote his own views and not for the benefit of the infant such an order (*i.e.*, the order dismissing a suit) was made summarily and without an enquiry." For that proposition, *Salé v. Salé* (1) was quoted as an authority. That was a case which came before the Master of the Rolls and the head-note is this:

"In a clear case the Court being of opinion that a suit had been commenced by the next friend of infants to promote his own views and not for the benefit of the infants, summarily and without a refer-

(1) 1 Bea. 586 (1830).

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ence to the Master dismissed it with costs to be paid by the next friend and the learned Master of the Rolls in his judgment said, 'I am perfectly satisfied that this suit is filed not for the benefit of the infants but to promote the views of the person who styles himself the next friend of the infants, and that being so, I apprehend there can be no doubt of the jurisdiction of this Court and that it ought to be exercised in such a case as this.' "

The learned Judge in this case came to the conclusion that there was no doubt that this suit was filed, not for the benefit of the infant Plaintiffs but in the interest of Sallayjee and I agree with the learned Judge in this respect. It is clear to me that Surendra Nath Banerjee was merely the tool and instrument of Sallayjee.

The learned Counsel for the Appellant argued first that this Court must assume the facts as stated in the plaint; secondly, that if those facts were assumed then the Plaintiffs would be entitled to rescission of the lease; and thirdly, that if the lease were rescinded then it must be for the benefit of the infant Plaintiffs. In view of the facts of this case and of the proceedings before Rankin, J., I am by no means satisfied that there is any substance in the first two contentions but even assuming for the present that the learned Counsel's argument was correct as regards the first two propositions I am certainly not satisfied that it would be for the benefit of the infant Plaintiffs if the lease, which was granted to Mr. Douglas, were rescinded.

The first ground upon which the learned Counsel relied was that the Plaintiffs were joint lessees under the old lease of the premises and that a year and a half of the term of that lease still remained un-

expired at the time of the proceedings before Rankin, J., and that it was not in the interests of the Plaintiffs that lease should be surrendered.

I ought to have said that the land in question was occupied by *bustees* and the Plaintiffs and the other lessees were not in occupation but were endeavouring to realise rents from the tenants who were living in the *bustees*.

In my judgment the learned Counsel's argument is met by the statements which are to be found in para. 5 of the petition because it there appears that the Petitioner after stating that the lessees were unable to realise any rent from the tenants for 2½ years proceeded to state:

"Thereafter the income of the said property with taxes was only Rs. 881-13-5 p. a month whereas the rent payable in respect thereof was Rs. 750 a month and the municipal rates and taxes Rs. 248-5-4 a month. There was thus a loss of Rs. 116-7-11 a month in rent besides costs of litigation which amounted to Rs. 3,000 or thereabouts and establishment charges and the Petitioners and the said Sreemati Kadambini Dassi, the mother and natural guardian of the Plaintiffs, were always anxious to get rid of the said premises and to surrender the lease in respect thereof." Those facts are uncontradicted and in view of those facts it seems to me that the lessees would be benefited by being relieved of that lease, inasmuch as it was an unprofitable lease; consequently in my judgment the first point which the learned Counsel urged cannot be sustained.

The next point which the learned Counsel argued was that, looking at the matter from the point of view of the Plaintiffs being *shebaites*, the lease was for a long period of 60 years and that there was no necessity as far as the estate was

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concerned for that lease. It seems to me that it is possible that there might be something in that argument (though I do not propose to express any definite opinion about it at the present moment, for in my judgment it is not necessary so to do) if that lease had not been approved by Mr. Justice Rankin, who after a full enquiry came to the conclusion that it was a proper lease for the *shebais* to enter into having regard to the circumstances of the case into which he had made an enquiry. That judgment of my learned brother was not appealed against. It is stated in the petition of Ashutosh Mullick that Sallayjee had instigated him to appeal against my learned brother Mr. Justice Rankin's judgment, but on further consideration he, Ashutosh Mullick, abandoned the appeal. Therefore my learned brother's judgment stands undisputed; consequently in my judgment the point that there was no necessity for this lease, having regard to the interests of the estate, is not open to the Appellant on this occasion.

It was further stated by Mr. Dass in the course of the argument and it was not denied that with regard to this *debutter* property the *shebais* had no pecuniary interest and it was the idol only which would be benefited from the increment which would be derived from this lease. It is a building lease for 60 years with a rent of Rs. 2,000 a month for the first 20 years with an increasing rent as in the lease provided.

It is further to be noticed that most of the *shebais* are adults, and they approved, with the exception of Ashutosh Mullick who has been found to be acting on behalf of Sallayjee, of the lease being granted to Mr. Douglas. Again it must be remembered that the mother and natural guardian of the infant Plaintiffs although

she was a *purdanashin* woman was advised by attorneys of this Court, and has sworn an affidavit that she approved of the lease being granted to Mr. Douglas; consequently in my judgment looking at the matter from the point of view of the Plaintiffs being *shebais*, the argument of the learned Counsel for the Appellant is without substance.

Now let us look at the case from the other side. The Plaintiffs are infants who are, we are told, about 10 and 12 years old. Surendra Nath Banerjee who appears on the record as their next friend is a total stranger to them. He is also a total stranger to the mother of the infant Plaintiffs. He is employed by Sallayjee and in my judgment there is no doubt whatever that Surendra Nath Banerjee had been instigated by Sallayjee to bring this suit. The learned Judge has found that the suit has been instituted not for the benefit of the infants but for the benefit of Sallayjee and the learned Counsel for the Appellant did not seriously dispute that finding, his argument being based upon the allegation that even if that were so the suit must be for the benefit of the infants. Now, if it be taken as a finding, as I think it must be taken, that this suit was instituted solely for the benefit of Sallayjee, what is the only conclusion to which this Court can come? In my judgment the conclusion is this that Surendra Nath Banerjee has been instigated to bring this suit with the same object as Ashutosh Mullick was instigated by Sallayjee when he made his application before Mr. Justice Rankin to set aside the order which the learned Judge had made. The Petitioners made a definite allegation as to the reason why this suit has been brought in para. 32 of their petition to this effect: "Your Petitioners further charge that this suit has

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not been brought for the benefit of the infants but for the purpose of benefitting the said H. E. Sallayjee and the real object thereof is to blackmail your Petitioners and the other Defendants and to compel them to enter into some arrangement with the said Mr. H. E. Sallayjee regarding the lands which have been leased out under the orders of this Hon'ble Court for the sake of peace." That statement is not denied as far as I can discover although Surendra Nath Banerjee filed an affidavit, except in so far as he states in para. 7 of his affidavit as follows :—

" I deny that I have any interest in this suit other than the interest of the infant Plaintiffs and of the idol referred to in the plaint herein and the desire to see justice vindicated." Speaking for myself I do not believe for a moment that Surendra Nath Banerjee had the smallest desire to see justice vindicated, for in my judgment he was merely a tool of Sallayjee and lent himself to Sallayjee for the purpose of bringing this suit. The learned Judge has found as a fact that this suit has been brought in the interest of and for the benefit of Sallayjee and I see no reason whatever for differing from the conclusion of the learned Judge on that question of fact. It is not difficult to see that if this suit were allowed to proceed Mr. Douglas, the lessee, would be placed in an inconvenient and difficult position because as long as this suit was pending undisposed of, it would be practically impossible for him to proceed with the development of the land of which he took the lease for the purpose of building and thus an opportunity would be provided for Sallayjee bringing pressure to bear upon Mr. Douglas to come to some arrangement. I consider this a bad case and the institution of the suit an abuse of the pro-

cess of the Court. In my judgment the learned Judge was right in dismissing the suit and consequently in my judgment this appeal ought to be dismissed.

Before leaving the matter and having regard to the discussion which took place yesterday with respect to the question of the proposed change of Surendra Nath Banerjee's attorney, with which we dealt fully in the judgment which was then delivered, I desire to say that the appeal was left in the hands of learned Counsel Mr. B. N. Ghose, instructed by Mr. Pannalal De and in my opinion everything was said by Mr. Ghose which could be said on behalf of the Appellant in this case and indeed as I said yesterday both my learned brother and I are indebted to him for the able argument which he presented to the Court.

As regards costs the Appellant Surendra Nath Banerjee must pay the costs of this appeal as far as Mr. Douglas is concerned. He must also pay the costs of this appeal of the Petitioners, i.e., Gopessur Mullick and Gorachand Mullick and the costs of the Official Receiver. But Mr. Gonesh Chunder De, Messrs. Cook & Co., Ltd. and Doyal Chand Mullick and Sarat Chunder Mullick must pay their own costs of this appeal, as we do not see there was any necessity for their being separately represented in the appeal.

RICHARDSON, J.—I agree. The true owner of the property in question is the deity to whom it was dedicated. The infant Plaintiffs in whose names the suit is brought are two of the trustees or *shebait*s who manage the property on behalf of the deity. The endowment is a private family endowment. The *shebait*s, who include a number of adults as well as the Plaintiffs, are members of the family to which the founder of the endowment belonged by marriage.

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Surendra Nath Banerjee who appears on the record as the next friend of the infants and by whom the suit was in fact instituted, nominally for the benefit of the infants, has nothing whatever to do with the original trust or with the family of the founder. He is an entire stranger.

The professed object of the suit is to obtain a declaration that the lease of this property, granted by the *shebais* with the leave of the Court to the Defendant George Douglas, is invalid on the grounds in brief that the Court had no jurisdiction to accord leave and that the leave was obtained by means of fraud and conspiracy.

It is beyond all dispute that the true motive of the suit is to have the lease invalidated in the interest of one H. E. Sallayjee who was also a candidate for a lease of the property. Sallayjee is the employer of Surendra Nath Banerjee.

The latter had no personal knowledge in respect of the various charges of fraud so liberally scattered about the plaint. It seems obvious that he could have no personal knowledge of the circumstances, and the verification at the end of the plaint says: "That the statements contained in all the paragraphs of the foregoing plaint are based on informations received by me and I believe the same to be true." Nevertheless when this gentleman came to answer the application with which we are immediately concerned in effect that the suit should be dismissed on the ground that it was not brought in good faith for the benefit of the infants he said that the allegations in the plaint were true to his "knowledge, information and belief." The change of form is not without significance and taken with the facts already referred to in detail by my Lord I have come to the conclusion that Surendra Nath Banerjee is

intermeddling in what does not at all concern him merely for private ends of his own or of H. E. Sallayjee. He is not acting at all for the benefit of the infants. Surendra Nath Banerjee now here states the source of his information and the charges made appear to be entirely speculative and visionary. It would in my opinion be a waste of the time of the Court to investigate them. I can see no reasonable or *prima facie* ground for saying that it would be to the advantage of the infants that this lease should be set aside. The lease was executed with the consent of the mother and guardian of the infants and at this stage at any rate is supported and adhered to by all the adult *shebais*. In my opinion the suit is plainly an abuse of the process of the Court.

It may be unnecessary to deal with the question but personally I see no reason why any doubt should be felt as to the jurisdiction of the Court to give the *shebais* leave to grant a lease of this kind. So far as I can see full materials were placed before the Court and the learned Judge before whom the matter came exercised a careful and circumspect discretion upon those materials. My Lord has already referred to the abortive appeal from the order which the learned Judge made and the statement which the Appellant (one of the *shebais*) afterwards made in reference to that appeal.

I agree that the appeal should be dismissed.

Babu Pannalal De, Solicitor for the Appellants.

Messrs. G. C. Chunder & Co., Orr, Dignam & Co., Rutter & Co., Babu Subodh Chandra Mitter and Mr. R. Rutter, Solicitors for the Respondents.

S. N. B.

'CIVIL REVISIONAL JURISDICTION.'

Re : S. A. No. 1522 OF 1925.

B. B. GHOSH, J. ALTAP ALI,
1926, Appellant,
Heard, 15, January. v.
Judgment, JAMSUR ALI,
20, January. Respondent.

Civil Procedure Code (Act V of 1908), sec. 2 (3), Or. 41, r. 11 (1), Or. 47, r. 1—Court Fees Act (VII of 1870), secs. 4 and 5, and Sch. I, Art. 4, Sch. II, Art. 17 (vi) and Art. 1 (4) (ii)—Bengal Court Fees Amendment Act (IV of 1922, B. C.)—Partition suit—Second appeal, summarily dismissed—Application for review—Court-fee, payable.

On a reference made by the Stamp Reporter under sec. 5 of the Court Fees Act (VII of 1870) as to the amount of court-fee leviable on an application for review, under Or. 47, r. 1, C. P. C., of a summary decision dismissing a second appeal under Or. 41, r. 11 (1) of the Civil Procedure Code :

Held—That the summary dismissal of an appeal under Or. 41, r. 11 (1), operates as a decree and falls within the definition of a decree in sec. 2 (2) of the Civil Procedure Code of 1908. The expression of opinion dismissing an appeal is a judgment, although as a matter of practice such judgments are not pronounced in the form prescribed under Or. 41, r. 31 and the application is one for review of judgment.

UMA SUNDARI v. BINDU BASHINI (1), MUNISWAMI v. MUNISWAMI (2), ASMA BIBI v. AHMAD HUSSAIN (3) and CHANDRA KANTA v. LAKSHMAN (4) referred to and followed.

On a proper construction of sec. 4 of the Court Fees Act, an application for review presented, under Or. 47, r. 1 of the Code of Civil Procedure, after the ninetieth day of a decision dismissing a

second appeal under Or. 41, r. 11 (1) arising out of a suit for partition the plaint and memorandum of appeal wherein bore a court-fee stamp of Rs. 15, should also bear a court-fee stamp of Rs. 15 as enacted in column (3), Art. 4, Sch. I of the Court Fees Act of 1870, as amended by the Bengal Court Fees Amendment Act of 1922.

Schedules annexed to an Act and the headings under which they are placed are parts of the enactment, but they are not to be taken into consideration if the language of the enactment is clear.

CRAIES ON STATUTE LAW, 3RD EDITION, PAGE 188, referred to.

This matter related to court-fee in connection with an application under Or. 47, r. 1, C. P. C., for review of a judgment in Appeal from Appellate Decree No. 1522 of 1925, dismissing under Or. 41, r. 11, C. P. C., an appeal against the decree of the District Judge of Comilla, dated the 18th March 1925, which had affirmed that of the Subordinate Judge of that place, dated the 16th July 1924.

The facts of the case material to the report will appear from the judgment.

Babu Ram Doyal Dey for the Appellant.

Babu Surendra Nath Guha for the Government.

The JUDGMENT OF THE COURT was as follows :—

The question before me arises out of an application for review of a decision of this Court dismissing a second appeal under Or. 41, r. 11 of the Civil Procedure Code. The suit out of which the appeal arose was one for partition and the plaint and the memorandum of appeal bore a court-fee stamp of Rs. 15 as required by Art. 17 (vi) of Sch. II of the Court Fees Act as amended by the Bengal Act of 1922. The application was filed with a

(1) I. L. R. 24 Cal. 759 (1897)

(2) I. L. R. 22 Mad. 293 (1898).

(3) I. L. R. 30 All. 290 (1908..

(4) 21 O. J. N. 430 (1916).

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court-fee stamp of Rs. 2, while the Stamp Reporter was of opinion that it should bear a court-fee stamp of Rs. 15 under the provisions of Art. 4 of Sch. I of the Act, as the application was presented after the ninetieth day from the decision of this Court. The Taxing Officer referred the question under sec. 5 of the Court Fees Act and the Chief Justice has appointed me for deciding the matter.

I heard the arguments of the learned vakil for the Petitioner as well as of the Government pleader on both sides of the question. The contention on behalf of the Petitioner is that sec. 4 of the Act directs the payment of fees as indicated either by the first or second schedule of the Act, and as the fee payable on the plaint in this case is under the second schedule which relates to "fixed fees," you cannot look to the first schedule, which refers to "*ad valorem* fees," for the purpose of levying fees on an application in a proceeding arising out of a plaint such as this. The headings of the two schedules form parts of the enactment and they refer to two distinct classes of documents, and in order to find what fee should be payable on this application one must be confined to the second schedule. That being so, the only provision applicable to this document is that under Art. 1 (d) (ii) of the second schedule, which requires a fee of Rs. 2. It is further contended that a dismissal under Or. 41, r. 11, is not a judgment but a mere order and as such it is not followed by a decree. Therefore in any view Art. 4 of Sch. I has no application to this petition.

The last contention may be disposed of first. That the dismissal of an appeal under Or. 41, r. 11 by this Court is a decree does not seem to admit of any argument at this time of the day. It falls

within the definition of a decree in sec. 2 (2) of the Civil Procedure Code. It was held to be a decree in the case of *Uma Sundari v. Bindu Bashini* (1) with reference to the corresponding sec. 551 of the Code of 1882, where the practice of not drawing up decrees in such cases by the High Court was referred to. It may also be pointed out that this case has been followed in *Muniswami v. Muniswami* (2) and *Asma Bibi v. Ahmad Hussain* (3) and in a number of cases in this Court, the latest of which I found reported in *Chandra Kanta v. Lakshman* (4). The expression of opinion dismissing the appeal is a judgment, although as a matter of practice such judgments are not pronounced in the form prescribed under Or. 41, r. 31. This contention of the Petitioner is therefore in my opinion without substance. This application is one for review of judgment.

With regard to the first contention, sec. 4 of the Court Fees Act provides: "No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed . . . in . . . any of the said High Courts . . . unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." In order to determine what amount of fee is payable in respect of the document one must find whether any of its kind is specified in either the first or the second schedule of the Act. Such a document is clearly specified in Art. 4, Sch. I of the Act. *Prima facie* then the court-fee payable is under that article. There is no

(1) 1 L. R. 24 Cal. 759 (1897).

(2) 1 L. R. 22 Mad. 293 (1898).

(3) 1 L. R. 30 All. 290 (1908).

(4) 21 C.W. N. 430 (1916).

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doubt that schedules annexed to an Act and the headings under which they are placed are parts of the enactment. But the same general rule which regulates the effect of the preamble applies also to these headings—namely, that they are not to be taken into consideration if the language of the enactment is clear. *Craies on Statute Law—3rd Ed.*, p. 188. The learned Government pleader also relies on the observation of the Privy Council in the case of *Abdul Rahim v. Municipal Commissioner for City of Bombay* (5) that the heading to a group of sections cannot be pressed into a constructive limitation upon the exercise of the powers given by the express words of the Act. In this case, however, this rule of interpretation need hardly be referred to. I am unable to appreciate the argument that in finding out what fee is payable on the document in question you must not look into the first schedule but must confine your attention to the second schedule. Why should this be so? The Act nowhere says (apart from the provisions of Art. 4, Sch. I) that in finding what fee is payable on an application you must find out how the fee was payable with respect to the plaint. The argument of the Petitioner in substance comes to this: you find in the third column against Art. 4 of Sch. I that reference is made to the fee leviable on the plaint. You should then find under which schedule of the Act fee is leviable on the plaint, and you must then find whether this application is specifically provided for in that schedule. As in this case such a document is not specified in that schedule it must come under the general provision of "application or petition" under Art. 1 of Sch. II. I am un-

able to accept this argument. It seems to me that that would not be a natural construction of the Act. In my opinion on a proper construction of sec. 4 of the Act this document directly falls within Art. 4, Sch. I and the fee leviable is according to the provision in the third column, irrespective of the provision relating to the levying of the fee on the plaint. The fee payable in respect of the application in question is therefore Rs. 15.

H. D. C.

[CRIMINAL REVISIONAL JURISDICTION.]

Rev. No. 785 of 1924.

KANIM ALI,
NEWBOULD, J. Complainant, Petitioner,
MUKERJI, J. v.
1924, SARADA KRIPA LABA
18, November. and ors., Accused,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 360—Deposition of witness read over to accused's pleader—Legality.

Reading over the deposition of a witness in the presence of the pleader of the accused and not in his own presence although he is in attendance in Court is not a sufficient compliance with sec. 360.

This was a Rule granted on the 9th September 1924 against the order of the Sub-Divisional Magistrate of Chittagong (Mr. S. C. Majumdar), dated the 18th of July 1924, discharging the accused Opposite Party under sec. 209, Cr. P. C., confirmed on appeal by the Sessions Judge of Chittagong (Mr. H. C. Stork) on the 18th of August 1924.

The facts of the case will appear from the judgment.

Mr. Camel and Babu Benoyendra Nath Palit for the Petitioner.

Mr. K. N. Chaudhuri and Babu Satindra Nath Mukerji for the Opposite Party.

(5) *I. L. J.* Bom. 648 at p. 672; A. C. 23 C. W. N. 110 (P. C.) (1915).

KASIM ALI v. SARADA KRIPA LAHA.

The JUDGMENT OF THE COURT was as follows :—

This Rule is directed against the order discharging two accused persons under sec. 209, Cr. P. C. We are asked to set aside that order and order either a commitment or further enquiry on the following main grounds, that the provisions of sec. 360, Cr. P. C., were not followed by the Magistrate who held the enquiry, that a *prima facie* case against the accused has been made out and that the Magistrate has usurped the function of the jury in deciding the credibility of the evidence of the witnesses called for the prosecution.

As regards the first point we must hold that the provisions of sec. 360, Cr. P. C., were not followed. It appears that the evidence was read over in the presence of the accused's pleader but not in the presence of the accused. It is clear from the wording of the section that if the accused is in attendance the evidence must be read over in his presence, and it is only when the accused appears by a pleader that the reading over of the evidence in the presence of the accused's pleader is sufficient. But we hold that we should not be justified in ordering further enquiry on account of this defect in the proceedings unless we thought that further enquiry was necessary in the interest of justice.

After hearing the learned Counsel on behalf of the Petitioner we are compelled to hold that the order passed by the Magistrate was a proper one. It may be that some of the prosecution witnesses have been gained over. Whether this be or not the fact remains that the evidence of witnesses who implicated the accused who were on their trial is totally unworthy of credit. It is said that when there is evidence it is for the jury and not

for the committing Magistrate to decide whether that evidence is worthy of credit. But it has been repeatedly held that it is the duty of the Magistrate when enquiring into a Sessions case to consider whether the evidence is credible or not, and though in case of doubt he may be justified in leaving it for the jury to decide, when he is convinced that the evidence is false, it is his duty to discharge the accused. In the present case we hold that the accused were rightly discharged.

We accordingly discharge this Rule.
S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
OF OUDH]

LORD SUMNER.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMER ALI.

LORD SILVESEN.

FARID-UN-NIRA,

Appellant,

v.

MUKHTAR AHM D and

anr., Respondents,

1925.

Heard, 1, 4, 5, 7

and 8, May.

Judgment, 6, July.

Purdanashin lady, dead by, law governing enforcement of—Want of independent advice, if in itself fatal—Intelligent execution, onus to prove—Discrepancy between draft and conveyance, how affects the consideration of the question—Duty of Court to apply law for protection of persons under disability strictly.

In the case of an illiterate purdanashin lady disposing of a large proportion of her property without professional or independent advice, the authorities show that independent legal advice is not in itself essential to its validity. The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. If the lady really understands and means

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to make the transfer, it is not required that some one should have tried to persuade her to the contrary.

The onus is on the party who sets up and relies on a deed executed by a purdanashin lady to satisfy the Court that it had been explained to and understood by her either before execution or after it under circumstances which establish adoption of it with full knowledge and comprehension.

Mere execution, though unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding unless her attention has been directly drawn to it. So if a deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person of the executant's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper

information had been given, it would have affected the mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the executant, subsequently made, that she had not understood what she was doing is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. Fraud, duress and actual undue influence are separate matters.

It is a matter of obligation on the Judicial Committee to be strict and unwavering in defence of those strict rules which have been laid down for the protection of the defenceless in India.

This was an appeal (No. 118 of 1923) from a decree, dated the 14th January 1921, of the Judicial Commissioner of Oudh, which reversed a decree, dated the 30th April 1918, of the Subordinate Judge of Bara Banki.

The Appellant, a Mahomedan purdanashin lady, had acquired by gift, while still an infant, considerable property in Ahmadpur, Rasulpur and Chilanki. In addition to the above property the Appellant inherited the family dwelling-house known as the "mahal," and a parcel of sir land, both in the village of Ahmadpur. After her marriage in 1898 it appeared from the evidence that the Appellant's property was managed by her husband until his death in March 1915. On the 20th October 1914 the Appellant executed a deed of wakf of her entire estate whereby she made a gift of all her property for religious uses and appointed the Respon-

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dents, her husband's nephews, as *mutwallis*.

In October 1915 the Appellant remarried and in May 1916 she instituted this suit to have the *wakfnama* cancelled and to obtain possession of the property alleging that the deed had been executed by her without understanding it and by reason of the undue influence of her husband and the Respondents.

The Subordinate Judge decreed the suit but that decree was reversed on appeal.

Mr. Hyam for the Appellant.

Mr. Wallach for the Respondents.

The arguments were directed to the evidence.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—The Plaintiff-Appellant, having sued to recover possession of a residence and agricultural land at or near Ahmadpur, the Subordinate Judge of Bara Banki passed a decree in her favour against two of the Defendants, who are now Respondents to this appeal. In the Court of the Judicial Commissioner of Oudh this decree was set aside and the suit was dismissed. The Plaintiff had executed a *wakfnama*, covering the property and appointing the Respondents *mutwallis* of the *wakf*, and accordingly the claim is in substance to set the deed aside.

At the time of the execution the Plaintiff was a married woman, illiterate, childless and *pardanashin*. She and her husband, Sheikh Karim-ud-din, were Moham-medans. Most of the property in question had been given to her upon her marriage by her maternal grandfather, but the residence, known as the mahal, and some *sir* land, both in the village of Ahmadpur, came to her by inheritance. Since her marriage she had lived there continu-

ously, and, although during the earlier part of their married life her husband was generally absent on Government service, he had retired, and for some years had resided entirely at Ahmadpur. He suffered from incurable disease, had become nearly blind, and was otherwise crippled and incapable, but his mind was not in any way affected.

The Defendants, the *mutwallis*, who were in possession, relied upon the *wakfnama* as their title. Its gist was to divest the Plaintiff of the whole of her property, which became vested in them, but it reserved to her a life stipend of Rs. 34 per mensem, and another of Rs. 33 per mensem to her husband, and also gave her the right to continue to reside in "The Mahal" for life, the *mutwallis* being bound to keep it in repair, as well as to pay the stipends. They were two brothers, sons of a sister of the Plaintiff's husband, to whom he was much attached. Their Lordships do not think it is sufficiently made out that they or either of them had acted as men of business for the Appellant, and they put this point aside, but she was on friendly terms with them. It is said that she was at enmity with her own relations, for reasons that do not appear to reflect on her. At any rate, she virtually lived apart from and saw little of them, nor had she, in fact, any support or advice from their side.

Very shortly after the marriage the management of the property was assumed by the Plaintiff's husband, her father, who had previously managed it, being now dead, and he continued to manage it as long as he lived. He employed the necessary *karindas* and others for the purpose, and directed the disposition of the rents and profits. Over and above his salary he was himself a man of little or no means. His wife never took part in

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the management, nor was she shown to have had any business knowledge or experience. From time to time, under the direction of her husband, she executed *muktarnamas* and other documents for estate purposes, but she relied on him entirely as to their necessity and purport. Sums for her personal and household purposes were paid to her with fair regularity, and they seem to have been, though modest, probably sufficient; but she did not direct the whole even of the household expenditure, and her own outlays were on various occasions criticised by her husband and even censured as improvident. There is this to be said for him, that the estate was encumbered and, when he took up the management, much embarrassed, but in time he considerably improved its position. The *wakfnama* enumerates sundry charges outstanding upon it, amounting in all to about Rs. 12,800, with an annual interest of Rs. 730, for the service and discharge of which the *mutwallis* were to provide, and the total value of the property, when settled by the deed, was from Rs. 40,000 to Rs. 50,000, and the income about Rs. 2,500.

The Respondents recognised that the burden of proof was on them [*Tacoordeen Tewary v. Syed Ali* (1)] and they accordingly set about to prove her intelligent execution of the deed, its contents having been read and explained to her both upon and after execution. It was not, however, contended that she had had any legal advice about it or any consultation with her own relations. She, on the other hand, raised two answers, the first, that she executed it under actual undue influence of her husband, which dominated her choice and will, and the second, that, when she executed it, she had had no ex-

planation of its nature and contents, but throughout believed it to be an instrument needed for the routine management of the estate, such as she had constantly executed before. A contention, that she had never executed it and that the thumb-mark which it bears is not hers, has not been persisted in.

The probabilities are not unequally balanced. She was a conforming and sincere Mohammedan, though not shown to have been of any exceptional piety. Her husband was a leper, and, even if he lived, as she says she was sure that he would, his management of the estate, at any rate, was nearing its end. The estate was no easy matter to deal with, and the assurance of an income, similar to that which she had hitherto enjoyed, and the continued use of her old home for life, might seem to be a desirable arrangement. She had nothing against the young men who were named as *mutwallis*. They were well-known to her, and, as to her own people, it is not pretended that she felt either duty or inclination towards them. A gift of her property to God, with a modest provision for herself and her husband during life, was no bad thing, even though she herself was only about thirty years of age.

On the other hand, her husband had been manager of his wife's property so long that he might quite probably regard it as his own, and certainly he so treated it. He, at least, could not have failed to foresee his death at no distant date, as actually befell within the year. He had no great opinion of his wife's prudence or moderation, and the idea that her property might pass away from him and his must have been repulsive to him. Security for his own last days and a provision for his widow, coupled with some acquisition of merit by the performance of a

(1) *18 B. L. R. A. 192, 206*; *13 B. L. R. 227, 231 W. R. 340 (1874).*

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pious act, must have made the idea of a *wakf* attractive to him. Though burdened with religious obligations, the property would, at any rate, be kept in his family.

There is a third probability. It is that the Appellant may have been fully acquainted with the scope of the deed, have fully concurred in the creation of the *wakf* for which it provided, and have executed the *wakfnama* freely and with understanding, but have changed her mind, for, after a few months of widowhood and pilgrimage, she married again.

After the fullest examination of the evidence, voluminous even for a case of this kind, their Lordships are of opinion that the *wakfnama* was not executed under actual undue influence of the husband, and that, both before its execution and also shortly after its execution, when it came to be registered, its contents were read over to the Appellant and were to some extent explained to her. In what terms that explanation was given the evidence does not show, and its sufficiency becomes the real issue on this appeal.

As for the case of actual undue influence, the husband was not present when the deed was registered, and there is nothing but mere suggestion, derived from the character of the transaction and his marital relation to her, to show that, when it was executed, his will operated on hers at all. In her evidence she declared with spirit that, had she known what the real import of the deed was, she would have refused entreaties and defied threats, and would never have given the smallest portion of her property to him or his relations. There is a ring of truth about this, which must prevail over the ingenious suggestion that, in the circumstances of the case, she must be deemed, all unknown to herself, to have been chronically under the hypnotic suggestion or

control of her husband, while believing and even glorying in her fancied independence.

Again, their Lordships are not prepared to reject the evidence that the *wakfnama* was explained to the lady before it was executed. It was open to much criticism, and the learned Subordinate Judge refused to believe it, but the evidence had been recorded by his predecessor and he had not seen the witnesses. Their Lordships agree with the learned Judges of the Judicial Commissioner's Court that there is no sufficient ground for its rejection. Taking it, however, as it stands, the question remains whether it goes far enough to satisfy the burthen of proof which rests on the Respondents.

The deed was registered on the 3rd November 1914. A month or six weeks previously the Appellant's husband, Karim-ud-din, being then unable to write or read, sent for his nephew, a young man named Jamal-ud-din, and dictated to him a *wakfnama* word by word. This took five or six hours. The Appellant was not present, and Karim-ud-din sent the young man into the house to ask her what salaries she wished to have inserted in the deed. To this she replied by asking whether Karim-ud-din was getting him to write the draft. All this, which is deposed to by Jamal-ud-din, a witness called by the Respondents, seems to point to some previous communication on the subject between the husband and the wife, but what it was is not known.

During the previous three years the Plaintiff had spoken on several occasions of creating some *wakf*, but full details of her scheme were never given, and once at least she was dissuaded from doing anything at all. Such details as are given show that her ideas then differed substantially from the scheme of the *wakfnama*

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which was ultimately executed. When Jamal-ud-din told her that a draft was being prepared she proceeded to say (i) that the salaries for herself and her husband were to be within Rs. 100 per mensem; (ii) that certain other things were to be provided for in the deed, namely, that the *rajabi* and *maulud*, which she had celebrated, were to continue to be celebrated as before, that at Moharram *majlis* and *sabils* were to be continued, that other ritual acts should also be performed, and that a *musjid* at Ahmedabad, which her mother's father had built and she herself had always caused to be cleaned and repaired, should be cleaned and repaired as before; (iii) that a plot of land, which she had given to a certain Kabir-ud-din for a house should not be included in the *wakfnama* at all. All this Jamal-ud-din says that he reported to Karim-ud-din, who agreed to the provisions required. He was then sent back to the Appellant to ask whether some provision should be made for payment to the *mutwalli*, to which she replied that one-third of the Rs. 100 provided for her husband and herself should be paid to him as his pension. Jamal-ud-din then completed his task and, as far as he remembers, the draft then provided for all the matters which the Appellant had required. He placed it in her custody, and to her question replied that all her requirements had been provided for. He did not see the Plaintiff again till after the registration of the *wakfnama*, nor did he see the draft again either. In fact, it was never put in evidence, nor did any witness prove that the draft, as it left the hand of Jamal-ud-din, was ever compared with the fair copy which the Plaintiff ultimately executed. The evidence is merely that one, Mustafa Hussain, a brother-in-law of the Defendants, engaged a person named Wazir-ud-

din to make a fair copy of this draft, because he could write a good hand, and, on getting the draft from the Plaintiff, read it over and he says, apparently from memory two years afterwards, that this draft and the draft ultimately executed were the same, except for the mention of a debt to Wazir-ud-din of Rs. 400 for procuring the necessary stamped paper, a matter only arranged after Jamal-ud-din's draft was prepared.

All this is absolutely denied by the Plaintiff, but, as the whole of her evidence cannot be true, and as the evidence given by Jamal-ud-din and Mustafa Husain is confirmed by other witnesses, their Lordships accept this story generally.

The form of the deed itself thereupon becomes of some importance. It is lucidly and logically drafted, with much more of a lawyer's phraseology and orderly arrangement and much less of a layman's irrelevance and colloquialism, than such deeds in India often contain. It differs, however, from the account given by Jamal-ud-din in several particulars, and no one suggests that, between the time when he gave her his draft and the time when Wazir-ud-din read over his fair copy to her before she executed it, she was ever told of any departure from the terms, in which her wishes had originally been expressed.

The following differences are material. Cl. 2 states that the Plaintiff appoints the first Defendant, "whom I have brought up and treated as my son," to the office of *mutwalli*, and continues "from to-day I have put Mukhtar Ahmad and Iftikhar Ahmad in possession of the said property as *mutwallis*." As a matter of fact, this admittedly was an after-thought. Mukhtar Ahmad, the first Defendant, on hearing of the *wakf*

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(though not from the Plaintiff) said that, as he was busy, he wished his younger brother Iftikhar to be joined as a *mutwalli*. Accordingly this was done, and as, by a subsequent clause, No. 12, each *mutwalli* was to have Rs. 33 per mensem, the sum of Rs. 100, which the Plaintiff had fixed to cover the stipends of herself, her husband, and the one *mutwalli*, whom alone she had in view, now became an aggregate of monthly stipends of Rs. 133.

Cl. 20 specified how "the *mutwalli*" was to expend the surplus income, after payment of Government revenue, the expenses mentioned, and all other necessary expenses as to the management. He was to do so "after taking into consideration the then existing circumstances of the *wakf* property and as to what sum is reasonable to spend, when and on one or more of the following purposes"—twelve in number. These purposes, except "repairs of the mosque in Ahmadpur," are expressed in general terms. The last sweeps in "other expenses on pious objects, which may come up." Subsequent provisions give further powers "beside these expenses . . . to spend money or [Query "on"] anything without the permission of the authority for the time being having power to interfere with the affairs of the *wakf*," and "if any of the objects mentioned in cl. 20 is void in law the *mutwalli* shall spend the money on any other legal object" (cl. 21). Among the twelve objects particularly named there occur quite generally some of the pious purposes named by the Appellant to Jamal-ud-din, though one is omitted. In no case is there mention of the continuance of those ceremonies, which the Appellant herself had performed. The objects supported by the *mutwalli* under these denominations might in his discretion be wholly divorced from those which

the Plaintiff had prescribed, and might be entirely unconnected with her or her place of residence in Ahmadpur. The question at once arises, "Was the Appellant ever really made aware of these discrepancies, and did she assent to them?"

As a formally valid instrument the *wakfnama* itself is not impugned, and their Lordships therefore do not criticise it. The real question is, whether the Appellant was so made cognisant of its contents and purport that it can be said, that the Respondents have discharged the onus of showing that she understood it so as to make it her deed.

The law of India contains well-known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules of English law, which protect persons, whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred. This is part of the law relating to personal capacity to make binding transfers or settlements of property of any kind. That the instrument here is a *wakfnama* is a mere accident, and the general and well-settled law of *wakf* is not in question. The case of an illiterate *purdanashin* lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential [*Kali Buksh Singh v. Ram Gopal Singh* (2)]. After all, advice, if given, might have

(2) L. R. 41 I. A. 23; s. c. J. L. R. 36 All.
81, 18 C. W. N. 722 (1913).

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been bad advice, or the settlor might have insisted on disregarding it. The real point is, that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it [*Wazed Khan v. Ewaz Ali Khan* (8) and *Sunitabala Debi v. Dhara Sundari Debi* (4)]. The Appellant clearly had no such advice, nor is it contended that she had. If, however, the settlor's freedom and comprehension can be otherwise established, or if, as is the Respondents' case here, the scheme and substance of the deed were themselves originally and clearly conceived and desired by the settlor, and were then substantially embodied in the deed, there would be nothing further to be gained by independent advice. If the settlor really understands and means to make the transfer, it is not required that some one should have tried to persuade her to the contrary. Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension [*Sudishtlal v. Shebarat* (5), *Sham Koer v. Dah Koer* (6) and *Sajjad Husain v. Wazir Ali Khan* (7)]. Further, the whole doctrine

involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter, are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it [*Sham Koer v. Dah Koer* (6)]. So if the deed, as presented for execution, differs substantially, either by way of addition or of omission, from the scheme and details which the intending settlor has previously laid down, the discrepancy ought to be clearly pointed out and its nature and effect should be fully described, unless, which must be rare, the difference is so obvious that even a person in the settlor's position must perceive and appreciate it for herself. If the description and explanation have been partial or erroneous, or have not been given at all, the question will then arise, as it arises where there has been no independent legal advice, whether, if proper information had been given, it would have affected the

(3) L. R. 18 I. A. 144, 148: s. c. I. L. R. 18 Cal. 545 (1891).

(4) L. R. 46 I. A. 278: s. c. I. L. R. 47 Cal. 175, 24 C. W. N. 207 (1919).

(5) L. R. 8 I. A. 38, 43: s. c. I. L. R. 7 Cal. 245 (1891).

(6) L. R. 29 I. A. 131: s. c. I. L. R. 29 Cal. 664, 6 C. W. N. 457 (1903).

(7) L. R. 29 I. A. 186: s. c. 16 C. W. N. 889 (1912).

(8) L. R. 29 I. A. 131 at p. 137: s. c. I. L. R. 29 Cal. 664, 6 C. W. N. 657 (1912).

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mind of the executant in completing the deed. On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters.

In the present case it is quite clear that certain matters were not brought to the Appellant's notice before the deed was executed, or at all. Not only was a second *mutwalli* with an additional salary introduced into the draft which was executed, but it made no provision for the settlor's desires as to the maintenance and repair of the mosque in Ahmadpur and as to the various religious ceremonies mentioned by her to Jamal-ud-din, beyond including them among the objects on which the *mutwallis* might expend the *wakf* funds, if and so far as they thought proper. As the deed stands, the *mutwallis* could decline to continue any of the special pious observances which the Appellant desired to continue, and could leave her to maintain them herself out of her diminished income and to die in the knowledge that, at her death, these objects would have no one left to care for them.

Their Lordships cannot regard these matters as insignificant or such as the

Plaintiff could reasonably be supposed not to insist upon. She was a woman of property, who had lived all her married life in her own family-house, hard by, as it would seem, to the mosque erected by her relations. Hers had been a lonely and restricted existence. Karim-ud-din, as a husband, was in many respects a very disappointing person. His own means were small, and for many years his official duties caused him to reside at a distance. She was herself piously disposed, and it was eminently natural in such a woman under such circumstances that she should attach importance to the instructions, which she gave to her husband through Jamal-ud-din. Her piety may well have manifested itself primarily in her care for the mosque, which her family had founded, and for the celebration of the observances to which she herself had diligently attended. If she had really appreciated that in none of these cases was that perpetual continuance assured, which was evidently dear to her mind, their Lordships are far from being satisfied that she would have patiently submitted to her disappointment and have accepted intelligently and without a word the surrender of her own preferences to the discretion of the *mutwallis*. The only prudent and probable conclusion is that, as the words were read over to her, she failed, very naturally, to observe the change. She would hear mention of the mosque and of nearly all the ceremonies by name, and would easily miss the difference between the inclusion of these objects in the powers of the *mutwallis* and the prescription of these objects as obligatory charities to be maintained by the *mutwallis* in any event. They are confirmed in this view by observing that, until a late stage in the argument before the Board, this precise discrepancy between the first draft of the

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wakfnama and its ultimate form had not attracted the attention of anybody, either in the Courts below or on this appeal. No doubt, where so many other points were in contest, this one might well pass unobserved, but this circumstance only makes it the more likely that the Appellant could not herself detect what has, in fact, eluded the vigilance of counsel and judges during two protracted hearings. It is not proved when or by whom the original draft was remodelled. There is no evidence that Wazir-ud-din so much as knew that the Appellant had given any particular instructions before the scheme was put into writing, and he could not draw the Appellant's special attention to something that he never knew. Upon the story told by the Respondents' witnesses there never was any chance that those, who explained the deed, should point out these matters, and it is certainly not enough to say that, if the Appellant cared about them, she should herself have asked about them, especially as the form of the deed was such as might well have misled her into taking it for a provision of all that she desired. From this point of view the Appellant's subsequent action does not assist the Respondents. Registration and mutation were promptly asked for by those interested in supporting the deed, and the Plaintiff herself attended the proceedings without protest. These circumstances are in themselves very favourable to the Respondents' case, but the registering officer, who says that he read and explained the deed to her, knew as little of the above-mentioned discrepancies as did Wazir-ud-din, and the Appellant's answers are quite consistent with her being in ignorance of a change, of which no one had informed her. As the Respondents have to bear the onus of bringing home to her mind the actual im-

port of the deed, they cannot rely on the fact that the Appellant's own evidence is untrustworthy, for it is by the evidence of their own witnesses alone that this defect is established, and by that evidence they must stand. The conclusion that they have failed to discharge the burthen of proof is one arrived at not out of any consideration for this lady in particular, but in defence of those strict rules which have been laid down for the protection of the defenceless in India, and it is a matter of obligation upon their Lordships to be strict and unwavering about it. They will accordingly humbly advise His Majesty that the appeal should be allowed, and that the decree passed by the learned Subordinate Judge should be restored with costs here and in both Courts below.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

G. D. M.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 90 of 1925.

JNANENDRA BALA DEBI,	
SANDERSON, C. J.	Appellant,
RANKIN, J.	v.
1925,	{THE OFFICIAL ASSIGNEE
17, 18, December	OF CALCUTTA and ors.,
	Respondents.

Presidency Towns Insolvency Act (III of 1909),
secs. 7, 27, 36—Evidence of insolvent taken under
sec. 27, admissibility of, against others—Benami
transaction—Onus—Practice under sec. 36.

The evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title.

MADHORAM RAGHUMULL v. OFFICIAL ASSIGNEE (1) considered.

(1) 27 C. W. N. 611 (1923).

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IN RE BRUNNER (2) referred to.

Proper use of powers under sec. 7 of the Presidency Towns Insolvency Act and of statements of persons examined under sec. 36, cls. (4) and (5), indicated by RANKIN, J.

This was an appeal against the order passed by Pearson, J., in Insolvency Case No. 29 of 1922, *Re : Nishi Kanto Chatterjee*, declaring certain property as belonging to the estate of the said insolvent and ordering the Appellant, wife of the insolvent, to deliver up the possession of the property to the Official Assignee.

One of the creditors of the insolvent obtained a commission to examine the Appellant (who claimed the property as her own) as a witness under sec. 36 of the Presidency Towns Insolvency Act and the wife of the insolvent deposed. The material portions of her depositions are as follows :—

5 Q.—On what pay?

A.—At Rs. 350 per month

6 Q.—What post?

A.—I can't say that. At that time we were young in age.

7 Q.—What was your age at that time?

A.—About thirteen or fourteen years.

8 Q.—You mean at the time of his death?

A.—Not that, at the time of my father's death I was 16 or 17 years old.

15 Q.—You have already said that your father died when you were 16 and you have also said that your father retired 10 years prior to his death. Do you appreciate that he must have according to that retired from service when you were 6 years old?

A.—I can't say that definitely, whatever I have said was by *andaaj*.

16 Q.—May I take it that the fact of your father drawing a pay of Rs 350 a month is also a statement by *andaaj* on information received by you?

A.—As regards the statement I have made with regard to the salary of my father

I am positive but as regards my age I am not definite.

17 Q.—Did you ever see your father draw Rs. 350?

A.—Yes, I have seen my father bringing in Rs. 350 as his salary.

18 Q.—When, in what month or year?

A.—I can't give the year or month but I saw my father making over his salary to my mother after the same has been counted and these things happened while we were present.

30 Q.—Have you ever heard of your father making any testamentary disposition?

A.—No. His sons would be able to answer that.

31 Q.—Did your father leave you anything by testamentary disposition?

A.—Not by any Will but at the time of his death we were present and he gave 22,500 to us three sisters at the rate of 7,500 to each of us.

32 Q.—Have you any books of account of your own?

A.—No, not with me, I do not keep any books of my own. All my accounts are kept by my son-in-law.

33 Q.—What is his name?

A.—Kiranlal Gangopadhaya.

34 Q.—Has Kiran in his possession your books of account of the period at or about the time of your father's death?

A.—No. The account in respect of household expenses is with Kiran.

35 Q.—Where are the accounts of the period at or about the time of your father's death? (objected to).

A.—No accounts were kept. All that I can say is that the money which was given by my father was deposited at the Nagpur Bank through my eldest brother.

36 Q.—Has your elder brother any books of account of that period?

A.—My brother is dead

37 Q.—Have you tried to find out if your elder brother kept any books of account for that period?

A.—I had no occasion to make an enquiry regarding that matter.

42 Q.—At or about the time of the purchase did you take any sum from your brother as a loan?

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A.—I borrowed Rs. 6,000 at the time when I bought the house.

43 Q.—Did you execute any document, promissory note or receipt in favour of your brother?

A.—No, my brother had advanced the money trusting my words.

44 Q.—Did you agree to pay interest on this money?

A.—I told my brother at that time that I would not be able to pay any interest. The wife of my brother was not agreeable to such an arrangement. I suggested that I would deposit with my brother whatever ornaments I have by way of security for the loan but my brother would not agree to that and said that he would not be so mean as to realise interest from his own sister on pledge of ornaments.

45 Q.—Is there anything in writing anywhere to show that your brother advanced you any money?

A.—No.

49 Q.—How many years from now your brother died?

A.—About 8 years ago.

50 Q.—Is your brother's wife still living?

A.—Yes.

51 Q.—You have already told us that she knew about this loan?

A.—Yes.

52 Q.—Has she up to now in writing made any demand for the return of this sum?

A.—No.

53 Q.—Besides your brother and sister-in-law does anybody know about this loan (objected to)?

A.—No.

55 Q.—Was he at that time involved in debts?

A.—He has had debts but I do not know the volume of such debt.

60 Q.—Was the Rs. 6,000 paid to you on the same occasion and on the same date?

A.—Yes, that is so. He paid me Rs 15,500 on the same date.

61 Q.—Was that the same date on which you asked for the money?

A.—I had asked for that amount when the negotiations for the purchase were going on and that was a few days before the purchase.

62 Q.—How many days after your asking

for the money was the sum actually paid by your brother?

A.—I cannot say that for certain. But it was when negotiations were going on for the purchase.

63 Q.—Have you no idea, whether it was the next day or a month after?

A.—I have no recollection.

67 Q.—You have sworn that you have accumulated Rs. 5,000 from monies given by your husband for household expenses?

A.—Yes.

68 Q.—Have you got any books of account or document from which you can show you saved a single pice?

A.—No. I have never kept any books of account.

69 Q.—How many years' savings this Rs. 5,000 represent?

A.—I do not remember that. Whenever I got any sum I kept that apart.

70 Q.—At what rate per month used your husband to pay for household expenses?

A.—There was no fixity about it. I would get money whenever I required.

71 Q.—Can you tell me what your savings were during any specific year when your husband used to contribute towards family expenses? (objected to).

A.—I have nothing in writing. Whenever I received any sum I would take a larger amount than would be actually necessary and after meeting the necessary expenses of the household I would save and keep apart the rest.

72 Q.—That does not answer my question. Question repeated. (objected to).

A.—No. I have no idea.

82 Q.—How much?

A.—Rs. 1,500.

83 Q.—When?

A.—At about the time of the purchase of the house.

84 Q.—Was anybody present when your mother made this present?

A.—No.

85 Q.—How long from now did your mother die?

A.—3 years.

86 Q.—How long before the date of actual purchase did your mother make over the money to you?

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A.—I do not remember that. It was long before the actual purchase that I told my mother and also my brother that they have to advance money to me in connection with the purchase of my house.

93 Q.—Do I understand you to say that you do not remember now as to whether you got the Rs. 1,500 from your mother before the date of the conveyance or after such date?

(Question objected to).

A.—I have no clear recollection.

99 Q.—Where did she get that money?

A.—Is it possible that my mother had no money of her own. A woman would always keep something by for her rainy days.

100 Q.—I take it she had no Zemindaries.

A.—That is so, but she saved from contributions made by my father.

101 Q.—Was that money invested in your brother's bank at Nagpur? (objected to).

A.—No. But I know this much that before the death of my father he had made such an arrangement that my mother would get a monthly allowance of Rs. 15. I do not know whether she had saved out of her monthly allowance. As a fact my mother had money.

102 Q.—Was this arrangement you speak of in writing?

A.—I can't say.

103 Q.—Was the conveyance or its draft ever explained to you?

A.—I don't remember.

107 Q.—Before the conveyance, was there any agreement to sell or a Bayona?

A.—Yes.

109 Q.—Was that in writing?

A.—I paid the money and a Bayona was made.

109 Q.—How much did you pay?

A.—I can't say. I think there is something in writing with them.

112 Q.—Was this document explained to you? (objected to).

A.—I was never anxious at any moment to know the contents of the document and I don't know what it contained.

119 Q.—Do you up to this date know that your attorney is the same as your husband's attorney?

A.—I do not know.

122 Q.—Have you yourself given any instructions to your attorney?

A.—It is I who have been conducting this case but I do not know who is my attorney.

128 Q.—Who gave instructions for that affidavit?

A.—I do not know, I did what I was asked to do.

133 Q.—Who got the benefit of the money?

A.—My husband.

140 Q.—What was the rate of interest?

A.—Can't say.

141 Q.—What was the date of the second mortgage, how many years after the date of the purchase?

A.—I do not remember at the distance of time.

148 Q.—What was the rate of interest?

A.—I do not know.

149 Q.—Who was the attorney?

A.—I don't know.

150 Q.—Who took the money?

A.—I myself.

151 Q.—Who took the money of the 2nd mortgage?

A.—I received the sum for my husband and I made it over to my husband.

153 Q.—Do you say that you made over the Rs. 35,000 to your son-in-law for carrying on your business?

A.—Not the whole of the amount. A part of the amount was applied to the business and the rest was kept with me in order to meet demands from time to time in connection with the business. I have made a mistake which I want to correct. The third mortgage was effected for the purpose of paying off the previous mortgage debt of Rs. 13,000 as the mortgagee had been pressing for his moneys, to apply a portion to the business and to keep a certain amount in my own hands.

159 Q.—Do you know what books of account are kept for your business?

A.—I don't know. I never enquired.

163 Q.—Is it business as a broker in jute, dealer in jute or what?

A.—I don't know how the business is being carried on. I supply funds. They buy jutes.

After the public examination of the in-

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solvent, the application under sec. 36 of the Act came before Pearson, J. Against the said order the wife of the insolvent appealed.

Sir Benode Mitter (with *Mr. S. R. Dass*) argued on behalf of the Appellant that the evidence of the insolvent taken in the public examination is not admissible against the Appellant. Refers to sec. 27 of the Presidency Towns Insolvency Act. [Cited *New York Life Insurance Company v. Phosbe Stella Gamble* (8), *In re Brünner* (2) and *Jarwa Bai v. Pitambar Nilambar* (9)].

In Hindu law there is no presumption that the transaction which stands in the name of the wife is the husband's transaction. [Cited *Manada Sundari v Mahananda Sarnakar* (10)].

The Official Assignee who represents the insolvent cannot be in a better position than the insolvent himself. [Cited *In re Maplebuck*, *Ex parte Caldecott* (11)].

The onus is on the Official Assignee to show that the property really belongs to the insolvent. There is no evidence to show that the insolvent was in a position to buy the property. When complicated questions of title are involved the Court should not make any order on a summary application. [Cited *In the matter of Umbica Nundan Biswas* (12), *In re Lucas* (13) and *Baldwin on Bankruptcy*, 11th Ed., p. 20]. Sec. 36 of Presidency Towns Insolvency Act applies only where there is a clear admission of the deponent that the property belongs to the insolvent.

Mr. S. N. Banerjee (with *Mr. B. C.*

Ghose) on behalf of the Respondent argued that the insolvency evidence is admissible inasmuch as notice was given stating that it would be used as evidence. [Cited *Madhoram Raghumull v. The Official Assignee* (1)].

The Court can decide the question of title under sec. 7 of Presidency Towns Insolvency Act. The trial Court has exercised its discretion and this Court should not interfere. The evidence shows that the Appellant had no money of her own and could not possibly buy any property.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Jnanendra Bala Debi against an order which was made by my learned brother Mr. Justice Pearson on the 17th of June 1925.

The order was made upon an application made by the Official Assignee of Calcutta in the insolvency of Nishi Kanto Chatterjee, who is the husband of the Appellant; and, the notice was to the effect that an application would be made by the Official Assignee for a declaration that the premises, No. 110, Beniatolla Street in the town of Calcutta, belong to the estate of the insolvent and that Srimati Jnanendra Bala Debi be ordered to deliver up possession of the said premises to the Official Assignee at such time, in such manner and on such terms as to the Court might seem fit and proper.

The learned Judge allowed the application, and the order was that the premises belonged to the estate of the insolvent and directed the Appellant to deliver possession thereof to the Official Assignee.

The learned Judge appears to have assumed that the application was made under sec. 36 of the Presidency Towns

(3) 19 Q. B. D. 572 (1887).

(8) I. L. R. 27 Cal. 593 at p. 614 (1899).

(9) 24 C. L. J. 149 at p. 155 (1916).

(10) 2 C. W. N. 387 (1897).

(11) 4 Ch. Div. 150 at p. 156 (1876).

(12) I. L. R. 3 Cal. 434 (1878).

(13) I. L. R. 42 Cal. 109 (1914).

(1) 27 C. W. N. 611 at p. 614 (1923).

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Insolvency Act: and, the learned Advocate, who appeared for the Official Assignee, informed the Court that both the parties treated the application of the hearing as having been made under sec. 36 of the Presidency Towns Insolvency Act.

In my judgment that was a mistake. It may be that the mistake arose by reason of the fact that the Appellant was examined under sec. 36. The evidence of the Appellant was taken on commission on the 4th April, 10th, 17th and 22nd May 1924 in pursuance of an order made on the 14th of March 1924, and the application, which is the subject of this appeal, was not made until May 1925.

It was, however, contended by the learned Advocate on behalf of the Official Assignee that the Court had jurisdiction to entertain the application and make the order under the provisions of sec. 7 of the Act, and that therefore the learned Judge's order should not be set aside.

The learned Judge did not act on the Appellant's evidence only: for he admitted as evidence against the Appellant the statements which were made by the insolvent on his public examination although the admission of such evidence was objected to by the learned Advocate who appeared for the Appellant.

The learned Judge in admitting the statements made by the insolvent on his public examination relied upon the case of *Madhoram Raghumull v. The Official Assignee* (1) and, the passage upon which the learned Judge relied is at page 614.

With great respect to the learned Judge, I am of opinion that the decision in that case was misunderstood. The facts of that case, shortly stated, were that the insolvents Surajmull and Mongalchand were adjudicated insolvents on the 15th of

March 1921. Thirteen days before the adjudication, viz., on the 2nd of March, the insolvents had assigned to certain creditors, who were called Roghu Nath Das Sew Lal, some outstanding debts which were alleged to be owing to the insolvent firm. The proprietor of the firm of Raghu Nath Das Sew Lal was a man called Ram Lal Pachisia. Ram Lal Pachisia on the 29th of June 1921 assigned his right, title and interest under the assignment of the 2nd of March to the Appellants Madhoram Raghumull. An application was made by the Official Assignee to the learned Judge taking insolvency matters on the Original Side, under the provisions of sec. 36 of the Presidency Towns Insolvency Act to have the two assignments of the 2nd of March 1921 and the 29th of June 1921 declared void as against the Official Assignee: and, the learned Judge made the order, declaring that the two assignments were void.

Madhoram Raghumull then appealed to the Court of Appeal. There was certain evidence before the learned Judge. It appeared that among others Raghumull, a member of the Appellant firm, Ram Lal Pachisia, the proprietor of the firm of Raghu Nath Das Sew Lal, and Mongalchand, one of the insolvents, were examined under sec. 36 of the Presidency Towns Insolvency Act: and, the question was raised whether the statements of the insolvent made on such examination could be admitted as evidence against the Appellants Madhoram Raghumull and against Ram Lal Pachisia.

In giving the judgment in that case I am reported to have said, "As at present advised, however, I am of opinion that the deposition of the insolvent was not admissible as evidence against the Appellants or Pachisia, but I do not decide this point and I leave that question open;

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if it ever becomes necessary to decide it on another occasion."

I did not decide it on that occasion, because, as I stated in that judgment, I did not rely upon the statements of the insolvent in any way. The case was decided upon evidence other than the statements of the insolvent, both by Mr. Justice Richardson and by me.

I do not understand how the above-mentioned case can be understood to be a decision that the deposition of the insolvent in the present case would be admissible as evidence against the Appellant.

The learned Advocate for the Official Assignee drew my attention to a passage which appears at the right-hand side of page 614 which begins as follows:— "The learned Counsel said that it was desirable that the practice of this Court should be laid down clearly." This related to the question and the sufficiency of the notice, which in the cited case was in general term, and what followed was meant to be a statement of what notice should be given with regard to depositions which were intended to be used upon an application under sec. 56, and it related only to depositions which would be admissible upon such an application.

It was a statement of the practice to be observed as regards notice, and in my judgment the passage cannot be read as a decision that the mere fact of giving notice would make admissible that which was otherwise inadmissible.

I adhere to the opinion expressed in the above-mentioned case and, in my judgment, the deposition of the insolvent taken on his public examination was not admissible against the Appellant upon the application which was before the learned Judge in the present case.

The reasons why the deposition of the insolvent is not admissible against the Ap-

pellant in such a case are set out in the judgment of Mr. Justice Cave in *Re: Brünner* (2).

I am, therefore, of opinion that the learned Advocate, who appeared for the Appellant, was right in his contention that the learned Judge ought not to have admitted the deposition of the insolvent as evidence against the Appellant.

That, however, does not dispose of this appeal.

The learned Advocate who appeared for the Official Assignee read the evidence of the Appellant herself and invited the Court to come to the conclusion upon that evidence that the premises in question really belonged to the insolvent.

I must say that I find it exceedingly difficult to accept the evidence of the Appellant. It seems to me that it is unreliable. I need not state the reasons for that conclusion in detail. But that conclusion is not sufficient to justify the Court in acceding to the contention of the learned Advocate for the Official Assignee. It does not seem to me that because the evidence of the Appellant is rejected it must follow that the premises belonged to the insolvent. In my judgment, if we were so to hold, we should be speculating as to the real facts, when there is no sufficient evidence to justify the Court in arriving at that conclusion. Although the evidence of the Appellant may be full of suspicion, I am of opinion that there is not sufficient evidence before the Court to justify it in holding that the Official Assignee has proved that the premises in question belonged to the insolvent.

The result, therefore, in my judgment, is that this appeal must be allowed and the order which the learned Judge made

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on the 17th of June 1925, must be set aside, and the application dismissed.

The Official Assignee must pay the Appellant's costs of the appeal and of the proceedings before the learned Judge on the Original Side.

RANKIN, J.—I agree.

In this case it appears that the Appellant was summoned as a witness under the private examination section, sec. 36 of the Presidency Towns Insolvency Act, and was questioned before a Commissioner as to her insolvent husband, his dealings and his property. She appeared before the Commissioner as a witness; and although she was allowed the assistance of a solicitor, the right of a witness to be re-examined under sec. 36 is a strictly limited right.

The answers given by her at this private examination are evidence against her. They are not merely evidence against her in any bankruptcy proceedings; they are evidence against her in any civil proceedings, whether in insolvency or whether in a civil suit on exactly the same principle. [Cf. *Exp. Hall, In re Cooper* (3), cf. the decision of Jessel M. R. on p. 583, which is not the same as the head-note. Cf. also Evidence Act, sec. 18].

Thereupon the Official Assignee was minded to claim a certain property No. 110, Beniatolla Street. That property stands and has since 1914 stood in the name of the Appellant. It appears to have been purchased in July 1914 for Rs. 19,000. It appears to have been mortgaged in August 1914 for Rs. 11,000, in September 1915 for Rs. 13,000, and it seems that in comparatively recent years another mortgage of Rs. 35,000 was taken and the prior mortgagees were paid off.

I collect that this property is in the possession of the lady: at all events, it is a

(3) 19 Ch. Div. 580 (1876).

property in or upon which the lady and the insolvent have been living; and we are told on the part of the Official Assignee that the property is worth some Rs. 60,000 and more, so that there is a very substantial value in the equity of redemption. When the Official Assignee made up his mind as a result of his investigation to move the Court to declare that the lady was a mere *benamdar* for the insolvent and had so been for something like ten years he had to choose what course he would take. The ordinary course, having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have been to commence a suit against the lady for a declaration that she was a *benamdar* for the insolvent. But under sec. 7 of the Presidency Towns Insolvency Act this Court in its insolvency jurisdiction has jurisdiction to determine such a point as that; just in the same way as where a person who carries on a retail business, becomes an insolvent in this Court, the Court would have jurisdiction by motion in insolvency to collect debts due to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the Insolvency Jurisdiction and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the Insolvency Jurisdiction to try such a question. I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within sec. 55 or 56 of the Presidency Towns Insolvency Act. There are many other cases. There may

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be cases, for example, where a property is claimed as having been taken by the Opposite Party from the insolvent after an available act of bankruptcy and it can be successfully claimed if the Opposite Party cannot bring himself within the protective sections. There may be cases where a transfer can be set aside if it is after an adjudication order. There are cases which come under sec. 53 of the Transfer of Property Act, where the right asserted by the Assignee is a right which belongs to creditors as such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's, is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case and, secondly, that it is not restricted only to secs. 55 and 56. But the rule is well-established if it is not rigid and it is necessary in fairness to third parties who cannot help their creditors debtors or *cestuis qui trustent* going insolvent, who may live far from Calcutta, and whose right may be difficult to ascertain apart from a regular suit. It is necessary also in the interests of this Court which cannot undertake in its insolvency jurisdiction to collect debts all over India or to decide on motion all classes of disputes merely because an insolvent or his estate is a party. [Cf. *Re Pollard* (4) and *Re Yates* (5)]. It may be noted that sec. 26 of the Indian Insolvent Act, 1848 (11 and 12 Vic., Cap. 21) is part of an entirely different scheme and corresponds neither to sec. 7 nor to any part of sec. 36 of the Act of 1909. [Cf. the observations of Peacock, C. J., in *Barlow v. Cochrane* (6) and such a case as *In re*

Khettsey Das (7)]. The scheme of 1848 relates to a very different type of Court.

In the present case I do not collect that the Appellant took such objection on these lines, to the proceedings being in the Insolvency Jurisdiction as to make it just to decide this case upon the mere question of propriety of forum. I rather gather that at the hearing both parties were under a mistaken notion that the proceedings were in some way or other under sec. 36. But whether in this case the Official Assignee would not have been more successful, had he proceeded by a regular suit, is a matter as to which one may have one's own opinion.

The matter of the ownership of this important property, apart from inadmissible evidence which has been allowed in the case, has to be decided upon an affidavit by the Official Assignee which sets out nothing except pieces from the Appellant's deposition, an affidavit by the lady, one or two documents such as the mortgages, and that is all. When one comes to look at the deposition of the lady one finds that her story is not such that any Court would be justified in acting upon it, if she were a Plaintiff suing anybody else. Her positive account of how she came to acquire this property is not only confused, (as to which one may be allowed to say that it is perhaps small blame to her) but it is highly unconvincing and full of suspicion. Nevertheless one has to ask oneself whether there are any such admissions of fact as to entitle the Court to come to the conclusion that it is proved that the property was the insolvent's. We are dealing with a transaction of 1914 and so far as we know the insolvent did not get into the Insolvency Court till 1922—a very long time afterwards. There is no presumption that he was in difficulties and there

(4) 5 Cal. Div. 377 (1878).

(5) 11 Cal. Div. 148 (1879).

(6) 3 B. L. R. (O. C.) 56 (1899).

(7) 3 B. L. R. App. 14 (1899).

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is no presumption that he had money wherewith to buy the house. Cases of *benami* have been often dealt with by the Court. There is no presumption that what stands in the name of the wife belongs to the husband. In India if it is shown that the money to purchase the estate was the husband's money in origin, then in contradistinction from the law of England the fact of the wife's relationship does not raise any presumption of advancement; but until it is shown that the husband's money was the origin of the purchase, that line of argument does not commence at all. In the absence of direct evidence that the origin of the property, the purchase-money, was from the husband, indirect evidence, no doubt, can be entertained and it can be shown from the dealings of the parties with the property that as between them the property must have belonged to the husband. But in the case of husband and wife, the mere fact that money which is borrowed goes to the husband or is put into the husband's business is no convincing evidence that the property was not the wife's. There are other possible explanations and it is not possible in such a case for a Court to proceed by an abstract deduction upon so ambiguous a circumstance as that.

For these reasons, it appears to me that when this matter is looked at upon the only admissible evidence the Official Assignee's claim must fail, and the judgment of the learned Judge in so far as it does not refer to evidence which is inadmissible, namely, the husband's answers on his public examination seems to me to lack cogency. He says: "The learned Counsel has argued on behalf of the wife that no evidence has been given that the husband himself was in a position to buy this property, that there is no presumption of *benami*

and in the absence of evidence on the husband's side it must be taken that the claim now made by the Official Assignee fails." That is the very contention which seems to me to be right. The learned Judge's answer to that is this: "To that I should be prepared to assent if there were anything at all to support the statements or any of the statements made by the wife as regards the source of the money which she alleges came to her hands and enabled her to pay the consideration for the purchase." With great respect to the learned Judge it is no evidence that the property was bought by the insolvent, to show that the wife's story that the property is hers is uncorroborated.

I come now to sec. 36 of Act III of 1909. This has not only been misunderstood by the parties before the learned Judge but I have some reason to believe that the misunderstanding is widespread.

The section has I think been misinterpreted by false analogies drawn from the Act of 1848. Sec. 36 of the old Act corresponds to part of the present sec. 36 but nothing else corresponds.

Sub-secs. (4) and (5) of sec. 36 of the Act of 1909 differ somewhat from their real proto-type, i.e., from the corresponding part of what is now sec. 25 of the present Bankruptcy Act in England (which used to be sec. 27 of the Act of 1883). The English Act runs: (4) "If any person on examination before the Court admits that he is indebted to the debtor, the Court may . . ." and so forth; (5) "If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may . . ." and so forth. The change made in the Indian Act is this: "If on the examination of such person the Court is satisfied that he is indebted to the insolvent, the Court may . . ."

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"If, on the examination of any such person, the Court is satisfied that he has in his possession any property belonging to the insolvent, the Court may" It seems quite clear that that change of wording has only a limited effect. The provisions of sec. 36 mean that when the witness is before the Court, the Court may at that time, (and even though for this purpose it is the Registrar and not the Judge) proceed even without an actual admission, if it is satisfied to the effect laid down in these two sub-sections. The power under the English Act has hardly been exercised but it is quite clear that it is exercisable in all cases coming within the section even by the Registrar of a County Court in the country. Whoever holds the examination has the power under the sub-sections provided it is held by the Court [*cf.* sec. 6 (1)]. It is quite true there is power to order the examination to be done by a Commissioner, but in that case I think it tolerably clear that sub-secs. (4) and (5) are out of action altogether although the same result can be obtained by proceeding under sec. 7 and using the deposition as evidence against the Respondent. What is contemplated under these sub-sections is the most summary of all proceedings, namely, an order made upon the witness there and then and without previous notice and it would be absolutely wrong ever to act under sub-sec. (4) or (5) unless there was a case so free from difficulty even on the story of the witness as to make it reasonable to act *brevi manu*. It is quite extravagant to suppose that in this case and under this section any order could have been made. A question of this sort whether a purchase ten years ago in the name of a lady was a purchase *benami*, is a long way from being within anything that sec. 36 contemplates. The correct course in

these cases where there is any real conflict is either to proceed by way of a motion before the Judge in insolvency or to proceed by way of suit. As an application under sec. 36, the present case would fall to be dismissed *in limine* and I have only dealt with the facts of the case at all because Mr. Banerjee sought to uphold the learned Judge's order as a good order under sec. 7.

With reference to the question whether the insolvent's evidence on his public examination is evidence in favour of his estate on a claim by the Official Assignee against a third party, that is a very easy and a very old question of law. It has been well-settled for years that the evidence of an insolvent in his public examination is not admissible against anybody except himself. It is not admissible in favour of his own estate as against a third party. It is possible for the Official Assignee to call the insolvent and it may be possible in certain circumstances in that way to get from him the fact that on his public examination he said so and so: when that is done then the insolvent can be cross-examined; and the Respondent has the opportunity of showing that it does not matter what the insolvent says, he has contradicted himself and his words are of no account. Even although it may be shown that the Respondent was a creditor and although it could be shown that the creditor had attended personally at the public examination and that he had heard the insolvent say what he had said, the insolvent's statements would not be evidence as such against the Respondent for any purpose. What X says in the presence of A is sometimes evidence against A in that A's conduct in relation to the statement throws light upon the facts, it is analogous to an admission by conduct; but in a judicial

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proceeding a party has no opportunity to interfere with statements being made which he does not admit; and though the circumstance might be put to the creditor in cross-examination, it is quite wrong even in such a case to suppose that his presence at the public examination makes the insolvent's statements evidence against him. In my judgment the learned Judge has proceeded upon materials which were inadmissible and there are no sufficient materials on the record to support his finding.

As regards the case of *Madhoram Raghumull v. The Official Assignee* (1), I have read that case with some care and I do not find that there is anything in the judgment contrary to the view I have expressed. As I regard the matter it was accepted that the deposition under sec. 36 was only evidence against the witness who gave it. The question as to the public examination, it was apparently not necessary then to decide.

Mr. T. B. Roy, Solicitor for the Appellant.

Mr. P. L. Mallik, Solicitor for the Respondents.

P. D.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1285 OF 1923.

NĒPALDAS MUKHERJI,

Defendant No. 6,

Appellant,

v.

PROBHAS CHANDRA

MUKHERJI and ors.,

Plaintiffs, Respondents.

GRAVES, J.

B. B. GHOSH, J.

1925,

9, July.

Hindu law—Spiritual benefit, the test of inheritance—Daughter's son's son, if heir.

The power to confer spiritual benefit is the foundation of the theory of inheritance.

(1) 27 C. W. N. 611 (1923).

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ance propounded in the Dayabhaga and a daughter's son's son who is unable to confer any spiritual benefit is no heir.

This was an appeal preferred on the 1st of May 1923 against the decree of Babu Nirode Ranjan Guha, Subordinate Judge of Zillah Faridpur, dated the 24th of January 1923, reversing the decree of Babu Dharendra Nath Bagchi, Munsif, 3rd Court at Bhanga, dated the 5th of April 1922.

The facts of the case will appear from the judgment.

Mr. Kanjilal and Babu Surendra Nath Das Gupta (II) for the Appellant.

Babus Suresh Chandra Taluqdar and Nibaran Chandra Samajpaty for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by Defendant No. 6 from a decision of the Subordinate Judge of the 2nd Court of Faridpur reversing a decision of the Munsif of the 3rd Court of Bhanga. The suit was brought by the Plaintiffs for declaration of their title to and for possession of a certain plot of *niskar* land, plot No. 137 of the cadastral survey, which was in Estate No. 1187. Some question was raised in the Courts below as to whether the property in dispute was *niskar* or *mal* land of the estate, but it has been found that the property is *niskar* and this is not questioned in second appeal. The plots originally belonged to one Raghu Moni Banerji. He died leaving a daughter Dakhina who had a son Purno. Purno died leaving him surviving three sons, who are the Plaintiffs in the present suit. Their case was that Dakhina succeeded to the property on the death of Raghu Moni and that on Dakhina's death the property passed to her son Purno and on his death to his

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sons, the present Plaintiffs. Their case was that they had been in possession through their *bhag* tenants and that they had been dispossessed. The Defendants or some of them were owners of the Estate No. 1187. As we have already stated they claim the land as *mal* land of the estate. The case was only contested by Defendant No. 6 who had purchased the land from the other Defendants. Although the Plaintiffs' case was that Purno had inherited after his mother and they had inherited from him, it turned out in the course of the case that Purno predeceased his mother Dakhina. The suit was dismissed by the first Court but the lower Appellate Court allowed the Plaintiffs to raise what is said to be a fresh case, namely, that although Purno predeceased his mother, Dakhina, the Plaintiffs inherited the property as Dakhina's heirs.

The only question that arises in this appeal is whether under the facts and circumstances stated, namely, that Purno predeceased his mother, the Plaintiffs are entitled to claim the property as heirs of Raghu Moni. The lower Appellate Court has held that they were entitled and this is the proposition which is disputed before us. It is stated that in no case can the grandsons of a daughter inherit the property as they cannot confer spiritual benefit on the original owner Raghu Moni and that the power to confer spiritual benefit is the only test of inheritance. In support of this proposition we were referred, first of all, to a passage in Mayne's Hindu Law (8th Edition), p. 706, sec. 505 and also to a passage in Trevelyan's Hindu Law (2nd Edition), page 410, where the learned author states that the daughter's son's son is not an heir according to the Bengal School. Then we were referred to the actual text of the Dayabhaga in the translation by Colebrooke, Chap. 11, sec. 2,

verse (ii) at page 159, where it is stated as follows:—"It is the daughter's son who is the giver of a funeral oblation, not his son; nor the daughter's daughter for the funeral oblation ceases with him" and in the analysis at p. ix it is stated that "in default of the widow the daughter inherits." The daughter that is barren or a sonless widow or female children, hence daughter's daughter, and daughter's son's son are not heirs being incompetent to confer spiritual benefit; and in support of the proposition that inheritance depends on the power to confer spiritual benefit and on this alone we were referred to the Full Bench case of *Gooroo Gobinda Saha v. Anund Lal Ghosh* (1). The passage relied on in the judgment of Mr. Justice Mitter is to the following effect: "Having shown by the preceding observations that the principle of spiritual benefit is the sole foundation of the theory of inheritance propounded in the Dayabhaga we proceed to determine whether the particular claimant before us, namely, the son of a paternal uncle's daughter, is competent to confer any such benefit on the deceased proprietor. We are of opinion that he is, and we may add that this point was not even contested before us by the pleader for the Respondent." We think therefore that this passage clearly lays down the principle that the foundation of the theory of inheritance as propounded in the Dayabhaga proceeds on the doctrine that only those can inherit who can confer spiritual benefit on the owner whose property they claim to inherit. Similar authority is to be found in another Full Bench case of this Court in *Digumber Roy Chowdhury v. Motilal Bandopadhyaya* (2), the material passages in the judgment on

(1) 13 W. R. 39 at p. 59 (F. B.): 5 B. L. R. 15 (1870).

(2) I. L. R. 9 Cal. 563 (1892).

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this point being those occurring at page 567. There is no doubt, as has been pointed out by a reference to the text books and to passages in the case to which we have referred, that from time to time attempts had been made to throw doubt on the proposition laid down in the passage to which we have referred in *Gooroo Gobinda Saha v. Anund Lal Ghosh* (1), but the attempts that have been made to re-open the question have always failed on the ground that the Courts have stated that that principle must be taken as decided by the passage to which we have referred in the case which is a decision which has stood for 50 years. But it is argued on behalf of the Respondents that even accepting this principle as there is no one alive who can confer spiritual benefit the grandsons of a daughter may be entitled to inherit on the ground of their propinquity to the original owner of the property in default of the existence of persons who can confer such spiritual benefit. In support of this proposition we were referred to the case of *Radharaman Chowdhuri v. Gopal Chandra Chakraborty* (3). The cases to which we have referred are there considered and the argument that was propounded to the Court based on the right of persons standing in propinquity to the original owner to inherit in default of the existence of persons who can confer spiritual benefit was discussed. But in the result no decision was arrived at by the Court on the application which was merely an application to appear and contest certain probate proceedings. We do not think therefore that the learned vakil who appeared for the Respondents is entitled to rely on anything that occurred in *Radharaman Chowdhuri v.*

Gopal Chandra Chakraborty (3) in support of his argument, for as we have already stated we do not think that any decision was come to there. In my view the passages to which we have referred in the two Full Bench cases lay down clearly that unless a person is in a position to confer spiritual benefit on the owner of the property whose property he claims he is not and cannot be an heir of such a person and cannot therefore claim to inherit such property.

This being so, we think that the appeal must succeed on this ground, namely, that the Respondents here who succeeded in the Courts below are not heirs of Raghu Moni and have, therefore, no interest in the property which they claim. They were suing in ejectment and it was for them to establish their title. This they have failed to do and the appeal accordingly succeeds and with costs in all Courts.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

R.F. No. 158 OF 1925.

SANDERSON, (J.	SHEIKH GARIB HAJI,
PEARSON, J.	Complainant,
1925,	v.
22, July.	MUCHIBAM SHAHA and
	anr., Accused.

Penal Code (Act XLV of 1860), sec. 379—Theft, charge of, not maintainable when object of theft admittedly in possession of accused—Criminal Procedure Code (Act V of 1898), sec. 438—Admission made by party before Sessions Judge at the time of hearing of application for reference to High Court—High Court, if should accept such admission.

Where it appeared that certain trees which were the subject of the charge of theft stood on the holding in the possession of the accused:

Held—That the charge of theft could

(1) 13 W. R. 39 at p. 59 (F. B.); 5 B. L. R. 15 (1870).

(3) 31 C. L. J. 81 (1919).

(3) 31 C. L. J. 81 (1919).

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not stand because the offence under sec. 379, I. P. C., is an offence against possession.

Held further—*That if in a proceeding before the Sessions Judge for a Reference to the High Court under sec. 438, Cr. P. C., admissions of fact are made by either party, then those admissions of fact ought to be accepted by the High Court for the purposes of the Reference.*

This was a Reference under sec. 438, Cr. P. C., made by the Sessions Judge of Birbhum (Mr. B. K. Basu), on 1st June 1925, recommending that the conviction and sentence passed by the Sub-Deputy Magistrate of Suri (Mr. Ekramuddin) be set aside.

The facts of the case will appear from the judgment.

Babu Satindra Nath Mukerji for the Accused.

Babu Ramoni Mohan Chatterji for the Complainant.

The JUDGMENT OF THE COURT was as follows :—

PEARSON, J.—This is a Reference under sec. 438 of the Code of Criminal Procedure made by the learned Sessions Judge of Birbhum.

It appears that the two accused, who were father and son, were convicted of an offence under sec. 379 of the Indian Penal Code in respect of two trees which they cut down either partly or altogether.

The facts show that they were admittedly occupying a *pachai* shop for about three years and that upon the bank of a tank near by, these trees were growing in what formed the compound of the house occupied by the accused.

The learned Sessions Judge has given his opinion that the complaint does not disclose an offence under sec. 379 of the Indian Penal Code, inasmuch as the trees

are admitted to have been on the holding in possession of the accused. That is an admission which disposes of the case because the offence under sec. 379 is an offence against possession.

It is said by the learned vakil appearing for the complainant that an admission in these circumstances should not be held necessarily binding upon his client in a proceeding of this kind which is not a judgment and in which the learned Sessions Judge does not come to any decision on the lines of a judgment. But it is quite clear that if upon the proceedings before the learned Judge upon which the Reference is made, admissions of fact should be made by either party, then those admissions of fact ought to be accepted by this Court for the purpose of the Reference : and, in the present case, it appears from the order-sheet that before the motion for Reference was made by the accused, notice was served upon the Opposite Party and that pleaders for both parties were heard. We have, however, been referred to the judgment of the trying Magistrate in connection with what is said to be a mistake with regard to these admissions : and, although there are certain statements there, which taken by themselves, might be construed into a finding that the compound in which these trees grew was not in possession of the accused, there are, on the other hand, other statements which would certainly lead to that conclusion.

I would, therefore, accept the Reference, set aside the conviction and the sentence, and direct that the fine, if paid, be refunded.

SANDERSON, C. J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SHAW.

LORD CARSON.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMBER ALLI.

1925,

Heard, 6 and

9, February.

Judgment,

9, February.

KEDARNATH GOENKA,

Appellant,

v.

ANANT PRASAD

SINGH and ors.,

Respondents.

Civil Procedure Code (Act V of 1908), Or. 22, r. 3 (2) (1) and r. 12—Decree under old Code for ascertainment of mesne profits in execution—Death, if causes abatement.—Substitution, if necessary.

Proceedings for ascertainment of mesne profits under a decree passed when the Civil Procedure Code, Act XIV of 1882, was in force are proceedings in execution and not proceedings in the suit. Or. 22, r. 12, of the Civil Procedure Code, applies to them, so that no substitution is necessary in the case of death and no abatement under Or. 22, r. 3 (2), sub-r. (1).

This was an appeal (No. 101 of 1923) from a decree, dated the 10th March 1921, of the High Court at Patna, which dismissed an application for the revision of an order, dated the 9th April 1920, of the Subordinate Judge of Monghyr.

In 1901 Bhup Narain Singh and Baijnath Singh instituted a suit against Baijnath Goenka, the father of the present Appellant, for the recovery of possession of a certain estate by setting aside a revenue sale thereof and for mesne profits.

The suit was decreed by the Subordinate Judge on the 28th November 1905 and his decision was affirmed by the High Court in 1908, and by the Privy Council in 1913 (*vide* 17 C. W. N. 485).

The order in Council provided for the ascertainment at the execution stage of mesne profits and the Plaintiffs were each

awarded their definite share in the mesne profits so to be ascertained.

In August 1914 the Plaintiffs applied for ascertainment of mesne profits and the Subordinate Judge held that they should be calculated only from the date of the Order in Council.

The High Court on appeal (Chapman and Roe, JJ.) decided on the 8th August 1917 that mesne profits were to be ascertained as from the said 28th November 1905.

Bhup Narain Singh died in January 1918 and Baijnath Singh a month later. On the 24th January 1920 the Appellant, who had been substituted on the record for his father applied for an order that the suit had abated.

On the 14th February 1920 the sons of Bhup Narain Singh obtained an order *ex parte* to be substituted on the record for their deceased father. On the 13th March 1920 the Appellant made the application now under appeal that the order of substitution might be cancelled and for a declaration that the suit had abated.

The Subordinate Judge dismissed the application holding that the inquiry as to mesne profits was a proceeding in execution of a decree within the meaning of Or. 22, r. 12 of the Civil Procedure Code and that therefore r. 3 of that order providing for abatement did not apply thereto.

An application by the Appellant for revision was refused by the High Court and the Appellant appealed to His Majesty in Council.

The judgment of the High Court was pronounced by Das, J., who *inter alia* stated as follows: "In dealing with the question whether mesne profits could be ascertained in the suit itself or in the execution proceedings, we must be guided by the Code of 1882, for the decree was passed while the Code of 1882 was

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in operation, but, in dealing with the question whether the proceedings for the ascertainment of mesne profits have abated. we must be controlled by the Code of 1908, for the application for the ascertainment of mesne profits was made after the Code of 1908 came into operation. Now it may be conceded at once—it was conceded before us in the arguments—that if the provision of Or. 22, r. 3 (2) applies, then the proceedings have abated, as confessedly no application was made under sub-r. (1) within the time limited by law. But then Or. 22, r. 12, provides that nothing in r. 3 shall apply to proceedings in execution of a decree or order; and it was argued before us that as mesne profits under the Code of 1882 could only be ascertained in the execution department, the proceedings in connection with the ascertainment of mesne profits in this case must be regarded as proceedings in execution, and, accordingly outside the operation of Or. 22, r. 3.

The decree passed by the learned Subordinate Judge provided that the mesne profits from the date of the decision was to be assessed at the execution stage. This decree was upheld first by the Calcutta High Court and then by the Judicial Committee of the Privy Council. If this decree was in conformity with the procedure as laid down in the Code of 1882, then it must follow that the proceedings directed by the decree in this case are proceedings in execution and therefore within r. 12 of Or. 22.

In my view, there is no possible room for controversy in this matter. Sec. 211 gave power to the Court, in a suit for recovery of immoveable property, to provide for the payment of the mesne profits in respect of such property from the institution of the suit until the delivery of

possession to the successful party and sec. 244 provided that questions regarding the amount of any mesne profits as to which the decree has directed inquiry and questions regarding the amount of any mesne profits which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution, and the execution of decree, shall be determined by order of the Court executing the decree. I have no doubt whatever that the policy of the Code of 1882 was to make the proceedings for the ascertainment of mesne profits proceedings in execution; the decision in *Ram Kishore Ghose v. Gopi Kanta Shaha* (1) furnishes a direct authority in support of this view.

But it was argued that *Puran Chand v. Roy Radha Kishen* (2) has laid down a contrary rule. No doubt there are observations in this case which, if taken out of the context, would seem to support the contention of the Petitioner; but the actual decision amounts to no more than this, that proceedings for ascertaining the amount of mesne profits awarded by the decree in accordance with the provisions of sec. 211 or 212 of the Code of 1882 are not proceedings in execution of a decree in regard to any fixed sum, but merely in continuation of the original suit, so that such proceedings were not governed either by Art. 178 or by Art. 179 of Act XV of 1877.

* * * * *

We were, however, referred to the following passage in the judgment of the Full Bench:—‘The proceedings, therefore, in determining the amount of the *wasilat* are not proceedings in execution of a decree in regard to any fixed sum, but merely a continuation of the original suit and carried on in the same way as if a

(1) 1. L. R. 28 Cal. 243 (1907).

(2) 1. L. R. 19 Cal. 323 (1901).

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single suit were brought for mesne profits by itself.' Two arguments were founded on this passage—first, that proceedings for ascertainment of mesne profits are not proceedings in execution, and, secondly, that such proceedings are proceedings in continuation of the suit. So far as the second point is concerned, it does not carry us very far, for it has been held that proceedings in execution and indeed proceedings in appeal are all proceedings in continuation of the suit. Quite apart from the fact that there is a wide difference between a proceeding in the suit and a proceeding in continuation of the suit, it must be remembered that the learned Judges in the case cited discussed the problem from the point of view of limitation and nothing else. On the first point, the learned Judges were very careful to say, not that the proceedings in determining the amount of *wasilat* are not proceedings in execution of a decree, but that such proceedings are not proceedings in execution of a decree in regard to any fixed sum. I may point out again that the whole problem was discussed from the point of view of limitation. If it was a proceeding in execution of a decree in regard to a fixed sum, then there would be a decree to execute, and consequently limitation would apply. The conclusion that a proceeding is not a proceeding in execution of a decree in regard to a fixed sum, does not, in my view, negative the conclusion that such a proceeding is a proceeding in execution.

I hold that under the Code of 1882, a proceeding for the ascertainment of mesne profits was a proceeding in execution and that, as the decree, in the present case, was passed under the Code of 1882, such proceedings must be held in execution and not in the suit. That being so, Or. 22, r. 12 applies, and it

must follow that substitution was not necessary."

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Appellant.—The proceedings in question were original and the parties to the suit or their representatives were necessary parties to be on the record for the ascertainment of mesne profits. On the death of each of the Plaintiffs their representatives should have been brought on the record; on the expiry of six months from the dates of their deaths the proceedings abated and any application to set aside that abatement became barred on the expiry of 60 days therefrom.

The decree of the Subordinate Judge though made in 1905 was not confirmed until the Order in Council in 1913 and the Code of 1908 is to be applied.

The Code of 1908 expressly altered the law; for whereas under sec. 244 of the Code of 1882 mesne profits could be ascertained by the Court executing the decree, under the 1908 Code the relevant section is sec. 47 and the proceedings have been taken out of the execution provisions.

The proceedings therefore do not come within Or. 22, r. 12 and the provision of Or. 22, r. 3 (2) applies.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—The question raised on this appeal is one of procedure. The judgments of the Courts below are concurrent; they are gathered together in the final paragraph of the judgment of the High Court, in which Mr. Justice Das says:—

"I hold that, under the Code of 1882, a proceeding for the ascertainment of mesne profits was a proceeding in execution and that, as the decree, in the present case, was passed under the Code of 1882, such proceedings must be held in execution and not in the

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suit. That being so, Or. 22, r. 12, applies, and it must follow that substitution was not necessary."

Their Lordships have heard a persistent argument criticising the entire authorities cited in the case; they have considered that argument and the authorities; and they now declare that nothing has been urged which would induce them upon this point of procedure to express disagreement with the result arrived at in the Courts below.

In their Lordships' opinion, the appeal accordingly ought to be dismissed, and advice will be humbly tendered to His Majesty in that sense.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD ATKINSON.

LORD SHAW.

LORD DARLING.

1925,

Heard, 21, 22 and

25, May.

Judgment, 23, June.

HIRA BIBI and ors,
Appellants,

v.

RAM HARI LAL and
ors., Respondents.

Transfer of Property Act (IV of 1882), sec. 59—Mortgage—Execution by purdanashin lady—Persons who did not see her sign—Signing as attesting witnesses on execution being reported to them—Admission of execution by executant, if dispenses with proof of proper attestation—Evidence Act (I of 1872), sec. 70.

Where the evidence showed that when the executant, a purdanashin lady, signed the mortgage bond, not one of the persons who signed as attesting witnesses was present or saw her sign, and it appeared that her son took the document behind the purdah and came out and told those outside, the witnesses amongst others, that she had signed the deed and they then signed as witnesses:

Held—That the mortgage was not

legally attested and it could not be enforced against the executant merely because she admitted that she signed it.

The words of sec. 70 of the Evidence Act applies to a document duly attested.

This was an appeal (No. 6 of 1924) from a decree, dated the 10th June 1921, of the High Court at Patna, which modified a decree, dated the 26th September 1917, of the Subordinate Judge of Patna.

The suit was brought by the Respondents to enforce a mortgage bond alleged to have been executed in their favour by the Appellant.

The bond was executed on the 17th August 1906 as security for an advance of Rs. 29,000. The Appellant who was a purdanashin lady denied its validity on the ground that she was under the influence of her husband and had no independent advice when entering into the transaction. She further contended that the mortgage was not attested in accordance with the provisions of sec. 59 of the Transfer of Property Act. The District Judge found all the material issues against the mortgagor and made a decree in favour of the Plaintiffs.

The High Court (P. R. Das and Adami, JJ.) found that the document itself did not show that it was attested in the manner required by sec. 59 of the Transfer of Property Act, but they were of opinion that the admission of execution made by the Appellant in her evidence at the trial was sufficient to dispense with the requisite proof.

Messrs. DeGruyther, K. C. and W. Wallach for the Appellants.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

'Their LORDSHIPS' JUDGMENT was delivered by

LORD DARLING.—This is an appeal

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from a judgment and decree, dated 10th June 1921, of the High Court of Judicature at Patna, partly affirming and partly reversing a judgment and decree of the District Judge of Patna. The suit was brought to enforce a mortgage, dated 17th August 1906. It was pleaded by the Defendants (Appellants) that the mortgage bond is void by reason of its not being attested in accordance with the provisions of the Transfer of Property Act, IV of 1882, sec. 59.

The only important question upon this appeal is in regard to the Appellant Musammat Hira Bibi and her liability on the mortgage bond. It is admitted that she actually signed the bond, but it is a document which requires attestation by witnesses, as is provided by statute.

Hira Bibi is a *purdanashin* lady. The evidence shows, beyond contest, that when Hira Bibi signed the mortgage bond not one of the persons who signed as witnesses was present or saw her sign it. She was behind the *purdah*. Anant Prasad, her son, took this deed, and others, inside the *purdah*. He came out and told those outside, and out of sight of Hira Bibi, that she had signed the deed, and after this all those signed whose names appear as witnesses.

The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond, but they have held that the deed is good as against Hira Bibi, because she has admitted that she signed it.

Mr. Justice Das—with whose judgment Mr. Justice Adami agreed—put the case thus :—

"If the matter were *res integra* I should doubt whether the admission of a party can render valid

that which is invalid. The question is—Is the rule enunciated in sec. 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in the circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party helps the solution of the problem. My own view is that sec. 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If, for instance, the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by sec. 59 of the Transfer of Property Act. I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the Defendant renders it unnecessary for the Plaintiffs to prove that the document was executed and attested in the manner required by sec. 59 of the Transfer of Property Act."

It appears, then, that the Judges of the High Court of Patna would have held that this mortgage bond was not duly executed by the Appellant, Hira Bibi, had they not felt bound to follow earlier decisions of that Court and of the High Court of Calcutta. They appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these are considered it appears to their Lordships that this case is already concluded by authority. It is needless to do more than to call attention to them very briefly :—

Shamu Patter v. Abdul Kadir Ravuthan (1) decides that to be a good signature attested by two witnesses, within the Transfer of Property Act, 1882, sec. 59, the persons signing as witnesses must

(1) L. R. 89 I. A. 218; s. c. 16 C. W. N. 1009 (1912).

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be present at the execution of the instrument. Their Lordships adopted these words of Dr. Lushington [in *Bryan v. White* (2)] : "' Attest ' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." And they followed the decision of the House of Lords in *Burdett v. Spilsbury* (3) to the same effect.

The case of *Padarath v. Ram Nain Upadhia* (4) is in its material facts totally different from this one, and has, therefore, no bearing on the question here to be decided. But another case—*Gunga Pershad Singh v. Ishri Pershad Singh* (5)—is in almost all particulars identical with this present one, and in that instance the mortgage deed was declared to be void as not being duly executed and attested.

These cases sufficiently confute the argument founded upon the words of sec. 70 of the Indian Evidence Act, 1872, that—

"The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested."

Those words apply only to a document duly attested. The mortgage deed here in question was not, in a legal sense, attested; for it was merely signed by persons who professed to be witnesses to its execution, although in truth and in fact they were not so.

Their Lordships are, therefore, of opinion that, as against the Appellant Musammat Hira Bibi, the mortgage decrees of both the Courts below should be set aside with costs, and the suit dis-

missed as against her. With regard to the other Appellants the decrees should stand.

The costs of Musammat Hira Bibi should be paid by the contesting Respondents, but the other, and unsuccessful Appellants, should pay the costs of such of the Respondents who appeared. Their Lordships will humbly advise His Majesty accordingly.

Solicitors : *Messrs. W. W. Box & Co.* for the Appellants.

Solicitors : *Messrs. Watkins & Hunter* for the Respondents.

(G. D. M.)

[CIVIL APPELLATE JURISDICTION.]**[APPEAL FROM ORIGINAL DECREE**

No. 39 OF 1924.

WALMSLEY, J.	}	REGISTERED JESSORE
CHAKRAVARTI, J.		LOAN CO., LTD.,
1925,		Defendants, Appellants,
Heard, 15 and		v.
16, December.		GOPAL HARI GHOSH
Judgment,		CHOUDHURY, Plaintiff,
22, December.		and anr., Defendant.

Contract Act (IX of 1872), secs. 69, 70—Contribution, suit for—Duty to contribute, arising from equity, apart from statute—"Interested," meaning of, in sec. 69—"Benefited," meaning of, in sec. 70—Court's duty to decide all matters finally in suit for contribution—Purchaser of a share of a tenure, if "bound" to contribute towards arrears of rent accrued due before purchase—A co-sharer, if one "interested" in paying up the whole rent—Rent, a first charge—Liability, if must be personal—Liability for rent as between mortgagor and mortgagees.

The Plaintiff and the Defendants except Defendant No. 12 were the owners of a permanent tenure. Defendant No. 12 purchased the shares of Defendants Nos. 13, 14 and 15 and was also the mortgagee of the share of Defendant No. 1. In execution of a decree for arrears of rent obtained by the landlords

(3) 2 Rob. (Ecc.) 315-317 (1850).

(3) 10 Cl. & F. 340 (1843).

(4) L. R. 42 I. A. 168; s. c. 19 O. W. N. 991 (1915).

(5) L. R. 45 I. A. 94; s. c. I. L. R. 45 Cal. 774; 22 O. W. N. 697 (1915).

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the property was put up to sale and was purchased by Defendant No. 12. The Plaintiff thereupon deposited the decretal money together with the usual compensation and had the sale set aside. The Plaintiff brought a suit claiming contribution from the several Defendants in proportion to their respective shares and contended that the Defendant No. 12 was liable to contribute to the extent of the shares in which he was interested, viz., the shares of Defendants Nos. 13, 14 and 15 acquired by purchase and the share of Defendant No. 1 of which he was the mortgagee :

Held—That the liability to contribution is not entirely contained in secs. 69 and 70 of the Contract Act although generally speaking a large number of cases do come within the purview of these two sections. The Court as a Court of justice, equity and good conscience may, in certain circumstances, although such circumstances do not bring the case strictly within the purview of these two sections, allow contribution if the claim appears to be either just or equitable.

That both secs. 69 and 70 of the Contract Act were applicable to the facts of the present case so far as regards the shares which were purchased by Defendant No. 12.

That the Plaintiff was interested in the payment of the money within the meaning of sec. 69 although he was also liable to pay a portion of the money.

That the Defendant No. 12 was bound to pay the money although he was not a party to the decree for rent and the period for which the rent was claimed was previous to his purchase, inasmuch as that rent was charged on the property purchased by him, and the section does not require the liability to be a personal liability.

That the argument that the Defendant No. 12 was not benefited because in the result he lost the benefit of his purchase of the entire property and was left only with the share which he held before was fallacious. The character in which the Plaintiff sued the Defendants and the character in which the Defendant No. 12 was charged with the liability was the character of co-sharers as between themselves and as the property was saved by the deposit the Defendant No. 12 was benefited to the extent of his share.

In a suit for contribution the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. The Court below therefore erred in making Defendants Nos. 1 and 12 jointly liable in respect of the share mortgaged by the former to the latter. The liability for the rent of this share being primarily Defendant No. 1's, the decree in regard to this share should be against Defendant No. 1 alone.

This was an appeal preferred on the 6th of February 1924 against the decree of Babu Nagendra Nath Bhattacharjee, Subordinate Judge of Zillah Jessore, dated the 10th of December 1923.

The facts of the case will appear from the judgment.

Messrs. S. C. Roy Choudhury and K. M. Ghose and Babu Mahendra Chandra Ghose for the Plaintiff.

Babu Hemendra Chandra Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This is an appeal by the Defendant No. 12—the Registered

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Jessore Loan Company, Ltd., against a judgment and decree of the learned Subordinate Judge of Jessore, dated the 10th December 1923, by which the suit of the Plaintiff for contribution was decreed in full. The question raised in this appeal is a question of law applicable to the facts of this case which are not disputed and they are as follows: The Plaintiff and the Defendants other than the Defendant No. 12 were the owners of a permanent tenure. The Defendant No. 12 purchased the share of the Defendants Nos. 13, 14 and 15 which was 1 anna odd gundas in execution of a mortgage decree in his favour on the 20th June 1921. The said Defendant No. 12 is now also the mortgagee of a 3 anna odd gunda share which belonged to the Defendant No. 1. The Plaintiff's share in the tenure was 3 annas 4 gundas. In execution of a decree for arrears of rent obtained by the landlords, the property was put up to sale and was purchased by the Defendant No. 12 on the 20th January 1923 for Rs. 25,000. The Plaintiff thereupon deposited the decretal money together with the usual compensation to the purchaser amounting to Rs. 17,000 odd and the sale was set aside. The Plaintiff brought the suit claiming contribution from the several Defendants in proportion to their respective shares and contended that the Defendant No. 12 was liable to contribute to the extent of the two shares in which, as already stated, he was interested, namely, the share of the Defendants Nos. 13, 14 and 15 and the share of the Defendant No. 1. The decree was passed without contest against the Defendants other than the Defendant No. 12. The Defendant No. 12 alone contested the suit and resisted the claim of the Plaintiff on two grounds. It was contended, on his behalf, first, that the

share of the Defendants Nos. 13, 14 and 15 which the Defendant No. 12 purchased in execution of the mortgage decree against the said Defendants was not liable for the rent at the time when the Defendant No. 12 purchased the same; in fact, the arrears of rent for which the decree was obtained fell due before this purchase. It was next contended that, so far as the share of the Defendant No. 1 was concerned, the Defendant No. 12 was no more than a mere mortgagee of that share as the sale of that share had already been set aside; and, therefore, it was said that the Defendant No. 1 remained liable, if there was any liability for contribution to the extent of his share. Now, the learned Subordinate Judge, as already stated, passed a decree without contest against the Defendants other than the Defendant No. 12 and they do not question the decree made against them. It is the Defendant No. 12 alone who has preferred this appeal.

The learned Advocate who appeared for the Defendants-Appellants contended, first, that neither sec. 69 nor sec. 70 of the Indian Contract Act were applicable to the facts of the present case; and, therefore, he said that the Plaintiff was not entitled to any contribution from the Defendant No. 12 upon the payment made by him. It was stated that the elements necessary to attract the operation of sec. 69 did not exist in the present case nor did the provisions of sec. 70 apply to this case. As regards this point, I need hardly say that the liability to contribution is not entirely contained in the two sections of the Contract Act referred to above, although generally speaking a large number of such cases do come within the purview of those two sections. The Court as a Court of justice, equity and good conscience may, in certain cir-

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cumstances—although such circumstances do not bring the case strictly within the purview of these two sections, allow contribution, if the claim appears to be either just or equitable. I need hardly cite more than one case in which the question was discussed, namely, the case of *Matangini Debi v. Brajeswar Banerji* (1). Mr. Justice Mookerjee in delivering the judgment in that case said as follows:—"The right of contribution has its foundation in and is controlled by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between the parties jointly liable *ex-contractu*. Every joint debtor who has been compelled to pay more than his share of the common debt has the right of contribution from each of the co-debtors. The principle is that one who has discharged a common liability can recover from his co-obligors only the excess that he has paid over his share and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation." Now, the same case is also authority for the proposition that, in cases such as the present one is, both secs. 69 and 70 of the Contract Act are applicable. I shall presently refer to the distinction, which the learned Advocate for the Appellants has drawn as to why the same rule should not be applied to the facts of the present case.

Taking sec. 69 first, it enacts that "a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it is entitled to be re-imbursed by the other." It is argued that the present Plaintiff cannot be said to have been interested in the payment because he was also liable

to pay the money. It was also argued that the Defendant No. 12 was not bound to pay the money because he was neither a party to the decree for rent nor was the period for which the rent was claimed subsequent to his purchase. It appears to me that this contention is not sound. The Plaintiff was interested in the payment of this decretal amount. He was interested because it affected his property. He was further interested because there was the decree against him and he was interested to see that that amount was paid. A person may be interested in a payment, though he may be liable for or bound to pay only a part of the money. Here the Plaintiff was not bound to pay the whole of the money. The share, according to the Plaintiff, which the Defendant No. 12 held was liable for the money and, therefore, sec. 69 applies. I think, therefore, the argument that the Plaintiff was not interested within the meaning of sec. 69 is not tenable nor is the argument that the Defendant No. 12 was not bound to pay the same tenable, because, although the said Defendant was neither a party to the decree nor were the arrears due for a period subsequent to his purchase, he was bound in law to pay the same as the property which he purchased was liable for the payment of that money. The section does not speak of mere personal liability. There is abundant authority for the proposition which I have relied upon. Take the case of *Manindra Chunder Nundy v. Jamahir Kumari* (2), which the learned Advocate for the Appellants cited in support of his contention. In that case, Mr. Justice Ghose in delivering the judgment of the Court said that a mortgagee who purchased a tenure in execution of his mortgage decree pur-

(1) 20 C. L. J. 205 (1914).

(2) I. L. R. 32 Cal. 643: s. c. 9 C. W. N. 670 (1905).

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chased it subject to the liability for the rent with which the tenure was charged. It may be pointed out that rent is the first charge—a charge which is superior to the charge of the mortgagee himself. The learned Judge pointed out in that case that the reason for this view was that when a mortgagee in execution of his decree purchased the tenure the price that he paid must have been in view of the liability for the arrears of rent to which the tenure was subject. Therefore, in the present case, the share which the Defendant No. 12 purchased in execution of his mortgage decree was liable for the amount of the decree for rent, although the period for which the rent was due was anterior to his purchase. Other cases may also be cited in support of the same view; but it is not necessary to do so. I shall only quote the words used in the case to which I have just referred, namely, the case of *Manindra Chunder Nundy v. Jamahir Kumari* (2). It was held there that “a mortgagee who purchases a property at an execution sale is under a legal liability to pay the rent due upon the property at the time of the purchase and, therefore, cannot claim under sec. 69 of the Contract Act contribution from the mortgagor.” The Defendant No. 12 was, therefore, legally bound to pay a part of the money due on the decree.

Now, taking sec. 70 of the Contract Act, the argument advanced by the learned Advocate on behalf of the Defendants-Appellants was that the Defendant No. 12 was not benefited by the payment and, therefore, sec. 70 had no application to the case. It was conceded that the payment made by the Plaintiff was not a voluntary payment and, therefore, he

did lawfully pay the money; but as the Plaintiff's deposit set aside the sale of the entire property, it was argued that the Defendant was not benefited, because, in the result, he lost the benefit of his purchase of the entire property and was left only with the share which he held before. In my opinion, there is a fallacy in this argument. The character in which the Plaintiff sued the Defendants and the character in which the Defendant No. 12 was charged with the liability was the character of co-sharers as between themselves; and, as the property was saved by the deposit, the Defendant No. 12 was benefited to the extent of his share. Whether his purchase in execution of the rent decree was a better bargain or not has no real effect on the question.

In my opinion, it is not necessary, therefore, to invoke any principle of equity or justice in the present case as I think that both secs. 69 and 70 of the Contract Act are applicable to the facts of the case so far as the share which the Defendant No. 12 purchased in execution of his mortgage decree is concerned, namely, the share which originally belonged to the Defendants Nos. 13 to 15.

But as regards the share which belonged to the Defendant No. 1, I think the position is different. The learned Subordinate Judge has made a joint decree against the Defendant No. 1 and the Defendant No. 12 so far as this share is concerned. This was obviously wrong. In a suit for contribution, the respective liabilities of the parties should be ascertained and determined once for all and nothing should be left undetermined which may lead to further litigation for the ascertainment of such liability between two or more of the parties to the suit. That is not the only error in the

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decree. It appears that, so far as the share of the Defendant No. 1 is concerned, the Defendant No. 12 was no more than a mere mortgagee—not a mortgagor in possession but an ordinary mortgagee. The property no doubt was liable for the rent due on it; but the liability was primarily the liability of the Defendant No. 1. So long as the Defendant No. 12 did not purchase in enforcement of his mortgage against the Defendant No. 1, the Defendant No. 1 was liable to pay the rent and, even if the Defendant No. 12 was obliged to make any payment to save the property from sale in execution of a rent decree, the Defendant No. 1 would be ultimately liable to pay that money to the Defendant No. 12 and the Defendant No. 12 would be entitled to add that money to the mortgage debt due to him by the Defendant No. 1. Therefore, so long as the Defendant No. 1 remained the owner of the property as a mortgagor and was in possession, the liability to save the property from sale in execution of the decree for arrears of rent was his liability and not the liability of the Defendant No. 12. Consequently, neither sec. 69 nor sec. 70 of the Contract Act would apply so far as the share of the Defendant No. 1 is concerned. The Plaintiff, therefore, has failed to establish any liability of the Defendant No. 12 for the amount due on account of the share which belonged to the Defendant No. 1.

In this view, I think that the decree of the learned Subordinate Judge should be varied. The appeal should be dismissed so far as regards the amount due on account of the share of the Defendants Nos. 13, 14 and 15 and it should be allowed in so far as the decree of the Court below makes the Defendant No. 12 liable for the amount due in respect of the share which belonged to the Defendant

No. 1 who alone should be held liable. Costs will be in proportion to the respective success and failure of the parties in both the Courts. The hearing fee is assessed at Rs. 200.

There is a cross-objection by the Plaintiff and it raises only one question, namely, that the learned Subordinate Judge ought to have allowed the Plaintiff interest upon the amount found due to him from the date of the suit. I think that that contention is right. The Plaintiff will be entitled to interest at six per cent. per annum on the amount found due to him by the lower Court from the date of the suit until realisation. No order is made as to the costs in the cross-objection.

WALMSLEY, J.—I agree.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
No. 1323 OF 1923.

GREAVES, J.

B. B. GHOSE, J.

1925,

Heard, 9 and

10, June.

Judgment,

10, June.

MOHIM CHANDRA DEY,
Plaintiff, Appellant,
v.

RAMDAYAL DUTTA,
Defendant, Respondent.

Evidence Act (I of 1872), sec. 92, prov. (4)—Mortgage—Oral evidence to prove discharge partly by payment and partly by release, if admissible.

Oral evidence may be admitted to prove that a mortgage has been discharged partly by payment and partly by release of debt and there is nothing in sec. 92 of the Evidence Act to prevent such evidence being admitted.

G. P. MALLAPPA v. MATUM NAGU CHETTY (1) distinguished.

MOHIM CHANDRA DEY v. RAMDAYAL DUTTA.

JAGANNATH v. SHANKAR (2) *dissented from*.

ARIYAPUTHIRIA PADAYACHI v. MULTHU-KOMARASWAMI PADAYACHI (3) *referred to*.

This was an appeal preferred on the 19th of March 1923, against the decree of B. K. Bose, Esq., 2nd Additional District Judge of Zilla Mymensingh, dated the 2nd of December 1922, affirming the decree of Babu Upendra Kumar Kar, Munsif, 1st Court at that place, dated the 23rd of December 1921.

The facts of the case will appear from the judgment.

Dr. Radhabenode Pal and *Babu Hem Kumar Bose* for the Appellant.

Babu Annoda Charan Karkoon for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This appeal arises out of a suit brought on a mortgage bond. Both the Courts below found that the mortgage debt was discharged by the Defendant depositing Rs. 600 and odd with the landlord with the consent of the Plaintiff. The mortgage debt on that date came up to Rs. 673-7-0. Upon the finding that the mortgage debt was discharged as aforesaid both the Courts below dismissed the Plaintiff's suit. The Plaintiff appeals and the sole contention on his behalf is that oral evidence is not admissible to prove the discharge of the debt, inasmuch as it imports an agreement to relinquish Rs. 73 odd of the mortgage debt. In support of this contention reliance has been placed upon two cases. The first of these is the case of *G. P. Mallappa v. Matum Nagu Chetty* (1). The head-note of the case runs thus :

(1) M. L. R. 42 Mad. 41 (1918).

(2) I. L. R. 44 Bom. 55 (1919).

(3) I. L. R. 37 Mad. 423 (1912)

" A subsequent oral agreement to take less than is due under a registered mortgage bond is an agreement modifying the terms of a written contract; and, if it is to be proved, oral evidence is inadmissible under sec. 92, proviso (4) of the Indian Evidence Act." In that case, however, it was held that the Defendant was exonerated from the liability of proving the agreement, because it was admitted by the Plaintiff. Under sec. 58 of the Evidence Act, such plea was taken into consideration and given effect to. The case only lays down the rule enacted under sec. 92 of the Evidence Act and can hardly be said to be an authority for the proposition advanced on behalf of the Appellant. The next case relied on is that of *Jagannath v. Shankar* (2). That case seems to be in point. There the debtor had alleged that he had paid a sum of money in full discharge of the mortgage debt although a larger sum was due on the mortgage bond. Sir Norman Macleod, C. J., observed at page 58 thus : " But the argument before us has been that there has not been subsequent oral agreement to rescind or modify the mortgage, but there has been an actual discharge, and that oral evidence was admissible to prove a discharge. In my opinion, there is no substance in that argument. The Defendant's case must be that the mortgagee agreed to receive Rs. 800 in full satisfaction of the much greater amount which was due on the mortgage, and although he might have said when receiving Rs. 800, ' I now discharge you from the mortgage,' there was none the less an agreement which modified the original agreement of mortgage." With all respect I am unable to accept the reasoning of the learned Chief Justice. A mortgage is discharged either by payment of

(2) I. L. R. 44 Bom. 55 (1919).

MOHIM CHANDRA DEY v. RAMDAYAL DUTTA.

the full amount of the debt or by release of the debt itself. It has never been doubted that a discharge of the debt by payment may be proved by oral evidence. This point is not contested on behalf of the Appellant. The cases in support of this will be found referred to in *Ariyaputhria Padayachi v. Multhukomaraswami Padayachi* (3). Oral evidence of such discharge is not excluded by any provision of sec. 92 of the Evidence Act. A release of a debt also may be effected by parole, but if it is in writing it should be registered, if it falls within the provisions of sec. 17 of the Registration Act. The release for value is not a transfer of ownership, and though it is true a person who releases a security without consideration may be said to make a gift of it, the transaction does not fall under Chap. VII of the Transfer of Property Act, which deals only with gifts of tangible property. There is nothing in the law which requires a writing for a release of the debt by the creditor. What then is there to exclude oral evidence of the discharge of a mortgage bond when it is pleaded that it was made partly by payment of money and partly by release of the debt? If the creditor says to the debtor "I now discharge you from the debt" or if he says "I make a free gift to you of the money you owe me," I do not think that this can be called an agreement, as there is neither any promise to perform anything in future nor is there any consideration for it. Nothing has been left to be done and the transaction is completed at the moment when the release is made. Such a transaction does not fall within proviso (4) to sec. 92 of the Evidence Act and I do not think that oral evidence of it is excluded by that proviso. The fear expressed by the learned Chief Justice that

(3) I. L. R. 37 Mad. 423 (1912).

it would be an extremely dangerous precedent if oral evidence were allowed of such a transaction does not also impress me and I think that the danger may be the other way. Such evidence has seldom been excluded in this province. It is common knowledge that when a debtor makes payment of his debt amicably to his *mahajan* a remission is often made of a part of the interest due on account of the mortgage bond. If it be held that this release cannot be proved by oral evidence, the mortgagee may sue his debtor for the amount remitted years after the debt was fully discharged; and this he may do, notwithstanding that he had returned the mortgage bond to the debtor on obtaining full satisfaction, for nothing but a proper document would prove the remission. This, however, would be a position which cannot be contemplated. I, therefore, think that oral evidence may be admitted to prove that a mortgage bond has been discharged partly by payment and partly by release of the debt and there is nothing in sec. 92 of the Evidence Act to prevent such evidence being admitted.

On this ground, I would dismiss the appeal with costs.

GREAVES, J.—I agree.

H. C.

(CRIMINAL APPELLATE JURISDICTION.)

GOVT. APP. NO. 3 OF 1925.

C. C. GHOSE, J.

DUVAL, J.

1925,

Heard, 24 and

25, November.

Judgment,

25, November.

THE SUPERINTENDENT
AND REMEMBRANCE
OF LEGAL AFFAIRS
OF BENGAL,
Appellant,
v.

KIRAN BALA DASSI,
Respondent.

Thumb impression of accused, taking of, in Court under orders of Magistrate—Comparison by expert

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of thumb impression so taken with others in evidence—Procedure, if proper and legal—Act XXXIII of 1920, sec. 5—Magistrate's power in this respect—Evidence Act (I of 1872), sec. 45, ill. (c)—Opinion of expert on comparison of thumb impression.

The Respondent was prosecuted under sec. 82 of the Registration Act for having falsely personated another woman at the time of the registration of a document purporting to have been executed by the latter. Under orders of the trying Magistrate the Respondent's thumb impression was taken by an expert and compared with that on the document in question and relying on the evidence of the expert that the two tallied and were totally different from the thumb impression of the woman whom the Respondent had personated, the Magistrate convicted the accused but the Sessions Judge on appeal set aside the conviction and the local Government appealed:

Held—That sec. 5 of Act XXXIII of 1920 authorised the Magistrate to direct the thumb impression to be taken in the manner in which it was done and illustration (c) to sec. 45 of the Evidence Act makes it abundantly clear that in a case like the present the opinion of the expert formed by comparison of the various thumb impressions referred to is admissible in evidence. The procedure adopted by the Magistrate was therefore in strict accordance with law.

The High Court in setting aside the acquittal directed, upon a consideration of the circumstances of the case, that the Respondent should be released under sec. 562 of the Criminal Procedure Code on her entering into a bond with surety to appear and receive sentence when called upon within one year.

This was an appeal against an order of the Sessions Judge of Bankura, dated the 6th February 1925, setting aside an order

of the Deputy Magistrate of Bankura, dated the 23rd December 1924, convicting the Respondent Kiran Bala under sec. 82, cls. (a), (b) and (c) of the Registration Act and sentencing her to six months' rigorous imprisonment.

The facts of the case will appear from the judgment.

Mr. Ashraf Ali for the Appellant.

Babu Narendra Krishna Bose for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, against the acquittal of the Respondent Kiran Bala Dassi by the learned Sessions Judge of Bankura by his judgment, dated the 6th February 1925.

The short facts are as follows:—The Respondent Kiran Bala Dassi along with three other persons, Upendra Nath Ghoshal, Kishori Mohan Misra and Panchu Gopal Chakravarti, was put upon trial for offences under sec. 82 of the Indian Registration Act. The case for the prosecution was that a deed of release, dated the 29th March 1923, purporting to have been executed by one Sindhu Bala Dassi in favour of Upendra Ghoshal was a forged document made at the instance of Upendra Ghoshal, that Panchu Gopal was the scribe and that he had signed the name of the executant and that Upendra Ghoshal procured the registration of the document by causing Kiran Bala, the Respondent before us, to personate Sindhu Bala Dassi before the Sub-Registrar of Assurances, and that Kishori Mohan falsely identified Kiran Bala Dassi as Sindhu Bala Dassi at the time of the registration of the document. During the course of the trial in the Court of first instance the learned Deputy Magistrate

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Mr. Ahmed directed that the Respondent Kiran Bala Dassi should give her thumb impression. Accordingly her thumb impression was taken and it was compared by an expert witness, being P. W. 17, Jnanada Chandra Bose, with the thumb impression purporting to be that of Sindhu Bala Dassi which was on the bond and which had been taken at the time of the registration of the deed and in the Sub-Registrar's book. The evidence of the expert was to the effect that the three thumb impressions, namely, that of Kiran Bala taken in the Court before the learned Magistrate, that which appeared on the deed and purported to be the thumb impression of Sindhu Bala and that which appeared in the Sub-Registrar's thumb impression book and which also purported to be the thumb impression of Sindhu Bala were in fact and in truth the thumb impression of one and the same person, and that the thumb impression of Sindhu Bala who had been examined as a witness for the prosecution and whose thumb impression had been taken in Court did not tally with the thumb impressions hereinbefore referred to. The learned Magistrate who tried the case acquitted Panchu Gopal, but he found that the three other accused persons, Upendra, Kishori and the present Respondent Kiran Bala Dassi were guilty and sentenced them to various terms of imprisonment. So far as Kiran Bala was concerned the sentence on her was that she should undergo rigorous imprisonment for a period of six months. The accused persons thereupon preferred an appeal before the learned Sessions Judge of Bankura. But it having appeared that there had been no compliance with the provisions of sec. 342, Cr. P. C., a retrial was ordered. On retrial by the learned Magistrate the accused were

again convicted and sentenced to the same terms of imprisonment as in the previous trial. There was then an appeal to the Sessions Judge and by his judgment, dated the 6th February 1925, the accused persons were acquitted. As regards the two accused Upendra Ghoshal and Kishori Misra the learned Sessions Judge held that there was not sufficient legal evidence against them to warrant a conviction. But as regards Kiran Bala Dassi the learned Sessions Judge was of opinion that her thumb impression taken at the time of the trial was inadmissible in evidence, as such thumb impression had been taken illegally. Thereupon the present appeal has been preferred as stated by the Superintendent and Remembrancer of Legal Affairs.

It is contended on behalf of the Government by the learned Deputy Legal Remembrancer that the Sessions Judge was clearly in error in holding that the thumb impression in question, namely, one that had been taken in Court of the Respondent Kiran Bala Dassi had been taken illegally, and in support thereof he has drawn our attention to the provisions of sec. 5 of Act XXXIII of 1920, being an Act which authorizes the taking of measurements and photographs of convicts and others. Sec. 5 of Act XXXIII of 1920 runs as follows:—"If a Magistrate is satisfied that for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898, it is expedient to direct any person to allow his measurements (measurements as defined in the Act include finger impressions and foot-print impressions) or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order, and shall allow his

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measurements or photograph to be taken, as the case may be, by a Police Officer." We think this is sufficient authority for the course that was adopted by the learned Deputy Magistrate. As is well known, before the passing of the Act there was considerable controversy as to whether thumb impressions could be taken of a person by order of a Magistrate, and to settle all such doubts this Act was passed.

Then the question arises whether the evidence of the expert who had an opportunity of comparing the thumb impression of Kiran Bala which had been taken in Court with the thumb impressions on the deed and in the Sub-Registrar's thumb impression book is admissible under the provisions of the Indian Evidence Act. Sec. 45 of the Indian Evidence Act makes the opinion of an expert on a matter like this admissible in evidence. Illustration (c) to sec. 45 makes it abundantly clear that in a case like the present the opinion of the expert formed by comparison of the various thumb impressions hereinbefore referred to is admissible in evidence. It would therefore follow that the procedure which was adopted by the Magistrate was one in strict accordance with the provisions of the law and that the learned Sessions Judge was not correct in saying that the thumb impression of Kiran Bala Dassi which had been taken in Court was one which had been taken illegally and against a fundamental principle of law. That being so, it is impossible to resist the conviction that the thumb impression which had been put on the deed at the time of the registration of the document was one which had been put not by Sindhu Bala Dassi but by Kiran Bala Dassi; in other words we are satisfied on the evidence on the record that it was Kiran Bala Dassi who had

personated Sindhu Bala Dassi at the time of the registration of the document.

We must therefore allow the appeal, and the only question now before us is what the sentence should be on Kiran Bala. She is stated to be a widow of over 15, and although there can be no doubt whatsoever that she did personate Sindhu Bala Dassi at the time of the registration of the document before the Sub-Registrar it is abundantly clear from the evidence on the record that she was a puppet in the hands of other accused. Under these circumstances we have anxiously considered whether we should pass a sentence of imprisonment on her, and we have come to the conclusion that having regard to the amended provisions of sec. 562 of the Code of Criminal Procedure, this is a case in which we can take action thereunder, and instead of sentencing Kiran Bala Dassi at once to any punishment we direct that she should be released on her entering into a bond with one surety of one hundred rupees to appear and receive sentence when called upon during the period of one year.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 548 of 1925.

C. C. GHOSE, J.
DUVAL, J.
1926,
13, January.

ARAJALI and ors.,
Appellants,
v.
THE KING-EMPEROR,
Respondent.

Circumstantial evidence, when sufficient for conviction—Verdict of jury—Verdict of guilty of murder with dacoity—No direct evidence and circumstantial evidence wholly insufficient—Accused acquitted by High Court on the ground of no evidence—Conviction of murder and sentence of imprisonment, impropriety of—Judge's duty when in his opinion verdict not right.

The case for the prosecution was that the accused who worked at a particu-

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lar place as reapers of paddy went away on a particular night with a quantity of paddy loaded in two boats belonging to them and accompanied by one K and his son for whom they had worked. K had a boat of his own which was lashed to one of the boats belonging to the accused. The accused reached their place of destination with their boats but K and his son and their boat were never seen again. The defence was that K and his son did not accompany the accused who went home after finishing their work with their share of the paddy to which they were entitled. The accused were tried on a charge under sec. 396, I. P. C., of committing dacoity with murder and un-animously found guilty by the jury and sentenced to various terms of imprisonment:

Held—That circumstantial evidence in order to bring a charge home to an accused person must be such as to show that within all human probability the act alleged must have been done by the accused persons.

Here the utmost proved was that the two presumably deceased persons went away with the accused on a windy night in accused's boat of their own free will, having their own boat in attendance and were never seen again, and it was impossible to say from this that they were murdered and the charge of dacoity also failed in the absence of evidence that the paddy did not belong to the accused.

The High Court finding that there was no evidence to substantiate the charges acquitted the accused.

Held further—That if a Judge accepts a finding of murder there are only two penalties and he has no right to pass inadequate sentences. If he does not believe the verdict is right it is his duty to refer it to the High Court.

This was an appeal preferred on the 24th of August 1925 against an order of the 2nd Additional Sessions Judge of Zillah Backerganj (Mr. N. Lahiri), dated the 16th June 1925.

The facts of the case will appear from the judgment.

Babu Debendra Narain Bhattacharjee and Moulvi Syed Nowsher Ali for the Appellants.

Mr. Khundkar (Deputy Legal Remembrancer) for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The five Appellants have been put on their trial along with two others who have not appealed on one charge under sec. 396, I. P. C., of committing dacoity with murder of one Kamaluddi and his son Abdul Majid at a place between Kachupatra and Keshabpur on or about the 22nd Pous 1329 (January 6th, 1923). They were tried by the 2nd Additional Sessions Judge of Backerganj with a jury and were unanimously found guilty and sentenced Mafizuddi to seven years' rigorous imprisonment, Hoshanali to three years' rigorous imprisonment and the other three to 4 years' rigorous imprisonment on the 16th June 1925. It appears there were previous trials which were set aside by this Court.

The facts of the case according to the prosecution are as follows:—

Kamaluddi, an inhabitant of Keshabpur, had certain paddy lands at Kachupatra. He engaged 13 reapers including the present Appellants to reap his paddy and the 13 reapers, who were apparently people unknown to him before, came in two big boats at the beginning of Agrahayan and settled on the land and during Agrahayan and Pous reaped his and some other people's paddy for them—the terms of their

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remuneration being that they were to get either 1/8th or 1/10th share of the produce—(the evidence on this point is discrepant) for their services. They completed their work. On the 6th January after night-fall eleven of the reapers (two staying behind) started back with 160 maunds of paddy, without being paid for their services, in two boats with Kamaluddi and Abdul Majid to take the paddy to Keshabpur. Kamaluddi had a small (*dingi*) boat which was lashed to one of the two reapers' boats. Since that date Kamaluddi and Abdul Majid have not been seen again, nor has their *dingi* boat. These eleven reapers reached their own homes, which are in a village in the Dacca District, shortly before the end of Pous, and there is evidence to show that they then unloaded the paddy of their two boats and took it by the help of pack-ponies to their headman's (Mofizuddi, Appellant No. 3) house.

The evidence further shows that when Kamaluddi and his son Abdul Majid left Keshabpur on the 6th January with the eleven reapers he left behind him besides the two other reapers another son of his, Abdul Karim, the complainant in this case. The evening after the boats left, some co-villagers of his arrived at Keshabpur and told him his father and brother had not reached home when they left. He then went to call the other two reapers who had been left behind and found they had disappeared leaving certain articles of little value behind them. He then started at once for home and found his father and brother were not there. He searched various waterways and then sent information to the thana and himself reported to the Sub-Divisional Officer of Patuakhali on the 13th January that his father was missing. Enquiries were made and it was found the 11 reapers

had arrived safely at their house with paddy. The defence is that Kamaluddi and his son did not go away from Kachupatra with the eleven reapers at all. The reapers went home with their share of the paddy, a share to which they were entitled, after finishing their work in Kachupatra.

In the present trial a *nolle prosequi* was entered against one of the reapers and he was called as a witness for the prosecution. He has given evidence but has supported the defence version.

Whatever may have been the charges at the previous trials (the case was originally instituted under secs. 364 and 407, I. P. (1.)) we are only concerned here with the charge of dacoity with murder.

The verdict of the jury and the charge of the Additional Sessions Judge are assailed on two points:—

(1) The direct evidence as to how much paddy the reapers actually had with them on their arrival home, i.e., whether they had more than what was their proper remuneration for their work is unreliable and the Judge has misdirected the jury on the point.

(2) There being no direct evidence of either dacoity or murder the Judge has failed to direct the jury as to what is sufficient circumstantial evidence on which to justify a conviction. Indeed there was no case to go to the jury at all on a charge under sec. 396.

As to (1) the evidence as to how much paddy was due to the reapers for their services is most meagre; they were entitled to a share not only of Kamaluddi's crop but of the other crops they reaped and the evidence of how much paddy the reapers actually had in their boats on their arrival home is that only of two of the owners of pack-ponies. Whatever else the evidence shows, it does

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not prove what amount of paddy reached the reapers' houses. We have only a rough guess at the most that can be deduced from the evidence of these two witnesses.

The second point however is the more important. If the complainant is to be believed (and the jury apparently believed him) Kamaluddi and his son undoubtedly left Kachupatra in the reapers' boat and were never seen alive again. The two reapers left behind mysteriously disappeared. There is therefore ground for suspicion, but is there anything more?

Circumstantial evidence, in order to bring a charge home to an accused person, must be such as to show that within all human probability the act alleged must have been done by the accused persons. Here the utmost proved is that the two presumably deceased persons went away from Kachupatra with the accused on a windy night in accused's boat of their own free will, having their own boat in attendance, and were never seen again. It is impossible to say from this that they were murdered; they may have got into their own boat and been drowned; they may have fallen out of the boat of the reapers and been drowned; anyway there is no conclusive evidence that any of the reapers caused their death. There is then no evidence of murder. Equally too there is no evidence of dacoity (robbery with violence); the offence of dacoity assumes that the reapers not being in possession of the paddy by violence seized it. The complainant himself says they took the paddy into their boats; he says it was his father's paddy but admittedly part was the share of the reapers who had cut paddy for him and there is nothing to show that the rest was not the paddy earned for cutting the crop from the other people for whom they worked at Kachupatra.

The learned Deputy Legal Remembrancer has admitted that there is difficulty in supporting the finding of the jury—which to our mind is due to the fact that the meaning of circumstantial evidence, sufficient for conviction, in the absence of direct evidence, was not explained to the jury—but has asked us to consider whether we cannot find a minor offence such as criminal misappropriation or breach of trust committed.

We are unable to accede to his request. In previous trials these unfortunate reapers, who have now been off and on before the Courts for nearly three years, were tried on various charges. A last effort has apparently been made to get them convicted by getting one of their number to give evidence on a new charge, not as an approver, but as an ordinary witness. This has failed and we must say that if this witness had supported the prosecution at this late stage we should have held his evidence of little value.

In the result we find there is absolutely no evidence to substantiate the charges and acquit the present Appellants. Two persons have not appealed—on them the sentences are two years' imprisonment. We are precluded from passing any orders in respect of them but in view of our judgment (a copy of which will be sent to the Legal Remembrancer forthwith) leave it to the Local Government to act under sec. 401, Cr. P. C., if so advised. We cannot close this case without two remarks. The re-trial on the present charge was only justified if the approver witness supported the case. He should have been examined at an early stage and when he failed to support the prosecution case (we have little reason to disbelieve him) the case should have been withdrawn.

It is also difficult to harmonise the

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sentences with the findings of the jury on the charges. Murder is murder and if a Judge accepts a finding of murder there are only two penalties. He has no right to pass inadequate sentences. If he does not believe the verdict is right it is his duty to refer it to this Court. Let the Appellants be released at once.

S. C. M.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 747 OF 1925.

PAGE, J.	}	VICTOR
MUKHERJI, J.		v.
1926,		THE KING-EMPEROR.
20, January.		

Security for good behaviour—Suspicious persons, inability to prove source of livelihood, if ground for action against—Criminal Procedure Code (Act V of 1898), sec. 109 (b), evidence justifying order under—Secs. 109 and 118, Cr. P. C.

If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond under secs. 109 (b) and 118, Cr. P. C., unless there is reasonable ground for suspecting that he is sustaining himself by dishonest means.

Passing the time in a certain street to all outward appearances innocently and in a manner void of suspicion would not bring him within the ambit of secs. 109 (b) and 118.

If proceedings under sec. 109 (b) are taken against a person because he cannot give a satisfactory account of himself, the Magistrate would not be justified in passing an order under sec. 118, Cr. P. C., merely because he is unable to prove that he spends his time or at least his leisure hours in a satisfactory manner.

In such a case the prosecution must satisfy the Magistrate that suspicion that he is being dishonestly attaches to the accused because of his failure to give a

satisfactory explanation when called upon to account for his presence in the place where he is found, e.g., if he fails to account for being discovered in the company of persons living a dishonest or criminal life or detected in some place where he has no legal right to be.

This was an appeal preferred on the 4th December 1925 against an order of the 3rd Presidency Magistrate, Calcutta (A. Z. Khan, Esq.), dated the 20th October 1925, whereby he directed the Appellant to execute a bond for Rs. 100, with one surety for Rs. 100, to be of good behaviour for one year, or in default, simple imprisonment for one year or until the security is furnished.

The facts of the case will appear from the judgment.

No one appeared in this appeal.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—On the 6th September 1925 at 10-30 in the forenoon the Appellant was accosted by a police officer in Lindsay Street, Calcutta. He was unable to satisfy the police that he was doing any work, or to provide them with the address of any place where he was residing. The only information which he gave to the police to account for his presence in Lindsay Street on that morning was that two or three days previously he had come to Calcutta from Tatanagar. He was straightway taken to the thana, hailed before a Magistrate, remanded pending enquiries and on the 5th October 1925 under secs. 109 and 118 of the Cr. P. C., ordered to execute a bond for Rs. 100 with one surety for Rs. 100 to be of good behaviour for one year and in default to suffer simple imprisonment for one year or until the security was furnished. The question which falls for determination is

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whether there was sufficient evidence to justify the order which was passed.

Under sec. 109 of the Cr. P. C., "whenever a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class receives information that there is within such limits (*i.e.*, the local limits of such Magistrate's jurisdiction) a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with sureties, for his good behaviour for such period not exceeding one year as the Magistrate thinks fit to fix." The provisions of sec. 109 (b) being disjunctive the accused was liable to have an order passed against him under secs. 109 and 118 if the evidence disclosed that he had been brought within the terms of either branch of sub-sec. 109 (b) and sec. 118. From the evidence adduced before the Magistrate it appeared that nothing was known concerning the accused at Tatanagar; that previously an order had been made against him under secs. 109 and 118, and that he had been convicted for an offence in connection with the sale of opium. Further it was stated that on several occasions he had been arrested under sec. 54, Cr. P. C., but in each case the charge against him had been dismissed. He was also suspected by the police of pilfering from motor cars. On the morning when he was arrested, however, his conduct in Lindsay Street appeared to be innocuous, and his presence there did not give rise to suspicion. Now, I am not disposed to place restrictions upon the discretion of a Magistrate in administering sec. 109, but the salutary provisions of this section are so stringent that it may be made an

engine of oppression unless care is taken by Magistrates to prevent its abuse. The object of the section is "to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction"—*Satish Chandra Sarkar v. The King-Emperor* (1). But merely to be penniless or out of work is not an offence—many an honest man may find himself in either predicament—and in a country where there are workless people but no work-houses, and casual labourers but no casual works, if it were the law that persons are exposed to proceedings under sec. 109 (b) merely because they cannot give a satisfactory account of the manner in which they are eking out a precarious existence, the Magistrates' hands would be full indeed, and much injustice might be done to innocent persons; see *Sheikh Piru v. King-Emperor* (2). In my opinion, however, that is not the meaning or effect of secs. 109 (b) and 118. As I construe the provisions of these sections if a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond under secs. 109 and 118 unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means, for such an order can only be made where "it is necessary for keeping the peace or maintaining good behaviour." Again, if proceedings under sec. 109 (b) are taken against a person because he "cannot give a satisfactory account of himself," in my opinion, the Magistrate would not be justified in passing an order under sec. 118, merely because the accused is unable to prove that "he spends his time or at least his leisure hours in a satisfactory

(1) I. L. R. 39 Cal. 456: s. c. 16 C. W. N. 499 (1912).

(2) 41 C. L. J. 142 (1925).

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manner" [per Chamier, J.—in *Sharif Ahmad v. King-Emperor* (3)]. In such a case the prosecution must satisfy the Magistrate that suspicion that he is living dishonestly attaches to the accused because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found, e.g., if he fails to account for being discovered in the company of persons living a dishonest or criminal life, or detected in some place where he has no legal right to be. But the poor and the outcast and the old offender must somewhere live and move and have their being, and, in my opinion, the Appellant who, during the morning of 6th September 1925, was passing the time in Lindsay Street to all outward appearances innocently and in a manner void of suspicion was not brought within the ambit of secs. 109 (b) and 118 merely because he was unable to prove that he was working for his living. If the order under appeal were upheld an old offender would be at the mercy of the police, for any ill-disposed police officer would be able to deprive him of personal freedom and procure his return to jail as his caprice or fancy moved him. For these reasons I am of opinion that the order passed upon the Appellant in this case cannot be sustained in law, and must be set aside. The Appellant will be released.

MUKHJEE, J.—I agree.

H. C.

(3) 12 Cr. L. J. 530.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 822 OF 1925.

C. C. GHOSE, J.	P. BANERJEE, Com-
DUVAL, J.	plainant, Petitioner,
1925,	v.
Heard, 11 and	BEPIN BEHARY
12, November.	GHOSE and anr.,
Judgment,	Accused, Opposite
9, December.	Party.

Criminal Procedure Code (Act V of 1898), sec. 403—Bengal Food Adulteration Act (VI, B. C., of 1919), sec. 21, failure of prosecution under, for want of sanction—Subsequent prosecution after sanction properly obtained, if lies—Autre fois acquit, principle of, when applies.

Prosecution of the accused for an offence under sec. 21 of the Bengal Food Adulteration Act having fallen through for want of a valid sanction and the accused acquitted under sec. 245, Cr. P. C., the Municipal Commissioners later at a meeting passed a resolution sanctioning the prosecution of the accused under the said Act and he was again prosecuted and tried for the same offence:

Held—That the previous acquittal of the accused did not operate as a bar to his subsequent trial.

There having been no order or consent in writing of the Municipal Commissioners sanctioning the prosecution of the accused for any offence under the Bengal Food Adulteration Act, the prosecution was incompetent and no cognizance could have been taken by any Court of any offence, and as such there could have been no trial of the accused within the meaning of sec. 403, Cr. P. C.

A verdict of acquittal is no doubt immune from challenge; but it is only when an accused has been tried and acquitted of an offence that the immunity arises.

This was a Rule granted on the 16th September 1925 against an order of the

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Deputy Magistrate of Howrah (Nawabzada Syed Ali Ashraf, Esq.), dated the 25th August 1925, acquitting the accused under sec. 245, Cr. P. C., of the charge under sec. 21 of Act VI, B. C., of 1919.

The facts of the case will appear from the judgment.

Mr. Narendra Kumar Basu and Babu Symadas Bhattachariya for the Petitioner.

Mr. B. C. Chatterji and Babu Lalit Mohan Sanyal for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule was issued calling upon the District Magistrate and the accused why the order of the 25th August referred to in the petition should not be set aside and the case tried according to law.

The facts are as follows :—It appears that on the 8th November 1924, the Sanitary Inspector of the Howrah Municipality filed a complaint before the Deputy Magistrate of Howrah against the accused under sec. 21 of Act VI of 1919 (the Bengal Food Adulteration Act, 1919) for selling adulterated milk in contravention of sec. 6, sub-cl. (1) of the said Act. The prosecution of the accused was under the orders of the Chairman of the Municipality and at the time the prosecution was instituted there was no order or consent in writing of the Municipal Commissioners of Howrah within the meaning of sec. 15 of the said Act. In that state of things the Deputy Magistrate, before whom the case was pending, passed the following order :—"The offence as taken cognizance of stands *ipso facto* vitiated for want of a valid sanction under the recent ruling of the High Court. The subsequent confirmation of the Chairman's action by the Municipal Commissioners cannot cure the inherent defect of the

present proceeding as it is. Accused acquitted, sec. 245, Cr. P. C." This was on the 27th March 1925. On the 15th May 1925, the Municipal Commissioners of Howrah passed a resolution at a meeting, sanctioning the prosecution of, among others, the said accused under the said Act. Accordingly on the 15th June 1925, a petition of complaint against the accused persons was filed before the Deputy Magistrate, but on the 25th August the Magistrate acquitted the accused by the following order :—"I find that the present accused was acquitted by Babu D. R. Ghose, Deputy Magistrate, on the 27th March 1925, in a previous case which was brought against him by the Municipality for committing the very same offence with which he is charged in this case. I don't think the accused can be tried in this case for the same offence so long as the order of acquittal in a previous case is not upset by some higher Court. The case cannot proceed any further. Accused acquitted, sec. 245, Cr. P. C."

Against the last mentioned order the present Rule is directed and it is contended on behalf of the complainant that the previous acquittal having been because of the want of sanction under sec. 15 of the Act and that defect having been now cured, there was nothing to prevent the Magistrate going on with the present trial, as the previous acquittal could not operate as a bar. It is also argued that there having been no "trial" within the meaning of sec. 403, Cr. P. C., of the accused in the previous case, the order of acquittal, dated the 27th March 1925, could not stand in the way of the present trial.

We think that the contentions urged on behalf of the complainant are sound and ought to be given effect to. Sec. 15 of

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the Bengal Food Adulteration Act, 1919. runs as follows:—"No prosecution for any offence under this Act shall be instituted without the order or consent in writing of the local authority within whose jurisdiction the offence is committed." The expression "local authority" is defined in the Act itself as meaning in the case of any Municipality the Municipal Commissioners. It would therefore follow on the facts set out above that there having been no order or consent in writing of the Municipal Commissioners prior to the 15th March 1925, sanctioning the prosecution of the accused for any offence under the said Act, the prosecution of the accused undertaken previously was incompetent and no cognizance could have been taken by any Court of any offence alleged to have been committed by the accused. It would further follow that in the circumstances mentioned above there could have been no trial of the accused within the meaning of sec. 403, Cr. P. C. A verdict of acquittal is no doubt immune from challenge; but it is only when an accused has been "tried" and acquitted of an offence that the immunity arises. In this case no question of immunity can possibly arise and we are of opinion that the previous acquittal cannot operate as a bar to the present trial. [See in this connection, *Emperor v. Umenooddin* (1)]. We therefore make the Rule absolute and send the case back to the District Magistrate for trial by such Magistrate as may be nominated by him.

H. C.

(1) I. L. R. 31 All 317 (1909).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 736 OF 1924.

SUHRAWARDY, J.
MUKERJI, J.
1924,
7, November.

CHERAGALI BEPARI and
anr., Accused,
Petitioners,
v.
SATISH CHANDRA GHOSH,
Complainant, Opposite
Party.

Previous acquittal on a charge under sec. 193, Indian Penal Code (Act XLV of 1860)—Subsequent trial on charges under secs. 465, 471, 120B—Facts exactly the same—Subsequent proceedings quashed—Criminal Procedure Code (Act V of 1898), sec. 403.

The Petitioners had previously been tried under sec. 193, I. P. C. and, upon a careful and exhaustive consideration of the whole evidence, acquitted. He was again put on his trial under secs. 465, 471 and 120B:

Held—That inasmuch as the facts on which the complainant founded the present case were inseparable from those upon which the previous case was proceeded with, the proceedings should be quashed.

This was a Rule granted on the 25th of August 1924, on an application praying for the quashing of proceedings pending in the Court of Mr. S. C. Sinha, Sub-Divisional Magistrate of Munshigunj, on charges under secs. 465, 471 and 120B, I. P. C.

The facts of the case shortly were as follows:—

On the 25th September 1923, the complainant lodged a complaint before Mr. P. N. Mukerji, Deputy Magistrate of Munshigunj, charging the Petitioners with having committed offences under secs. 193, 465, 467 and 423, I. P. C., on the allegation that there having been a long-standing enmity between complainant and Petitioners Protap Das and others

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(the present Petitioner being a tenant of Protap Das), with a view to cause loss to the complainant, Petitioners had entered into a conspiracy to execute a false *kabuliyat* in respect of the land belonging to the former and let out to the present Petitioner, and in pursuance thereof made a false *kabuliyat* purporting to have been executed by the Petitioner Cheragali and to have been attested by Protap Das.

Upon this complaint Petitioners were placed upon their trial before Mr. S. N. Chatterji on a charge under sec. 193, I. P. C., neither the complainant nor the Crown took any exception to the proceedings of the Magistrate, nor was any superior Court moved to get a charge of forgery framed in the case. The Magistrate by his judgment, dated the 28th May 1924, acquitted the Petitioners.

Thereafter on 20th June 1924 the complainant lodged a fresh complaint before Mr. S. C. Sinha, Sub-Divisional Magistrate of Munshigunj, in respect of the same matter charging Petitioners with offences under secs. 465, 467, 471 and 120B, I. P. C. and sec. 109, I. P. C., leaving out sec. 193, I. P. C. The allegations in the second complaint were substantially similar to those in the first excepting in one particular. The Sub-Divisional Magistrate after perusing the judgment of acquittal and hearing the complainant's pleader summoned Petitioners to answer charges under secs. 465, 471 and 120B, I. P. C.

The Petitioners put in objection against the contemplated fresh trial but the Magistrate disallowed the objection.

Babus Debendra Narain Bhattacharya and *Binoyendra Prosad Bagchi* for the Petitioners.

Babus Narendra Kumar Bose and

Radhika Ranjan Guha (for *Babu Prokash Chandra Pakrashi*) for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

As to the two grounds upon which this Rule was issued we are of opinion that they are not well-founded. The grounds are to the effect that the present proceedings are barred by the provisions of sec. 403, Cr. P. C., and that the facts alleged in the petition of complaint and examination of the complainant under sec. 200, Cr. P. C., do not constitute in law the offence of forgery within the meaning of that word as used in the Indian Penal Code. But on a reference to the judgment of the learned Deputy Magistrate who dealt with the case against the accused that is referred to in the petition we find that the present proceedings should not have been allowed to be instituted. The learned Magistrate went very carefully into the cases set up on behalf of the parties, dealt exhaustively with the evidence that was adduced in the case, considered the probabilities thereof and came to the conclusion that the culpability of the accused had not been established beyond reasonable doubt. Although the accused were tried in that case only on a charge under sec. 193, I. P. C., the facts upon which the complainant founded the present case with regard to the offences under secs. 467, 471 read with 120B, I. P. C., are wholly inseparable from the facts upon which the previous case was proceeded with.

We therefore think that the Petitioner was entitled to a Rule upon the third ground stated in his petition. We have asked the learned vakil appearing on behalf of the Opposite Party to show cause with regard to that ground. Having heard both parties we have come to the

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conclusion that the present proceedings should be quashed on the said ground.

We accordingly quash the said proceeding and make the Rule absolute.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SUMNER.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVEEN.

1925,
Heard, 30, April
and 1, May.
Judgment,
12, June.

NOWROJI RUSTOMJI
WADIA, Appellant,
v.

THE GOVERNMENT
OF BOMBAY,
Respondent.

Land Acquisition Act (I of 1894), sec. 54, as amended—Valuation, question of, judgment of reversal on—Privy Council, appeal to—Practice—No interference except on question of law or principle.

Upon a question of valuation, where the opinions of competent Courts in India differ (and a fortiori where they concur), it is not the practice of the Board to interfere as an Appellate tribunal unless there appears to be error in law (including error in appreciating or applying the rules of evidence or the judicial methods of weighing evidence) or miscarriage of justice.

Where no error in principle or law was found in the method adopted by the High Court in arriving at its valuation of land which had been compulsorily acquired, the Privy Council refused to go into the question of valuation raised in an appeal preferred to it under sec. 54 of Act I of 1894, as amended.

This was an appeal (No. 43 of 1921) from a decree of the High Court at Bombay, dated the 20th September 1921, which modified a decree of the said Court,

dated the 30th August 1920, on a reference thereto under sec. 18 of the Land Acquisition Act, I of 1894.

The Appellant was the owner of certain property in Bombay known as Chinchpokli, which was compulsorily acquired by Government for the extension of the Municipal hospital for infectious diseases in Arthur Road.

The Deputy Collector awarded compensation at the rate of Rs. 8 per square yard. On a reference the High Court (Kajiji, J.) increased the compensation to Rs. 10 per square yard and on appeal the High Court (MacLeod, C. J. and Shah, J.) restored the Collector's award. The only question on the appeal was as to the amount of compensation to which the Appellant was entitled.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant.

Messrs. A. M. Dunne, K. C., A. M. Tulbot and Mr. Kenworthy Brown for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—In 1917 the Municipality of Bombay acquired a plot of land for purposes connected with an existing hospital, and the usual statutory proceedings took place before the Collector of Bombay to fix the amount of compensation to be paid for the land. The owner, being dissatisfied with the amount awarded, viz., Rs. 98,724, claimed a reference to the High Court, and in 1920 Kajiji, J., varied the Collector's award by increasing the rate to be allowed per square yard superficial from Rs. 8 to Rs. 10. This raised the total compensation to Rs. 1,39,970. Upon an appeal by the Municipality the High Court set aside the learned Judge's decree and dismissed the reference. They thus in effect con-

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firmed the Collector's award. From this decision the claimant now appeals.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion.

It has been declared in decisions of the Board, by which their Lordships are now bound, that appeals in valuation cases will only be entertained on questions of principle. [See *Secretary of State v. India General Steam Navigation and Railway Company* (1) and *Rangoon Botatoung Company, Limited v. The Collector, Rangoon* (2), per Lord Macnaghten; *Charandas v. Ameer Khan* (3), per Lord Buckmaster—"this Board will not interfere with any question of valuation"—and *Rai Bahadur Lala Narsingh Das v. Secretary of State for India* (4)]. Errors in law, including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, are matters that can and will be dealt with on appeal by this Board, but when, as in the present case, a difference of opinion has occurred between two Indian Courts upon the number of rupees per yard to be allowed for a plot of land, as to which

their Lordships can form no opinion of their own, it would be alike unprofitable and impracticable to embark on a comparison of the decisions of these Courts. In cases relating to the acquisition of land the whole matter, both of fact and law, is a proper subject of appeal in India, for there local knowledge and experience enable the learned Judges to form useful judgments upon the whole case. The amending Act of 1921 declares awards under the Land Acquisition Act, 1894, to be decrees, so as to bring them within the general rules as to appeals to this Board, but it does not prescribe any special mode, in which they are to be treated. This Board has found it necessary to limit the extent of the inquiry, in order to spare the parties costly and fruitless litigation. Just as in cases where there are concurrent findings of fact in the Indian Courts, it has long been the general rule of the Board not to allow such findings to be re-opened here [*Naragunty Luchmedavamah v. Vengama Naidoo* (5) and *Umrao Begum v. Irshad Hussain* (6)], so it has now been settled that this Board will not review the decree of an Indian Appellate Court merely upon questions of value. Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinions of competent Courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere, as an Appellate tribunal, unless there appears to be error in law or miscarriage of justice.

In view of this practice the present case may be shortly dealt with. The plot to be acquired was irregular in shape

(1) I. L. R. 36 Cal. 967: s. c. 14 C. W. N. 134 (1909).

(2) L. R. 39 I. A. 197 at p. 201: s. c. I. L. R. 40 Cal. 21; 16 C. W. N. 961 (1912).

(3) L. R. 47 I. A. 264: s. c. I. L. R. 48 Cal. 110; 25 C. W. N. 289 (1920).

(4) Reported 29 C. W. N. 522 (1924).

(5) 9 M. I. A. 87 (1861).

(6) L. R. 21 I. A. 163: s. c. I. L. R. 21 Cal. 997 (1894).

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and contour. Except at one point, and there only by a narrow passage, it had no access to any road. Part of it was hollow and low-lying, so that in the rains water accumulated there to the depth of several feet. No transactions were proved in respect of land closely adjacent to or precisely similar to this plot and such transactions as had occurred were cases of development and sale at dates not at or about the material time, *viz.*, 1917. The question, whether or not there had afterwards been an upward trend in market values generally, was not only highly disputable as a matter of opinion, but was not affirmatively supported by any satisfactory proof.

Both parties admitted that the most satisfactory use, to which the land could be put, was the erection of workmen's dwellings, and the value of the land for this purpose accordingly became the question to which both directed their attention. Development of this kind required the dedication of a considerable part of the surface, in order to provide an access road, and also the raising of the whole surface to one level, free from risk of flooding, by permanently filling in the cavities with suitable loose material. Estimates of the area of land required for the road and of the cost of filling in per cubic yard were accordingly prepared, and were agreed on both sides. It does not appear, however, that any allowance was made for the time required to enable the made ground to settle, or for the risk that unexpected settlements might take place, and probably these factors were beyond any exact estimation. Of course the circumstances that might exist, when the work was done and the realisable value of the developed site could be ascertained, were alike beyond human foresight.

Kajiji, J., appears to have addressed himself to the question of the fair compensation for land taken in 1917, to be allowed as at that date, as if it were an algebraic problem, which could be solved by an abstract formula. He sought to ascertain what value per yard the land might be supposed to have, if improved at some uncertain date, by treating the cost of filling in the cavities as a determined sum, to which there could not be any addition, and by deducting this sum alone from the supposed realisable value after future development. From these somewhat abstract factors he arrived at a concrete rate per superficial yard to be paid presently by way of compensation. In doing so he took no account of the factor of interest on the cost of the filling in and the other development work during the uncertain interval before the time of realisation might arrive.

From his conclusions thus arrived at the High Court dissented. Their reasons are not very clearly given, but this may be due to the fact that the evidence, which they discussed, is not very clearly recorded. At any rate, as it appears to their Lordships, they fell into no error of principle in their criticisms of the judgment of Kajiji, J., or in the process by which they arrived at their own conclusions. In dissenting from the method, which the learned Judge seems to have followed, they were certainly right. Factors such as he omitted to notice may be of great importance or of little, or even may be truly negligible, according to the circumstances of the particular case, but it cannot be right to ignore them altogether, as having no place at all in a rigid system of calculation. They were guided by their own view, as they were entitled to be, of the weight of the various pieces of evidence, nearly all of indirect

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bearing on the problem in hand—and in many cases only imperfectly developed. They thought, as they were entitled to think, that the grounds, on which the supposed rise in general market values was rested, were so unsubstantial in themselves and so distantly related to the circumstances of the site in question, as not to amount to any evidence on which to rest the judicial conclusion that something should be allowed for a rising market.

After carefully examining the evidence and the way in which the High Court appears to have dealt with it in arriving at the conclusion now under appeal, their Lordships are unable to find that there has been any error in principle or in law in the method of arriving at it. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors : Messrs. T. L. Wilson & Co. for the Appellant.

Solicitor : The Solicitor, India Office, for the Respondent.

G. D. M.

(ORDINARY ORIGINAL CIVIL JURISDICTION.)

SUIT No. 1926 OF 1921.

PAGE, J.	}	NAGENDRA NATH PALIT,
1925,	}	Plaintiff,
5, August.	}	v.
	}	ROBINDRA NABAIN DEB,
	}	Defendant.

Hindu law—Shebait's right of worship of family deity, alienation to another member of family, if legal in the absence of custom—"Benefit to idol," if justifies alienation—"Consensus" of persons interested, if justifies alienation—"Benefit," what is.

There is a distinction between a shebait's obligation to perform the spiritual duties of his office and his obligation to manage the temporalities of the idol. A shebaiti primarily and mainly is a

sacred office and because in certain circumstances a shebait may be entitled to alienate the temporalities of the deity, it does not follow that in similar or any circumstances he is entitled to transfer the spiritual duties and privileges which appertain to his office.

In the nature of things, there can be no necessity for a voluntary transfer of the spiritual duties of a shebait, and the doctrine that a shebait at his own will and pleasure is at liberty to alter the line of shebait on the ground that to do so would be for the benefit of the deity offends against the common law of India and is in conflict with the uniform rulings of the Judicial Committee of the Privy Council.

MUNCHARAM v. PREMSHUNKER (22), NIRAD MOHINI DAS v. SHEVADAS PAL DEWASIN (24) and dictum of MITRA, J., in RAJESWAR MULLICK v. GOPESWAR MULLICK (23) dissented from.

VIDYAPURNA TIRTHA SWAMI v. VIDYANIDHI TIRTHA SWAMI (34) referred to.

Quære.—Whether the consensus of all the persons interested in the worship would justify a transfer of the spiritual rights and duties of the office of a shebait.

RAJA VURMA VALIA v. RAVI VURMAH MUTHA (9), KHETTER CHUNDER GHOSE v. HARIDAS BANDOPADHYA (14), PROMOTHA NATH v. PRADYUMNA KUMAR (15) and SETHURAMA SWAMI v. MERUSWAMY (16) referred to.

(9) I. L. R. 4 I. A. 56, 76 (1876).

(14) I. L. R. 17 Cal. 557 (1890).

(15) I. L. R. 52 Cal. 809 : s. c. 30 C. W. N. 25 (P. C.) (1925).

(16) I. L. R. 41 Mad. 296 (1917).

(22) I. L. R. 6 Bom. 296 (1882).

(23) I. L. R. 35 Cal. 226 : s. c. 12 C. W. N. 323 (1907).

(24) I. L. R. 36 Cal. 975 : s. c. 13 C. W. N. 1084 (1909).

(34) I. L. R. 27 Mad. 435 (1908).

NAGENDRA NATH PALIT v. ROBINDRA NARAIN DEB.

The nature of the "benefit" which would justify alienation of the corpus of endowed property by the shebait considered.

PROSUNNO KUMARI DEBYA v. GOLAB CHAND (8), KONWAR DOORGANATH ROY v. RAM CHUNDER SEN (28), ABHIRAM GOSWAMY v. SHYAMA CHARAN NUNDY (29), PALANIAPPA CHETTY v. SREEMATH DEVASIKAMONY PANDARA SANNADHI (30), NALLAYAPPA PILLIAN'S case (31), BHUGWANDAS NAIK v. MAHADEO PRASAD (32) and SHANKAR SAHAI v. BECHU RAM (33) referred to.

The facts of the case appear from the judgment.

Messrs. N. N. Sircar, B. K. Ghose and B. C. Kar for the Plaintiff.

Messrs. H. D. Bose and A. K. Deb for the Defendant.

Mr. H. D. Bose :—Kumar Girindra Narayan Deb, the original Plaintiff in this suit, was a *shebait* under the Will of the late Raja Sir Radha Kanto Deb Bahadur. By a Bengalee *arpannama*, dated 13th September 1918, Girindra purported to make a gift of his turn of worship or *pala* under the said Will to the Defendant and his heirs, etc. Thereafter Girindra instituted this suit for a declaration that the said *arpannama* was a *benami* transaction and as such was void and inoperative in law. Pending this suit Girindra died leaving a Will by which he appointed the Plaintiff amongst others as an executor. The Plaintiff got him-

self substituted in place of Girindra and is continuing this suit.

My first point is that the present Plaintiff being only an executor has no *locus standi* and cannot continue this suit. [Cited sec. 89 of the Probate and Administration Act]. Moreover Girindra's legal heir is alive and he alone can challenge the transaction and not the present Plaintiff who had no title. My second point is that the *arpannama* having been executed by Girindra during his lifetime is valid and operative in law. [Cites *Rajeswar v. Gopeshwar* (23)].

PAGE, J.—In transferring the *pala* is not he defeating the object of the founder? In any event the transfer must be either for necessity or benefit of the idol.

Mr. Bose.—He is not defeating the object of the founder. And the transfer was for the benefit of the idol. I am the Defendant and a Plaintiff having no title cannot challenge mine.

Mr. Sircar.—The Plaintiff has good title to continue the suit for Girindra as will appear from the pleadings. As for the second point this is not an absolute dedication, so Girindra remained the owner of the property. The Privy Council have held under the common law of India the transfer of *palas* or turns of worship are not valid in Hindu law. [Cites *Rajah Vurmah Valia v. Ravi Vurmah Mutha* (9) and *Gnanasambanda Pandora v. Velu Pandaram* (6)].

PAGE, J.—It seems that such transfers are contrary to the principles of Hindu law.

Mr. Sircar.—Yes, *shebait* cannot

(8) L. R. 2 I. A. 145, 150 (1875).

(28) L. R. 4 I. A. 52; s. c. I. L. R. 2 Cal. 341 (1876).

(29) I. L. R. 36 Cal. 1003; s. c. 14 O. W. N. 1 (P. O.) (1909).

(30) L. R. 44 I. A. 147; s. c. I. L. R. 40 Mad. 709; 21 O. W. N. 729 (1917).

(31) I. L. R. 27 Mad. 465, 473 (1903).

(32) I. L. R. 35 All. 390, 394 (1923).

(33) I. L. R. 47 All. 381 (1925).

(9) L. R. 27 I. A. 69, 76; s. c. 4 O. W. N. 329 (1899).

(6) L. R. 4 I. A. 56, 76 (1876).

(23) I. L. R. 35 Cal. 226; s. c. 12 O. W. N. 323 (1907).

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transfer even to a co-shebait. [Cites *Gobinda Kumar Roy v. Debendra Kumar Roy* (21)].

Therefore under the law this transfer is invalid. Moreover there was no legal necessity or benefit to the idol.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—This case raises an issue of deep and general interest to the Hindu community, viz., whether a *shebait* is entitled to transfer the rights and duties which appertain to his office.

On the 19th April 1867 Raja Sir Radha Kanto Deb died. He was an erudite Sanskrit scholar, and a personage of culture and distinction. He left surviving him three sons and numerous other relations of whom the following is a pedigree.*

On the 3rd August 1863 the Raja made his last Will which has been admitted to probate, although the terms thereof have formed the subject of much litigation. Under this Will a large estate passed to the executors and trustees subject to certain trusts, but for the purpose of my judgment in this suit, I need refer only to those set out in the 12th, 15th, 16th clauses of the Will. Under the 12th clause it is provided :—

The executors and trustees shall pay to my sons or their heirs and representatives such sums for the sheba or service of my family idols and the usual poojahs that are celebrated in my house and the periodical Sradhas of my ancestors, of my late wife and of myself when dead as to the executors and trustees may seem fit and proper, but the executor and trustees are not to be personally responsible for the proper performance of this trust, which is to devolve and be a burden and duty upon the recipient and recipients of the said sums.

(21) 12 O. W. N. 98 (1907).

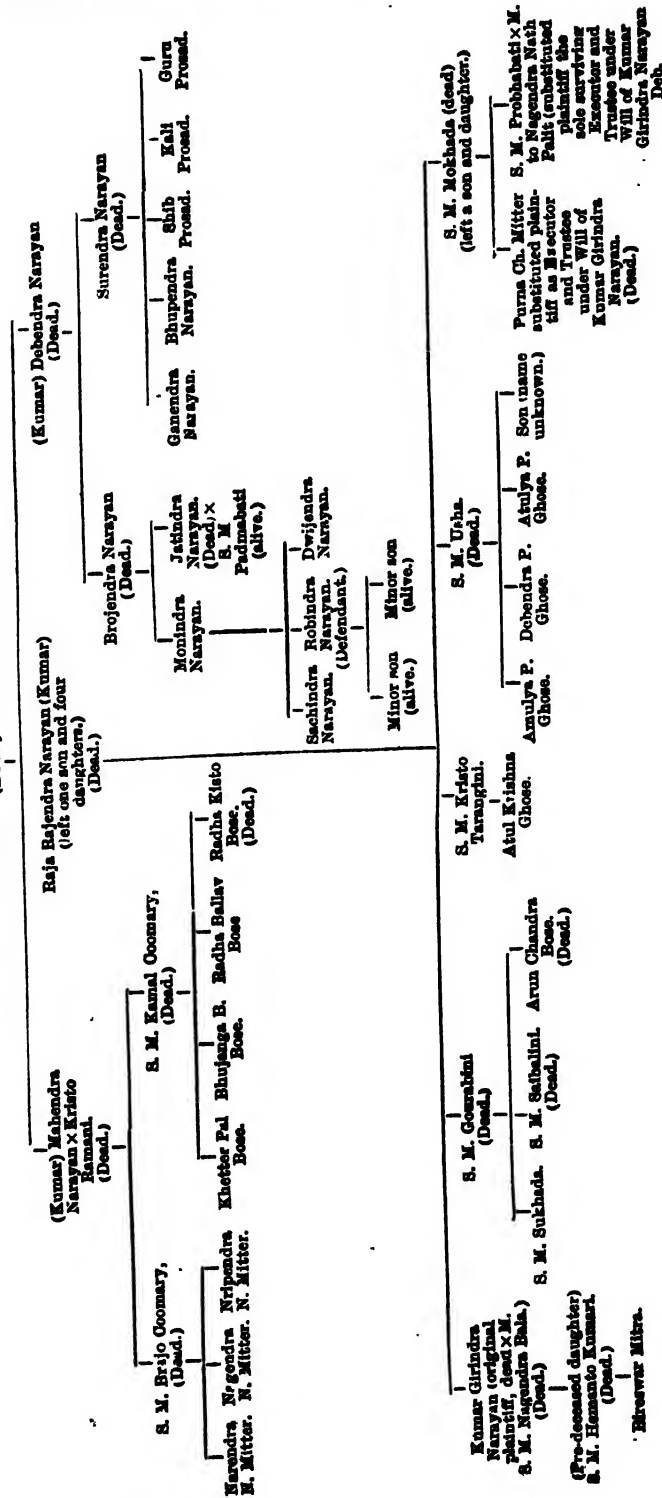
Under the 15th clause provision was made for the mode in which the family dwelling-houses, including a certain garden-house at Sukchar, should be used. Under the 16th clause it is provided that—

the clothes, ornaments, jewels and other articles for the use of the family idol, daily or on festive occasions and relating to the pujhas and ceremonies are to remain in the common custody of my sons and heirs, provided nevertheless that the articles above mentioned shall not be appropriated to any private use of my sons or their heirs.

By a decree of the High Court (Peacock, C. J. and Macpherson, J.), dated 20th September 1869, it was declared that the bequests contained in the 12th and 16th clauses were valid, and as regards the 15th clause it was declared that in so far as the terms thereof related to the dedication of property to the family idol, Gobinjee, the same were valid, but in so far as the said clause related to the use of the family dwelling-houses and garden, the directions of the testator must be limited to the members of the family who were living at the time of his death. By a decree of the High Court (Macpherson, J.), dated 6th October 1871, it was *inter alia* ordered that the worship of the idols was to be performed by the three branches of the family in *palas* of one year in succession and that the " garden with *baitakkhana* at Sukchar be enjoyed by the person or persons entitled to perform the *deb sheba* while performing the same during his or her turn of worship." Since that date further litigation in connection with the terms of the Will has taken place, but it is unnecessary, I think, that I should refer to these later proceedings except to mention that by a decree of the High Court (Sale, J.), dated 7th September 1899, the garden and house at Sukchar were included in

* See next page.

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the trusts under the Will of 3rd August 1863, provided that the same should be used in the manner prescribed under the decree of the 6th October 1871.

On the 13th September 1918 Girindra Narayan, the only son and heir of Raja Rajendra Deb, being entitled to a *pala* of the worship of the deities, referred to in the Will, executed in favour of the Defendant an indenture of *arpannama* in the following form :—

This indenture of *arpannamah* Patra made this thirteenth day of September in the Christian Year one thousand nine hundred and eighteen, between Kumar Girindra Narain Deb, son of the late Raja Rajendra Narain Deb Bahadur of the Sovabazar Rajbati in Raja Nabo Kissen Street in the town of Calcutta hereinafter called the grantor of the one part and Robindra Narain Deb, son of Monindra Narain Deb of the same place of the other part hereinafter called the grantee (in which term is included his lineal male heirs and representatives unless the context is repugnant thereto) whereas Raja Sir Radha Kanto Deb Bahadur, K.C.S.I. of Sovabazar in the town of Calcutta died on the nineteenth day of April one thousand eight hundred and sixty-seven leaving behind him three sons, viz: Kumar Mahendra Narain Deb, Kumar (subsequently Raja) Rajendra Narain Deb and Kumar Debendra Narain Deb and a Will bearing date the third day of August in the year of Christ one thousand eight hundred and sixty-three. And whereas a probate was obtained by the executor therein named of the Will from the Testamentary and Intestate Jurisdiction of the Hon'ble High Court of Judicature at Fort William in Bengal on first day of May one thousand eight hundred and sixty-seven, and whereas the grantor herein Kumar Girindra Narain Deb, the only son and heir of Raja Rajendra Narain Deb, deceased, was born during the life-time of the said testator Raja Radha Kanto Deb Bahadur and whereas under the terms and provisions of the said Will the grantor is sufficiently possessed of the right of worship of the family deity Sree Sree Iswar Radha Gobinda Jew

and other deities in the manner indicated in clause 12 of the said Will and as such sufficiently entitled to and possessed of the right of enjoyment of certain properties, privileges, rights and liberties particularly set forth in the said Will by clause 12 and also by terms and provisions of the consent decree, dated 6th of October one thousand eight hundred and seventy-one, in Suits Nos. 155 and 220 of 1868 and also under the decree in Suit No. 699 of 1899 in the High Court of Judicature at Fort William in Bengal in its Ordinary Original Civil Jurisdiction to any other rights, privileges in or any other deeds and documents and whereas the grantor herein is performing the daily worship of the said family deity Sree Sree Iswar Radha Gobinda Jew and other pujas according to his turn of worship and the annual *Sradh* in compliance with the terms and provisions of the said clause 12 of the said Will and in the manner indicated therein and the decrees and orders set forth above and is in full possession, enjoyment of the rights, privileges, etc., as set forth in the said Will of Raja Sir Radha Kanto Deb Bahadur and the consent decree dated sixth day of October one thousand nine hundred and seventy-one made in Suits Nos. 155 and 220 of 1868 and also of the decree of seventh day of September one thousand eight hundred and ninety-nine in Suit No. 699 of 1899 in the Original Side of the High Court and whereas the grantor has no male lineal descendant and has only a grandson Bireswar Mitra son of his deceased daughter Sreemuty Hemanta Kumari Dasi who the grantor holds and considers is unfit to perform the various orders and duties imposed upon him and enjoy the privileges by the terms and provisions of the Will of the late Raja Radha Kanto Deb Bahadur and the decree set forth above by reason of his want of training and defective moral character and whereas the grantor hath given the grantee sound and regular training as to the way in which the said worship of the family deities Sree Sree Laksmi Narain Jew Salgram established and consecrated by his late father and also of the periodical *Sradh* from his infancy and believes and considers the said grantee the best person to perform truly and faithfully the worship of the said

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deities and is best able to manage the properties and control the affairs in connection with the worship of the said family deities other pujahs and Shradhs of the late Raja Sir Radha Kanto Deb Bahadur instead of the grantor and whereas the said grantee Robin-dra Narain Deb is great great grandson of the said testator Raja Sir Radha Kanto Deb Bahadur, K.C.S.I. in the male line of succession and best able to perform the worship of the said deities. Now this Indenture witnesseth that in consideration of the said grantee being a great great grandson of the said testator Raja Sir Radha Kanto Deb Bahadur in the male line of succession and by his character, education and training is best able to perform the worship of the said family deity Sree Sree Radha Gobinda Jew and other deities of late Sir Radha Kanto Deb Bahadur and of Sree Sree Laksmi Narain Jew Salagram as above stated and in consideration of the fact that the arrangement will be beneficial for the said deities as it will be conducive to the proper conduct of the worship the grantor Kumar Girindra Narain Deb doth hereby convey, confer, alienate and transfer his right, title and interest to and in the worship of the said family deity Sree Sree Radha Gobinda Jew and other deities with all rights and privileges that he is entitled to under the will of the said Raja Sir Radha Kanto Deb Bahadur, K.C.S.I. and the consent decree dated the 6th day of October one thousand eight hundred and seventy-one in Suits Nos. 155 and 220 of 1868 on the Original Side of the High Court and by any other document for the performance of the said seva and pujah to be held and enjoyed by him so long as he shall be alive and capable of performing the seva or service of the family deity etc., and the usual pujahs that are celebrated in the house of Raja Sir Radha Kanto Deb Bahadur, K.C.S.I. to be continued to be so held and enjoyed by his heirs in the male line of succession only on condition of their duly performing the seva and service of the said family deities etc., with other usual pujahs that are held and celebrated in the family Rajbati and not for any personal gain and that in the event of failure in the male line of succession of the same grantee the grantor

doth hereby confer or convey and alienate his right of worship of the said family deities etc and privileges attached thereto under the Will of the late Raja Sir Radha Kanto Deb Bahadur, K.C.S.I., and the consent decree of the sixth day of October one thousand eight hundred and seventy-one in Suits Nos. 155 and 220 of 1868 in the High Court of Judicature at Fort William in Bengal or by any other deed or deeds in favour of Dwijendra Narain Deb the third son of Monindra Narain Deb and in his absence his heir or heirs in the male line of succession who may be living at the time to be held and enjoyed by him or them only on condition of his or their performing the seva or service of the said deities, etc., and in his or their absence the grantor doth hereby confer, convey, transfer and alienate his right of worship of the said family deities and the several pujahs and all rights and privileges attached to the same under the terms and provisions of the Will of late Raja Sir Radha Kanto Deb Bahadur and those of the consent decrees of sixth day of October one thousand eight hundred and seventy-one in Suits Nos. 155 and 220 of 1868 and the decree dated seventh day of September one thousand eight hundred and ninety-nine in Suits No. 699 of 1899 in the Original Side of the High Court of Judicature at Fort William in Bengal to the nearest male agnate that may be alive at the time to the exclusion of Sachindra Narayan Deb eldest son of Monindra Narain Deb and his representatives.

In witness whereof I do hereunto affix my signature.

(Sd.) GIRINDRA NARAYAN DEB.

Witnesses:

Ramesh Chandra Bose,
Solicitor, Calcutta.

Anil Chandra Sircar,
Clerk to Babu Romesh Chandra Bose,
Solicitor.

On the 14th September 1918 Girindra executed a general power-of-attorney in favour of the Defendant empowering him *inter alia* to represent Girindra in all matters connected with the trust estate, and to receive monies for the purpose of the *deb sheba* expenses. After execut-

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ing the said documents Girindra went to Benares, and in his absence the Defendant performed the Durga Puja of 1918. In December 1918 Girindra returned to Calcutta, and becoming suspicious of the manner in which the Defendant was managing his affairs cancelled the said power-of-attorney, and on the 23rd June 1921 filed the present suit, praying *inter alia* that the said indenture of *arpan-nama* be declared invalid and void, and that the said indenture be cancelled, and for incidental relief. On the 20th April 1923 Girindra died, and on 3rd July 1923 an order was made substituting his two executors as Plaintiffs in his stead. On the 7th March 1924 one of the executors died, and on the 14th April 1924 an order was made directing the present Plaintiff, as the sole surviving executor to prosecute the suit.

The Defendant has based his defence upon three grounds : (1) that the present Plaintiff is not entitled to maintain the suit ; (2) that Girindra did not execute the said indenture of *arpannama* with the intention thereby of defeating or delaying his creditors, as the Plaintiff alleged, or in the alternative, if such was his intention, that the said creditors were thereby defeated and/or delayed ; (3) that the transfer of Girindra's rights and interests in the turn of worship of the said deities was for the benefit of the deities, and that Girindra executed the said indenture *bona fide* in the interest of the deities in order that the worship should be more fittingly celebrated and the endowment more effectively managed.

As regards the first ground of defence, the Defendant urged that as the subject-matter of the suit related to a personal right of worship vested in Girindra as the heir of Rajendra, the cause of action, if any, which Girindra possessed did not

pass to his executors, for *actio personalis moritur cum persona*. In my opinion, there is no substance in this contention. Apart from the question as to whether, having regard to the interlocutory proceedings in this suit, it is open to the Defendant to raise this contention, by para. 27 of the plaint the Plaintiff alleged that his " turn of worship commenced from the 1st Bysack 1328 (14th April 1921), and he had begun to perform the worship of the deities in accordance with the testator's Will at his own expense. The Plaintiff has been put to great hardship in consequence of the withdrawal of the funds by the said trustee at the instance of the Defendant." This allegation is not denied in the written statement, and the executors clearly are entitled to recover from the trust estate the reasonable expenses of the *palas* which Girindra incurred, and this relief they cannot obtain unless and until the indenture is cancelled, or declared to be void. In my opinion, the cause of action is not merely of a personal nature, and the Plaintiff is entitled to maintain the suit. [*Peary Mohan Mukerjee v. Narendra Nath Mukerjee* (1)].

In support of the second ground of defence, evidence was led, and arguments were addressed to me for the purpose of casting aspersion upon the moral conduct, and impugning the financial dealings of the parties in connection with this *debutter* estate. Now, this is a dispute between relatives, and the parties are members of a well known and distinguished family. It is very desirable, I think, that I should not embark upon a discussion of the matters raised in this ground of defence, for the result inevitably would be to embitter, and not to heal, the dis-

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sensions which have arisen among the members of this family; unless, indeed, I am compelled to do so in order to determine the issues raised between the parties.

It is a source of satisfaction to me that I am not called upon to express any opinion upon the second ground of defence, for, in my opinion, the terms of the indenture of *arpannama* are such that I must hold the indenture to be in law void and inoperative. It is to be observed that by the operative words in the indenture the grantor "doth hereby convey, confer, alienate and transfer his right, title and interest to, and in the worship of, the said family deity Sree Sree Radha Gobinda Jew and other deities with all rights and privileges that he is entitled to under the Will of the Raja Sir Radha Kanto Deb and the consent decree, dated the 6th October 1871, in Suits Nos. 155 and 220 of 1868 on the Original Side of the High Court, and by any other document for the performance of the said *sheba* and *pujah* to Robindra, to be held and enjoyed by him so long as he shall be alive and capable of performing the *sheba* or service of the family deities." And later: "doth hereby confer, convey, transfer and alienate his right of worship of the said family deities, and of the several *pujahs* and all rights and privileges attached to the same to the nearest male agnate that may be alive at the time to the exclusion of Sityendra Narain Deb, eldest son of Monindra Narain Deb, and his representatives."

It is conceded that the rights and privileges conveyed by the indenture are solely those relating and attached to the worship of the deities, and that the line of succession to the *shebaiti* set out in the indenture is neither that laid down by the founder, nor that prescribed by the

principles of the Hindu law. It is contended, however, that inasmuch as the provisions of the indenture were "for the benefit of the deities," and the grantee was a member of the founder's family, the indenture was one that Girindra as *shebait* was competent to execute, and that the transaction should receive the sanction of the Court. I have to determine whether this contention is sound or not.

A Judge who is not a Hindu must needs approach the consideration of such a question with diffidence, but I have had the advantage of hearing the matter exhaustively argued by distinguished Hindu Counsel, and I have myself explored the case-law and such Hindu texts as bear upon the subject. The ancient sages for the most part are silent on the subject of *shebaiti* rights and duties, [*per* Seshagiri Aiyer, J., *Annaya Tantri v. Ammakka Hengsu* (2)], but the decisions are numerous, and conflicting and I find myself, therefore, at liberty—indeed I am constrained to express my own opinion on the matter.

Now, "*sheba*" means "service," and whenever an image or idol is set up and consecrated, there must needs be a *shebait* to serve and sustain the deity whose tabernacle the image is. The duties and the privileges of a *shebait* primarily are those of one who fills a sacred office. He must take the image into his charge and custody; he must see that it is washed and fed and clothed and tended, and that due provision for its worship is made: "We need not describe here in detail the normal type of worship of a consecrated image—the sweeping of the temple, the process of smearing, the removal of the previous day's offerings of flowers, the presentation of fresh flowers, the respectful oblation of rice and flowers and

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water and other like practices. It is sufficient to state that the deity is in short conceived as a living being, and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy, the vivified image is regaled with necessities and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest." [Per Mookerjee, J., in *Rambrama v. Kedar* (3)]. The main concern of a *shebait*, therefore, is duly to carry out the sacred duties of his office. He may perform his spiritual functions personally or he may—indeed, if he does not possess the necessary qualifications to enable him to celebrate the worship of the deity he must,—appoint a qualified deputy to officiate in his stead. [*Annaya Tantri v. Ammakka Hengsu* (2)].

Now, it usually happens when an image is consecrated that property, moveable or immoveable, is dedicated to its use. This is the common, indeed, almost the invariable, practice. After dedication the proprietary title to the property is vested in the idol, the right to possess and the duty to manage the property in the *shebait*. [*Jagadindra's case* (4)]. "As regards the property the manager is in a position of a trustee, but as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity [Per Lord Macnaughten; *Ramanathan Chetti v. Murugappa Chetti* (5)]. There is "no distinction between the office and the property of the endowment; the one is

attached to the other [Per Sir Richard Couch in *Gnanasambanda Pandara v. Velu* (6)] but, in truth, it is the endowment which is attached to the office, not the office to the endowment, for while there may be a *shebait* without endowed property, there cannot be property dedicated to an idol without a *shebait* to manage it. "I might at once say that in respect of such a religious office it is not the right of the office-holder to receive emoluments which is the important or principal right, but, in my opinion, it is the right of the deity to have certain services performed to it which is a primary right. I also think that as regards the religious office itself the duties of the office should be considered as the substance of the office, the right to receive the emoluments being only an appurtenance of the said deity . . . I am inclined to hold that it is the rights that are subordinate and appurtenant to the duties, and it is not the duties that are subordinate and appurtenant to the rights" [per Sadasiva Aiyer, J., in *Sundarambal Ammal v. Yoga Varma Gurukhal* (7)].

I have emphasised the distinction between the *shebait's* obligation to perform the spiritual duties of his office, and his obligation to manage the temporalities of the idol, because it is important to bear in mind that a *shebaiti* primarily and mainly is a sacred office, and that it does not follow, because in certain circumstances a *shebait* may be entitled to alienate the temporalities of the deity, that in similar or any circumstances he is entitled to transfer the spiritual duties and privileges which appertain to his office.

Now, on the question which falls for determination the authorities in India

(2) I. L. R. 41 Mad. 886 (1918).

(3) 36 O. L. J. 478, 483 (1922).

(4) L. R. 81 I. A. 203; s. c. I. L. R. 32 Cal. 132 (1904).

(5) I. L. R. 29 Mad. 283, 289 (1906).

(6) L. R. 27 I. A. 69, 77; s. c. 4 O. W. N. 329 (1899)..

(7) I. L. R. 38 Mad. 850, 854 (1914).

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are numerous, but, as I apprehend them, the decisions sometimes are inconsistent, sometimes inconclusive, and if I refrain from examining them in detail, I do so, not out of want of respect for the learned Judges who were parties to the decisions, but because I am content to found my judgment upon the common law of India and the decisions of the Judicial Committee of the Privy Council which, to my mind, put the matter beyond controversy. In 1869 an appeal was heard by the Judicial Committee in which the issue was whether a *shebait* was entitled to sell certain *jammās* connected with a taluk which had been dedicated to an idol. The Judicial Committee held that "The taluk itself with which these *jammās* were connected by tenure was dedicated to the religious services of the idol. The rents constituted, therefore, in legal contemplation, its property. The *shebait* had not the legal property, but only the title of manager of a religious endowment. In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage." [*Maharani Shibessuree Debya v. Mothooranath* (7a)].

In 1875 in *Prosunno Kumari Debya v. Golab Chand* (8), Sir Montague Smith, in the course of the judgment, observed that "there is no doubt that as a general rule of Hindu law property given for the maintenance of religious worship and of charities connected with it is inalienable But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion, competent for the *shebait* of property dedicated to the worship of the idol in his capacity as *shebait*

and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them . . . It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must, in the nature of things, be entrusted to some person as *shebait*, or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least to as great degree as the manager of an infant heir. If this were not so, the estate of the idol might be destroyed or wasted, and its worship discontinued for want of the necessary funds to pr serve and maintain them."

In 1876 in *Raja Vurma Valia v. Ravi l'urmah* (9) the issue was whether the urallars or managers of a pagoda were entitled to assign the conduct of the worship and the right to manage the property of the endowment to the Raja of Cherakel. The deed of assignment recited that "the pagoda and its dependent institutions belong exclusively to the four tarwads of the urallars; that they are in debt to the amount of Rs. 46,000; that as the property was insufficient to conduct the affairs of the pagoda, this debt was likely to increase, that the Cherakel was willing to pay off the debts and take over the pagoda and its property and conduct all the ceremonies, and that the urallars had received in cash Rs. 46,000 to pay off debts and Rs. 10,000

(7a) 13 M. I. A. 270 (1869).

(8) L. R. 2 I. A. 145, 150 (1875).

(9) L. R. 4 I. A. 53, 76 (1876).

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for their own use. In consideration of the above the deed assigned over to the Raja all the property, moveable and immoveable, of the pagoda, and the uraima right of the four families, with the reservation of the right to join in the assembly for conducting the ceremonies and to receive the privileges attached thereto."

Sir James Colville who in this appeal delivered the opinion of the Board, observed: "The first question is whether, independently of custom, the persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seemed to be strongly opposed to such a power and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship, and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district, open to the public opinion of that district and having that sort of family interest in the maintenance of this religious worship which would ensure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties with all the property of the trust to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken. Such a transferee might be a powerful

man, as probably this Cherakel Rajah is; and therefore, the less amenable to public opinion, the less capable of being reached by the Courts, and the more likely to deal with the institution with a high hand. Mr. Mayne almost admitted that the broad principle *delegatus non potest delegare* would *prima facie* apply to such a case." After discussing the authorities, his Lordship added: "This being the state of the authorities, their Lordships are of opinion that there is no authority binding even on the Court of Madras which is inconsistent with the judgments under appeal; that the general principle affirmed by those judgments is correct; and consequently that the urallars had no power under what may be termed the common law of India to transfer their uraima right to the Plaintiff, the Cherakel Rajah. But it is said that in India, and particularly in that part of India in which this pagoda is situated, custom must prevail against the general law. That such would be the consequence of a well-proved and established custom their Lordships do not deny But their Lordships are of opinion that no custom which can qualify the general principle of law has been established in this case, and they desire to add that if the custom set up was one to sanction not merely the transfer of a trusteeship, but as in this case the sale of a trusteeship for the pecuniary advantage of the trustee, they would be disposed to hold that that circumstance alone would justify a decision that the custom was bad in law."

In 1899 in *Gnanasambanda Pandara v. Velu* (6) a later Board of the Judicial Committee restated the same rule: "In *Raja Vurma Valia v. Ravi Vurmah*

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Mutha (9) this Committee held that an assignment by the urallars of a pagoda of the right of management thereof was beyond their competence under the common law of India, and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void, and do not give any title to the purchaser." Alienations by a *shebait* in contravention of the law as laid down in these decisions are void and need not be set aside: *Raja Vurma v. Ravi Vurmah* (9); *Narayanam v. Lachamanan* (10) and such an alienation may be declared void even at the instance of the alienor [*Jagat Mohini Dasi v. Sukhimani Dasi* (11), *Sreemuty Mallika Dasi v. Ratanmani* (12)]. The Judicial Committee have never deviated from the principles laid down in the above cases, and it is settled law that "in the absence of any custom or usage to the contrary or any term to that effect in the deed of endowment a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder [*per Mookerjee, J.*, in *Mahamaya Debi v. Haridas Halder* (13)].

In the present case it is conceded that no usage obtains in the family which would render valid the indenture of *arpannama*, if otherwise it is void under the common law of India. I need not therefore, embark upon the still unsettled question as to whether, and if so, in what circumstances, the Courts would sanction an usage under which rights of worship have been alienated by a *shebait*. Again,

(9) L. R. 4 I. A. 58, 76 (1876).

(10) I. L. R. 39 Mad. 458 (1915).

(11) 17 W. R. 41 (P. C.) (1871).

(12) 1 C. W. N. 493, 496 (1897).

(13) I. L. R. 42 Cal. 455, 470; s. c. 19 C. W. N. 208 (1914).

there is authority for the proposition that the consensus of all the persons interested in the worship may "give the estate another direction," [*Raja Vurma Valia v. Ravi Vurmah Mutha* (9), *Khetter Chunder Ghose v. Haridas Bandopadhyaya* (14) and *Promotha Nath v. Pradyumna Kumar* (15)]: but so far as I know the Judicial Committee in no case have determined that such a consensus of opinion would justify a transfer of the spiritual rights and duties of the office of a *shebait*: *Sethurama Swami v. Meruswamy* (16). In this case, however, it is admitted that Girindra executed the *arpannama* entirely at his own will, and upon his own initiative, and that he neither invited nor obtained a consensus of opinion among those interested in the worship of the deities in favour of the course which he pursued. It is further urged that Girindra as *shebait* was competent and entitled to execute the indenture of *arpannama* provided that either of the following conditions was fulfilled: (1) that the assignment of the *pala* was to a member of the founder's family qualified to perform the duties of *shebait*, or (2) that the assignment was "for the benefit of the deities." As regards (1) it is well settled that "according to Hindu law, when the worship of a *thakur* has been founded, the *shebaitship* is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution" [*Goswami Shree Gree Dhariji v. Rumanlalji Goswami* (17)].

(9) L. R. 4 I. A. 58, 58 (1876).

(14) I. L. R. 17 Cal. 557 (1890).

(15) I. L. R. 52 Cal. 809; s. c. 30 C. W. N. 25 (P. C.) (1925).

(16) I. L. R. 41 Mad. 296 (1917).

(17) L. R. 16 I. A. 137, 144 (1889).

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The High Court at Madras consistently has held that an alienation by a *shebait* of the corpus of the dedicated property, either to a member of the founder's family or to a stranger, is utterly void, *Kuppa v. Doraswami* (18), *Narayana v. Ranga* (19) and *Sundarambal Ammal's case* (7); see also *Juggurnath Roy Chowdhury v. Kishen Pershad* (20), *Narayana Chintaman* (20a), *Shri Ganesh v. Keshavarav* (20b), *Mallika's case* (12), *Gobinda Chowdhury v. Deb Kumar Roy* (21). In *Sm. Mallika's case* (12), Banerjee, J., observed that "It has been held in a uniform current of decisions both in this and in the High Courts of Bombay and Madras that a priestly office with emoluments attached to it is inalienable If it were necessary to give reasons for such a proposition so amply supported by authority as the proposition contended for on behalf of the Respondents, I may say that it would be contrary to public policy to allow an office like this to be transferred either by private sale or by sale in execution of a decree. The Defendant in this case is one of several *shebait*s of the idol, his turn of office extending for 11 days in a month; the emoluments consist of votive offerings, and if a person professing a religion different from Hinduism were to become the execution purchaser, it would lead to no end of complications and disturbances, which would be detrimental in the highest degree to the interests of other *shebait*s and of votaries generally."

It is not settled whether the renunciation of a *shebaiti* by the office-holder in favour of a sole immediate heir would be void: [*Narayana v. Ranga* (19)]. It may be—though I do not decide—that such an alienation would contravene the doctrine of *delegatus non potest delegare*: [*Raja Vurma Valia v. Ravi Vurmah Mutha* (9)], but if it be assumed that a *shebait* is competent to abdicate from his office, in my opinion, such an act would operate to transfer the office to the persons entitled thereto as reversioners under the foundation, or in default of any directions by the founder or of custom according to the principles of the common law of India. The office would not pass under or by virtue of any assignment of his office by the abdicating *shebait* whether it purported to be in favour of the sole immediate heir or of any other person, for every such assignment in my opinion is wholly void and inoperative. If the view of the position and status of a *shebait* which I have expressed is correct, it follows that the case of *Muncharam v. Premshunker* (22) was wrongly decided and ought not to be followed. *Rajeswar Mullick v. Gopeswar Mullick* (23) and *Gobinda Kumar Roy's case* (21). As regards (2) it is urged that the assignment in suit is valid and should receive the *imprimatur* of the Court because the transfer of the *pala* was "for the benefit of the deities." In support of this contention learned Counsel for the Defendant referred to the decision of this Court in *Nirad Mohini Dasi v. Shevadas Pal*

(7) I. L. R. 38 Mad. 850 (1914).

(12) 1 O. W. N. 493, 496 (1897).

(18) I. L. R. 6 Mad. 76 (1882).

(19) I. L. R. 15 Mad. 183 (1891).

(20) 7 W. R. 266 (1887).

(20a) I. L. R. 5 Bom. 393 (1881).

(20b) I. L. R. 15 Bom. 625 (1890).

(21) 12 O. W. N. 98 (1907).

(9) L. R. 4 I. A. 56, 81 (1876).

(19) I. L. R. 15 Mad. 183, 186 (1891).

(21) 12 O. W. N. 98 (1907).

(22) I. L. R. 6 Bom. 298 (1882).

(23) I. L. R. 35 Cal. 226; s. c. 12 O. W. N. 323 (1907).

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Dewasin (24) and the dictum of Mitra, J., in *Rajeswar Mullick's* case (23). With all respect to the learned Judges who decided these cases, for the reasons which I am about to state, I am of opinion that the decisions in *Nirad Mohini Dasi's* case (24) and in *Rajeswar Mullick's* case (23), so far as it is founded upon the same reasoning, are not in accordance with the law of India as enunciated by the Judicial Committee of the Privy Council, and I cannot acquiesce in them.

The contention which learned Counsel has urged upon the Court, in my opinion, is founded upon a heresy which has crept into the Hindu law, and ought to be exposed and eradicated. This is not the only branch of law in which the words "for the benefit" have caused error and confusion [see *Barwick v. The English Joint Stock Bank* (25), *Lloyd v. Grace, Smith & Co.* (26)]. Who is to determine whether any particular alienation is "for the benefit of the deity?" Is it the founder? Is it the persons interested in the worship? Is it the *shebait*s, or one or more of them? Is it the Court? I do not pause to hazard a conjecture, for, in my opinion, the doctrine contravenes the Hindu law, and in any event cannot be extended to an alienation of the spiritual rights and duties of a *shebait*. The genesis of the heresy may be found, I think, in a misapprehension of certain observations of Sir Montague Smith in *Prosunno Kumari's* case (8): "The authority of the *shebait* of an idol's estate would appear to be in this respect

analogous to that of the manager for an infant heir which was thus defined in a judgment of this Committee delivered by Lord Justice Knight Bruce: The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate, but where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is the thing to be regarded." *Hunooman Persaud Pandey v. Mussamat Babooi Munraj Kunwarji* (27). From the above passage the doctrine has been evolved that although there might be no necessity for any particular alienation of *debutter* property, yet, if the transfer was "for the benefit" or "for the clear benefit" of the endowment, it could be upheld according to the Hindu law. It is incumbent upon me, therefore, to examine more closely the rule propounded in *Prosunno Kumari's* case (8). It is to be observed that while Sir Montague Smith laid down that a *shebait* "may incur debts or borrow money for necessary purposes," his Lordship added: "The power, however, to incur such debts must be measured by the existing necessity for incurring them." Since 1875, the Judicial Committee have more fully defined the circumstances in which a *shebait* is empowered to alienate *debutter* property. In 1876 Sir Montague Smith, delivering the opinion of the Board in *Konwar Doorganath Roy v. Ram*

(8) L. R. 2 I. A. 145, 148 (1875).

(23) I. L. R. 35 Cal. 226 at p. 231: s. c. 12 C. W. N. 323 (1907).

(24) I. L. R. 36 Cal. 975, s. c. 13 C. W. N. 1084 (1909).

(25) L. R. [2] Ex. 259 (1867).

(26) [1913] A. C. 716.

(8) L. R. 2 I. A. 145, 151 (1875).

(27) 6 M. I. A. 393, 423 (1856).

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Chunder Sen (28) stated that the Rani Rashmoni, who had effected the alienation of the property then in suit "had, as the manager of the estate, power, if it were *debutter* dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular to alienate it if it became necessary to do so to preserve the rest of the family estate." And later in his judgment his Lordship, referring to *Prosunno Kumari's* case (8), observed that "in that case a *shebait* had incurred debts and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol; and this tribunal held that the position of the *shebait* was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate." In that case their Lordships held that the "sale of part of the land was justified by the *imperious necessity* of finishing the temple which had been commenced." In *Abhiram Goswamy v. Shyama Charan Nundy* (29), Sir Andrew Scoble, delivering the judgment of the Board, observed that "it is well-settled law that the power of the *mohunt* to alienate *debutter* property is, like the power of the manager for an infant heir, limited to cases of *unavoidable necessity*." Again, in *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi* (30), Lord Atkinson laid down that "if for the reasons above mentioned the grant of a lease in perpetuity of *debutter* lands at a fixed rent requires to be justi-

fied by *unavoidable necessity*, it is difficult to see why an absolute alienation in perpetuity of the same kind of land in consideration of a premium should not equally require to be justified by the same kind of necessity, since it brings about quite as completely the same prejudicial results." His Lordship also observed that "the only specific point touching the present case actually decided in these three authorities was this: that a *debutter* estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit of the estate.' It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it from injury or deterioration by inundation, this and such like things would obviously be benefits. The difficulty is to draw the line as to what are in this connection to be taken as benefits, and what not." An examination of these authorities leads to the conclusion that the power of a *shebait* to alienate the corpus of *debutter* property is to be measured by the exigencies of the occasion. An alienation of such property, in my opinion, cannot be justified unless it is impracticable duly to carry out the service and worship of the deity, and matters incidental thereto, or to preserve the dedicated property without incurring the expenditure, to defray which it is proposed to effect the alienation; and further, unless the required expenditure cannot be met out of the income of the endow-

(8) L. R. 2 I. A. 145, 148 (1875).

(28) L. R. 4 I. A. 52: s. c. I. L. R. 2 Cal. 341 (1876).

(29) I. L. R. 36 Cal. 1003: s. c. 14 O. W. N. 1 (P. O.) (1909).

(30) L. R. 44 I. A. 147: s. c. I. L. R. 40 Mad 709, 21 O. W. N. 729 (1917).

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ment, and without alienating the corpus of the estate. In short, the *shebait's* power of alienation must be exercised for purposes of defence and not of aggrandisement, as a shield and not as a sword. Occasions which would justify the alienation of the corpus will not frequently arise, for "even in cases where owing to causes beyond the control of the manager such as famine, etc., the income falls off, the uniform and approved practice of the country has been to regulate the scale of the services with reference to diminished income until the income returns to its normal condition, and not to keep up the service on a scale rendering the incurring of debts necessary, nor is money ever borrowed even for the purpose of repairs. One reason why a manager never thinks of mortgaging or selling the corpus for such a purpose is that he will ordinarily not be able to find a mortgagee or purchaser among the members of the community since the principle that property dedicated to a god ought never to be diverted for other purposes, operates so strongly on the mind of the community that even innocent participation in such diversion is understood to be sinful, and to forbode evil to the participant . . . Nor should it be forgotten that as shown by the formula with which grants and donations to charities usually conclude, the people take it that to renovate is even more meritorious than to found. In such circumstances it is obvious that the manager's powers are quite limited. He can only do what is necessary for the services of the idol, and he need only preserve and duly manage what property may belong thereto. It is no part of his duty to effect improvements with reference to existing endowments when the funds in his hands do not admit of it; nor is he called upon to enter into transac-

tions for the purpose of augmenting the funds of the institution. He cannot in any manner subject the institution in his charge to duties, obligations and burdens to which with reference to the nature of the foundation or otherwise the institution is not inherently or necessarily subject" [*per* Subramania Iyer (A. C. J.) in *Nallayappa Pillian's case* (31)].

Where there is an "*imperious necessity*" or an "*unavoidable necessity*" in the above sense compelling the *shebait* to alienate the property, such an alienation clearly is "for the benefit of the deity," but if there is no such necessity, the fact that the value of the estate will be increased if an alienation by sale, mortgage, exchange or otherwise is effected, will not justify such a transaction, although thereby it may be that the endowment can be benefited [*per* Subramania Aiyer (A. C. J.) in *Nallayappa Pillian's case* (31); *per* Lord Atkinson in *Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannadhi* (30), *Bhugicandas Naik v. Mahadeo Prasad* (32) and *Shankar Sahai v. Bechu Ram* (33)]. As it is admitted that there was no necessity in the sense I have indicated which would justify the execution of the *arpanama* in suit, in my opinion, the contention that the Court ought to uphold the *arpanama* on the ground that it was or might be "for the benefit of the deities" is misconceived, and irrelevant, and I reject it.

I desire to add that, in my opinion, the rule of necessity extends only to an alienation of the temporalities of the idol. It does not, and in my opinion, it cannot

(30) L. R. 44 I. A. 147; s. c. I. L. R. 40 Mad 709; 21 O. W. N. 739 (1917).

(31) I. L. R. 27 Mad. 465, 473 (1903).

(32) I. L. R. 45 All. 390, 394 (1923).

(33) I. L. R. 47 All. 381 (1925).

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be made to apply to an alienation of the spiritual rights and duties, the fulfilment of which is the primary function of a *shebait*. To apply such a rule to the spiritual duties of a *shebait* would be to contravene the fundamental principle of the Hindu law, and to violate the religious instincts of all orthodox Hindus. Indeed, in the nature of things there can be no necessity for a voluntary transfer of the spiritual duties of a *shebait* [*Vidyapurna Tirtha Swami v. Vidyānidhi Tirtha Swami* (34)], and the doctrine that a *shebait* at his own will and pleasure is at liberty to alter the line of *shebait*s on the ground that to do so will be "for the benefit of the deity" offends against the common law of India and is in conflict with the uniform rulings of the Judicial Committee of the Privy Council. For these reasons, in my opinion, the indenture of *arpanama* of the 13th September 1918 must be declared void and inoperative and there will be a decree in favour of the Plaintiff.

The Receiver will be discharged. Each party will bear his own cost.

Mr. S. C. Ghose, Solicitor for the Plaintiff.

Mr. J. N. Maitra, Solicitor for the Defendant.

P. D.

(34) I. L. R. 27 Mad. 435 (1903).

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 274 of 1925.

| BHUBAN MOHAN BASAK
and ors., Plaintiffs,
Appellants,

v.

CUMING, J.

B. B. GHOSE, J.

1925,

14, December.

THE CHAIRMAN OF THE
MUNICIPAL COMMISSIONERS OF THE DACCA-
MUNICIPALITY,
Defendant, Respondent

Bengal Municipal Act (III, B. C., of 1884), secs. 102, 103—Re-valuation of holdings without a fresh determination of percentage rate, if ultra vires—Sec. 113—Privy and water tax, assessment of owner for occupier and vice versa—Remedy—Civil action, if maintainable where remedy given by Act not availed of.

Sec. 102 of the Bengal Municipal Act provides that once a percentage on the valuation of holdings at which the rate shall be levied has been fixed it shall remain in force until rescinded or until the Commissioners at a meeting determine some other percentage at which the rate will be levied from the next year. Reading the Act as a whole, it is not required that whenever a fresh valuation is made the Commissioners must hold a meeting to fix the percentage. It is open to them by not holding any meeting to levy at the old rate of percentage on the new valuation.

Though it may be business-like, after a valuation has been made, to consider how much money is required and therefore what the percentage rate should be, the omission to do so does not render the preparation of the valuation and rating list null and void.

Per CUMING, J.—Where the Municipality erroneously assesses the owner with the water and privy tax where they ought to assess the occupier and vice

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versa, the aggrieved person has his remedy by application to the Commissioners under sec. 113 of the Act, and he is not entitled to invoke the assistance of the Civil Courts until he has exhausted his remedies which the Act provides.

This was an appeal against the decree of R. F. Lodge, Esq., District Judge of Zilla Dacca, dated the 24th of November 1924, confirming the decree of Babu Rebati Ranjan Mukherjee, Additional Munsif of that place, dated the 26th of May 1924.

The material facts will appear from the judgment.

Sir Benode Charitra Mitter and Babu Bhupendra Chandra Guha for the Appellants.

Mr. B. L. Mitter (Advocate-General) and *Babu Prokas Chandra Pakrasi* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This appeal arises out of a suit brought by one Bhuban Mohan Basak on his own behalf and on behalf of the rate-payers of Dacca against the Chairman of the Municipal Commissioners of Dacca for a declaration that the last assessment made by the Dacca Municipality is null and void, illegal and *ultra vires* and that there is no municipal tax payable for the years 1923-24. He also prayed for a permanent injunction to restrain the Municipality from realising the taxes.

His case was briefly as follows :—

On the 28th June 1922 the Commissioners passed a resolution that the general revision of the assessment of holdings be undertaken without delay as it was overdue. In pursuance of this resolution an Assessor was appointed to value the holdings and also an Assistant

Assessor. Valuation was duly made and accepted and the new assessment was made. There was no change in the percentage charged on the valuation, which remained as it was before. This assessment was brought into force for the years 1923-24. The Plaintiff complained that the assessment was illegal for the following reasons :—

(1) That the resolution of 28th June was illegally passed, the objection, if I understand it rightly, being that an amendment and substantive motion were put at the same time.

(2) That no percentage was fixed before the assessment and that under the resolution the Commissioners cannot assess any tax without first fixing the percentage.

(3) That Government and Railway buildings have not been properly assessed and many holdings have not been assessed at all.

(4) The Assistant Assessor had no power to assess any buildings.

(5) The privy and water tax being payable by the occupiers, assessment of the owners to pay it is illegal.

(6) That assessment of privy and water tax of houses let when the occupier was living elsewhere was illegal. *

(7) That the assessment made being on a different basis is illegal.

(8) That as the money realised by the assessment exceeded the expenditure by Rs. 1,04,000, it was illegal.

A number of issues were framed.

The trial Court for reasons which it is unnecessary to specify found against the Plaintiff and dismissed his suit.

The Plaintiff appealed to the District Court where he was equally unsuccessful. He now appeals to this Court.

His grounds of appeal number some 20

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but the following points only have been urged :—

(1) The meeting of the 22nd June 1922 resolved that there should be a new assessment and this means that there should be both valuation and the fixing of the actual percentage.

(2) The percentage at which taxes are to be levied must be fixed before the valuation or rating list is prepared and that whenever there is a fresh valuation there must be a fresh fixing of percentage.

(3) That it is illegal to assess the water and privy tax on owners.

(1) The whole of the argument here centred round what did the Commissioners mean when in their resolution they resolved that there should be a fresh assessment. Did they mean both valuation and fixing of the percentage or did they mean only a valuation of holdings?

Sir Benode Mitter for the Appellants contends they meant both valuation and percentage and that as they have not fixed the percentage the assessment is illegal. The learned Advocate-General contends that "assessment" was used loosely by the Commissioners to mean "valuation." It seems quite clear to me that what the Commissioners resolved to do at their meeting and what they meant in their resolution by the expression "assessment" is a question of fact. The lower Court of Appeal has found that by the expression "assessment" they meant a valuation of the holdings. In second appeal we cannot go behind this finding of fact unless it can be argued that it is based on no evidence. There is, however, no suggestion in any of the 20 grounds of appeal that this finding of fact was come to without any evidence and in these circumstances the Appellant cannot be allowed to argue that it was not. It cannot be said that the determination of

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the point depends on the construction of any document. The document on the construction of which it is contended that the point depends is merely the record of the proceedings of the Commissioners and what we are concerned with is what the Commissioners mean by their resolution. It is not suggested that the record of the proceedings is inaccurate or that it does not represent what the Commissioners resolved. This disposes of the Appellant's first contention.

(2) The decision on the second point requires the consideration of certain sections of the Municipal Act, *viz.*, sec. 96, secs. 97, 97-A, sec. 102 and sec. 103. Sir Benode Mitter contends that the Commissioners have not complied with sec. 103 of the Act and hence their action is illegal.

Sec. 103 runs as follows :—

"As soon as possible after the percentage at which the rate is to be levied for the next year shall have been determined under the last preceding section the Commissioners shall cause to be prepared a valuation and rating list which shall contain the following particulars—

- (f) amount of rate payable for the year,
- (g) amount of quarterly instalment.

Sec. 102 which is referred to in this section provides that at a meeting to be held before the close of the year next preceding the year to which the rate will apply the Commissioners shall determine the percentage on the valuation of holdings at which the rate shall be levied and the percentage so fixed shall remain in force until the order of the Commissioners determining such percentage shall be rescinded and until the Commissioners at a meeting shall determine some other percentage. Sir Benode Mitter argues that if sec. 102 and sec. 103 are read together it is clear that the valuation and

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rating list can only be prepared shortly after a meeting has been held to fix the percentage and that as no such meeting was held after the valuation was made the assessment was illegal. I do not think that this is necessarily the interpretation to be placed on these sections. Sec. 102 provides that once a percentage has been fixed it shall remain in force until rescinded or until the Commissioners at a meeting determine some other percentage at which the rate will be levied from the next year. The reasonable interpretation to be put on this section then is that the rate fixed continues unchanged and is to be considered as the rate for the year until altered. It might be said that by implication the rate is to be considered as fixed each year at the same rate until changed and this although there is no formal meeting to do so. The Commissioners by holding no meeting to change it by implication fixed the rate at the old rate. There is no provision in the Act which provides that every time there is a fresh valuation there must be a formal meeting to fix the percentage even though the Commissioners intend the same percentage to continue.

It no doubt might be argued that the Commissioners should after they have made a valuation take into consideration the percentage rate and consider how much money they require and therefore what the rate should be. No doubt if the Municipality was properly managed, as a business concern should be, this would be done, but the fact that it has not been done does not, I think, render the assessment invalid. I do not think reading the Act as a whole that it is required that whenever a fresh valuation is made the Commissioners must hold a meeting to fix the percentage. I think it is open to them by not holding any meeting to

levy the rate at the old rate of percentage on the new valuation.

(3) The last point to be dealt with is the privy and water tax.

It seems to be the case of the Appellant that the privy and water tax is payable by the occupier and it is illegal to assess owners to privy and water tax. Sec. 279 (3) provides that the water rate shall be paid by the occupier and sec. 281 provides that such occupier may recover $\frac{1}{4}$ share from the owner.

Sec. 282 provides that when the house is unoccupied the owner will pay $\frac{1}{4}$ rate. Sec. 312 provides that if the house is occupied by more than one tenant severally it shall be lawful for the Commissioners to recover the rate from the owner. With regard to privy tax the provisions are more or less similar. It is thus clear that in some circumstances the owner and in other circumstances the occupier is liable. There is therefore nothing illegal in assessing an owner to pay privy and water tax. It may be, however, that the owner is wrongly assessed in some cases while in other circumstances the assessment is legal, for it cannot be said that in no circumstances is the owner liable. The Municipality may owing to ignorance of the facts assess the owner where they ought to assess the occupier and *vice versa*. The aggrieved person has his remedy under sec. 113 which provides that a person who disputes his liability to be assessed may apply to the Commissioners under sec. 113. Clearly this was the remedy open to the Plaintiff of which he did not avail himself.

Until the aggrieved person has exhausted the remedies which the Act provides he cannot invoke the assistance of the Civil Courts. This point is also decided against the Appellants.

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The result is that the appeal fails and is dismissed with costs.

B. B. GHOSH, J.—I agree. The first point argued in the appeal that the resolution of 28th June 1922 of the Commissioners was not given effect to is based on the ground that there has not been revision of "assessment" of holdings but only a valuation. This depends upon the meaning of the word "assessment" as used in the resolution. The Court of Appeal below has held that the word is not necessarily of wider import than the word "valuation." It is argued that this is a question of construction and may be raised in second appeal. The expression "construction" as applied to a document includes two things: first, the meaning of the words; and secondly, the effect which is to be given to them. It is well settled that the meaning of words is a question of fact in all cases. The effect of the words is a question of law. This distinction between the meaning and the legal effect of expressions used must be always borne in mind. This question cannot therefore be raised in second appeal. Moreover as the learned District Judge points out the words "assessor" and "assessment" have been rather loosely used in the Municipal Act itself.

The second and most important question is whether the valuation and rating list prepared under sec. 103 is null and void, as the procedure prescribed in sec. 102 of the Bengal Municipal Act has not been followed. Sec. 102 provides that the Commissioners at a meeting, before the close of the next preceding year to which the rate will apply, shall determine the percentage on the valuation of the holdings at which the rate shall be levied, and the percentage so fixed shall remain in force until that order is rescinded or some other percentage is determined. This

seems to imply that when once the percentage is determined that will continue in force for each succeeding year so long as it is not altered in the manner provided in the section. It follows that if there is no intention to rescind or alter the percentage which has been once fixed it is not necessary that the Commissioners should at a meeting determine that the same percentage on the valuation should remain in force. Stress, however, is laid upon the opening words of sec. 103 by Sir Benode which runs as follows:—"As soon as possible after the percentage at which the rate is to be levied for the next year shall have been determined under the last preceding section" and it is contended that this provision shows that a valuation and rating list cannot be prepared unless the percentage is determined under sec. 102 after a new valuation and Sir Benode further argues that it is necessary that this should be done in order to ascertain the gross amount of taxes to be levied after a re-valuation. It appears to be quite reasonable and proper that the percentage should be determined after a new valuation. But the question is whether the omission to do so renders the preparation of the valuation and rating list null and void. It seems to me upon a consideration of the relevant sections in the Act that the passage relied on is only for the purpose of instruction and guidance of the Commissioners in order to enable them to give notice in due time of the rates to be levied for the next year, or in other words, as directory only. No time is fixed for doing the act, and no imperative language is used that there should be a fresh determination of the percentage on a re-valuation, and there is the provision that if there is no fresh determination the percentage previously fixed shall remain in force. The omis-

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sion to fix a percentage after the re-valuation did not operate to the prejudice of any person, as the old rate continues. Under these circumstances, in my opinion, the omission to hold a meeting does not carry with it the consequence of nullification of the preparation of the list under sec. 103.

With regard to the third point relating to the water and latrine tax, the Plaintiffs are not, in my opinion, entitled to maintain the suit. It has been found that these Plaintiffs are liable to pay the rates. They are not persons in the same interest, as provided in Or. 1, r. 8 of the Civil Procedure Code, with persons who might have been illegally rated, if there are any such. If the rating on the Plaintiffs is excessive that is not a matter for the Civil Court to revise. The appeal should therefore be dismissed with costs.

N. G.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SHAW.

LORD CARSON.

LORD BLANESBURGH.

SIR JOHN EDGE

MR. AMER AIL.

1925,

Heard,

23, January.

Judgment,

24, January.

MOTILAL ITOHHALAL

GANDHI, Appellant,

v.

HAJI MOOFA HAJI

MAHOMED,

Respondent.

Vendor and purchaser—Time made essence of contract—Waiver—Settlement of terms—Notice by vendor to purchaser to engross conveyance for signature and pay money within four days, if unreasonable, specially when purchaser gave assurance that he had money.

Though time was originally of the essence of a contract of sale of land, the parties having allowed the negotiations to continue far beyond the time appointed,

the condition as to time being of the essence of contract was, by conduct of the parties, obliterated therefrom.

When subsequently the negotiations were concluded and all the terms were settled and only two things remained to be done to complete the transaction, viz., the engrossment of the conveyance for signature and the payment of the money, and the vendor then pressed for early completion of the purchase at the same time expressing doubts as to whether the purchaser had money and received an assurance that he had :

Held—That in the circumstances the vendor did not act unreasonably in thereupon demanding that the contract should be completed within four days.

That the purchaser was estopped from urging that the assurance he gave that he had money was unfounded.

That irrespective of the estoppel created by the assurance, the vendor was in the circumstances justified, in a time of financial strain, in demanding the completion of the little that remained to be done within four days.

This was an appeal from a decree, dated the 20th December 1921, of the High Court at Bombay, which reversed a decree of that Court, dated the 6th September 1921, in its Original Civil Jurisdiction.

The suit out of which the appeal arises was instituted by the Respondent for specific performance of a contract for the sale of immoveable property in Bombay.

The contract was made on the 27th February 1919 and was to be completed within two months.

That stipulation was, however, waived. Requisitions were made and answered and on the 29th July, the Appellant having approved the draft conveyance asked for an early appointment for completion.

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On the 23rd August the Appellant complained of the delay and on the 27th August they gave notice that unless the sale were completed by the 7th September he would treat the contract as broken.

On the 6th September the Respondent tendered the purchase money, and on the tender being refused, instituted this suit.

The trial Judge was of opinion that the Appellant was entitled to limit a reasonable time within which the contract should be performed and that the notice given was reasonable. The appeal Court (Macleod, C. J. and Shah, J.) reversed that decision and decreed specific performance.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant.

The Respondent was not represented.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—The Board is at a considerable disadvantage in this case on account of the absence of the Respondent. The case, however, has been explained with complete candour and fullness by Sir George Lowndes, on behalf of the Appellant.

In the contract for the sale of this immoveable property, made in the month of February 1919, there was a clause making the settlement and the payment of the price subject to the condition that time was of the essence of the contract. The negotiations, however, proceeded, and the parties entered into communication with regard to the furnishing of a title, requisitions were made and answered, and arrangements with the municipality, usual in Bombay, had to be come to so that the battaki announcements should be made in the District.

It is quite clear to their Lordships that

the time allowed for completion was far exceeded and the condition as to time being of the essence of this contract was, by the conduct of the parties, obliterated therefrom.

The circumstances which are argued to be alone relevant to the issue, are said to begin late in the month of August 1919. But their Lordships desire it to be understood that they make no pronouncement with regard to whether a notice as to completion would be reasonable or abrupt in the case of a contract made at that period. The contract had been made months before. What had happened was that before the period in August 1919, alluded to, a clean title had been furnished, a draft conveyance had been prepared, it had been approved by the vendor and had been sent to the agents for the purchaser; and that nothing *de facto* remained to be done of this transaction—every kind of complication being removed—except the mere clerical item of engrossing the draft, and the financial result, namely, the payment of the price. Those two matters alone remained: the price to be paid and the draft conveyance engrossed for signature.

In those circumstances, on the 23rd August 1919, the vendor's agents wrote saying that the matter must be completed without delay. They intimated by their letter of that date that nearly six months had elapsed since the agreement was executed, and the sale must accordingly now be completed. The letter may be fully quoted. It is as follows, *viz.* :—

“Bombay, 23rd August, 1919.

“Messrs. Rustamji and Ginwala.

“*Re Sale of Property at Ardeshir*
Dady Street.

“DEAR SIRS,

“We extremely regret to note that we have not yet received the engrossment of the Conveyance for our comparison. Requisi-

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tions on title were answered long ago. Your client had inspection of Trust Deed, and they have been satisfied on all the points. Our client has waited sufficiently long for completion.

"Our client says that your clients have no money and that they have purchased the property from our client only with a view to profiteering. They are out for some purchaser but they have not been able to secure any. It is nearly six months that the agreement was executed and the sale must now be completed without any delay. You should not lose sight of the fact that the agreement provides that the time for completion is the essence of the contract.

"We are therefore instructed to request you to send us the engrossment for comparison. The draft conveyance has already been sent to you duly approved. We are expecting the engrossment within four days from the receipt hereof by you.

"Yours truly,

"(Sd.) MOTICHAND AND DEVIDAS."

This letter of the 23rd August was not unnatural in the circumstances which their Lordships have stated, namely, that everything except the clerical part of engrossing the draft and the financial part of payment had been already finished.

In answer to the letter of the 23rd August this letter, dated 25th August 1919, was, however, received by the Defendant's agents from the agents for the Plaintiff, the purchaser. They say:—

"Bombay, 25th August, 1919.

"Messrs. Motichand and Devidas.

"*Re Sale of Property at Dady Street.*

"DEAR SIRS,

"With reference to your letter dated the 23rd instant we beg to state that the delay was on your client's part in not replying to the requisitions in time and not furnishing the Municipal bill for a very long time.

"We received the Battaki only recently and have since then taken the engrossment in hand which we shall let you have as soon as it is ready. Your client's suggestion that our client has no money or that he is trying to secure a purchaser is an imaginary one.

Our client's moneys are lying idle with him since two months past and he is more eager to complete this matter than your client.

"Yours truly,

"(Sd.) RUSTAMJI AND GINWALA."

This letter accordingly cleared away any doubt or hesitation on the part of the vendor and his advisers as to the reasonableness of making an immediate demand for the completion of the sale and the payment of the price. They thereupon wrote the letter of the 27th August giving the five days' notice, which was received on the 28th August, so that four days remained during which these two simple things had to be done, namely, engross the deed and pay the money.

The question before their Lordships is not any serious or complicated question as to what would be a demand of equity in the completion of a transaction of sale recently made, with reference to which many practical things had to be done by way of clearing the title, and reasonable time for needful business arrangements had to be taken into account. In the circumstances of this case it is simply the ordinary commonplace question: Was it reasonable, with the assurance given by a purchaser that he had the money in the bank and the title in his land, to say, "Well, the contract having been made months ago, do this little matter within four days or the contract is off"?

The Board, having considered the matter, is of opinion that there was no abruptness whatsoever in the conduct of the Defendant's agents or in their letter of the 27th August 1919, and, there being no abruptness in it, the unreasonableness falls to the ground, because the unreasonableness of the demand consists, not in its method, but would have consisted in this, that it would have put the purchaser, whose finances might have been allowed

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to drop owing to the dragging on of the negotiations, into a position of much embarrassment on such a short notice being given.

Their Lordships are further of opinion that it is not open to this purchaser to set up such a case because the purchaser had given, prior to that notice, the very assurance that no abruptness could be felt by the two statements that he had made, namely, that his money was ready and his title was engrossed. In these circumstances the case for the purchaser falls to the ground. It is explained to the Board that the letter of the 25th August had misstated the facts and that it was not in accordance with truth that (*inter alia*) he was ready with the purchase money. It is clear that he is estopped from maintaining that the facts are otherwise than his letter of the 25th August 1919 represented them to be.

But their Lordships are further of opinion that, whether he was estopped or not, the circumstances of a long-drawn-out transaction in which all remaining to be done was the engrossment of the deed of sale and the payment of the price, demonstrate that as between purchaser and vendor of immoveable property in a time of financial strain it was not a reasonable position for a purchaser to occupy to be unable to complete within four days.

For these reasons their Lordships have to take the course which will presently be announced, but before doing so they have to note that prior to these proceedings the vendor, who was in possession of a certain deposit of Rs. 500, had made offer to refund that if the transaction went off. Through his counsel, an intimation has been made to the Board that he does not resile from that position. Their Lordships do not think it necessary to put this into the decree, but it will be recorded in

their judgment and the vendor will act accordingly.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the decree of the trial Judge should be restored, with costs in both Courts. The Respondent will pay the costs of the appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellant.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 2268 AND 2269 OF 1923.

CUMING, J.	}	RADHABINODH MONDAI,
B. B. GHOSE, J.		Defendant No. 12,
1925,		Appellant,
3, December.		v.
		NABA KISHORE MONDAL
		and ors., Respondents

Suit for rent—Joint co-sharer, if alone may sue for his share of the rent.

The Plaintiff and his brother were joint owners of one-third of an estate. He sued the Defendant for his one-sixth share of the rent:

Held—That the Plaintiff and his brother being joint proprietors with regard to the one-third share of the rent payable to them the Plaintiff was not entitled to enforce his claim to the one-sixth share of the rent as against the tenants without their consent.

The Plaintiff might sue for the enforcement of the entire contract between him and his brother by making his brother a party Defendant but he was not entitled to enforce a part of the contract between himself and his brother on the one hand and the tenants on the other.

These were appeals against the decrees of Babu Durga Prosad Ghose, Subordinate Judge, 1st Court, 24-Perganahs, dated the 3rd day of July 1923, modifying

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the decrees of Mr. Khirode Ranjan Dhar, Munsif, 3rd Court, Alipore, dated the 30th June 1921.

The facts of the case will appear from the judgment.

Mr. Atul Chandra Gupta and Babu Radhika Ranjan Guha for the Appellant.

Mr. Sarat Chandra Mukherjee, Babus Indu Bhusan Mukerjee and Biraj Mohan Mazumdar for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

(HOSE, J.—These two appeals arise out of two different suits for rent brought by the Plaintiff against a number of Defendants. Defendant No. 12 is the Appellant before us; and the only point that requires consideration is whether the Plaintiff's suits are maintainable as framed. The Plaintiff claims 1/6th share of the rent alleging that that is due to him on account of the holdings.

The finding of the lower Appellate Court is that the co-sharers who own 2/3rd share in the estate were collecting their share of the rent separately for a considerable time, and the Plaintiff and his brother were collecting their 1/3rd share jointly. But the Plaintiff and his brother started collecting their shares separately from the beginning of 1321 B. S. The claim is for the rent of the years 1319 to 1322 B. S. Both the Courts below decreed the Plaintiff's suit for the rent of his 6th share.

The principal ground urged on behalf of the Appellant is that the Plaintiff is not entitled to maintain his suit for his 1/6th share of the rent. It is urged that the fact that the Plaintiff and his brother Gopi Kishor were collecting their 1/3rd share jointly might raise an inference that the Defendants had agreed to pay the rent for the 1/3rd share belonging to the

two brothers jointly and the rent for the other 2/3rd share to the other co-sharer, but there is nothing to show that the Defendants ever consented to pay the Plaintiff the rent for his 1/6th share separately. The question, therefore, is whether the Plaintiff and his brother being joint proprietors with regard to the 1/3rd share of the rent payable to them the Plaintiff is entitled to enforce his claim to the 1/6th share of the rent as against the Defendants without their consent. Obviously he is not so entitled. The Plaintiff alone may sue for the enforcement of the entire contract between him and his brother by making his brother a party Defendant. But he is not entitled to enforce a part of the contract between himself and his brother on the one hand and the tenants on the other.

It is argued on behalf of the Respondents that the Defendants are not in any way prejudiced by this procedure and it is supported by the case of *Raj Narayan Mitra v. Ekadasi Bag* (1) which has been cited by the learned Subordinate Judge. It is difficult to say that the Defendants would not be prejudiced by such a claim of the Plaintiff, because the Defendants would be liable to be harassed by two suits where one could only have been brought. Moreover if the Defendants had succeeded in establishing in the present suit their other plea that they were not liable to pay any rent on account of the *jama* being non-existent and obtained a decree in their favour the brother of the Plaintiff would not be bound by such a decree. The case of *Raj Narayan Mitra v. Ekadasi Bag* (1) was a different one in which the parties prayed for apportionment of rent by a decree of the Court in the presence of all the parties.

(1) I. L. R. 27 Cal. 479 : s. c. 4 C. W. N. 491 (1899).

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The result therefore is that it must be held that the suit as framed by the Plaintiff in which he does not show under what circumstances he is entitled to enforce a portion of the claim as maintainable must be dismissed.

A belated prayer was made that the Plaintiff should be allowed to amend his plaint. But we are not inclined to grant that application in second appeal having regard to the fact that this objection had been taken by the Defendants in the trial Court as well as in the Court of Appeal below and no application for amendment of the plaint was made at all except at the close of the arguments here.

Another point was urged on behalf of the Appellant that by a decree of this Court passed since the decision of the appeal in this case in the lower Appellate Court it has been declared that Defendant No. 12 is not liable to pay any rent for the *jama*. We are unable to decide the question in the present appeal as the proper materials have not been placed before us with regard to the identity of the lands concerned in the declaratory decree.

On these grounds the appeals must be allowed and the suit dismissed with costs in all the Courts.

CUMING, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1271 of 1923.

SUBHAWARDY, J.

MUKERJI, J.

1925,

Heard, 24 and

25, November.

Judgment,

17, December.

GANGAPROSAD CHAUDHURY, Defendant,
Appellant,

v.

KULADANANDA ROY,
Plaintiff, Respondent.

Civil Procedure Code (Act V of 1908), sec. 11—Res judicata, as amongst co-Defendants, conditions

necessary therefor—Construction of deed by Court, if necessarily res judicata as between co-Defendants—Deed of endowment by a Hindu—Dedication of property to deity and appointment of trustees to manage—Properties, if vested in trustees for a specific purpose—Limitation—Limitation Act (IX of 1908), sec. 10—Trustee, if may prescribe against deity.

Per MUKERJI, J.—In order that a decision of a conflict between co-Defendants should operate as res judicata, it is enough that its adjudication was necessary to determine the claim put forward by the Plaintiff whether in the Plaintiff's favour or against him.

Where a Plaintiff asked for the construction of a deed in order to determine whether the Plaintiff or her heirs had any right to a certain property thereunder, and certain Defendants filed a joint written statement denying her title, and the Court in determining the issue held that the property in question had by the deed been absolutely given to one of the latter:

Held, per CUMING.—That the decision was not res judicata as between the co-Defendants.

Per MUKERJI, J.—The decision was not res judicata as between the co-Defendants in the absence of anything to show that a conflict was raised as between them and such a conflict could not be presumed by reference to the doctrine of constructive res judicata contained in Expt. IV to sec. 11 of the Civil Procedure Code. In the absence of a conflict as between the co-Defendants, the other Defendants could not appeal against the adverse finding when no relief was given to Plaintiff.

Nor was it a case in which all the parties to the litigation invited the Court to construe the deed in order to ascertain or adjust their respective rights.

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The rulings in HOOK v. ADMINISTRATOR-GENERAL (29), RAM KRIPAL SUKUL v. RUP KUARI (30), T. B. RAMA CHANDRA v. A. N. S. RAMA CHANDRA (31) and BADAR BEE v. HABIB MERICAN NOORDIN (33) do not in any way qualify the provisions of sec. 11 of the Civil Procedure Code in their application to cases coming within the scope of the section or affect the question of res judicata when a previous decision in a suit is alleged to operate as a bar in a subsequent one as between persons who were co-Defendants in the previous suit.

GOKUL MANDAR v. PUDMANAND SINGH (34) referred to.

Per CURIAM.—Where the effect of a deed of endowment executed by a Hindu was to vest the properties in the deity and not in the trustees for a specific purpose, though trustees were appointed for the management of the properties, sec. 10 of the Limitation Act had no application, in view of the pronouncement of the law made in VIDYAVARUTHI TIRTHA v. BALUSAMI AYYAR (35), and a trustee in such a case could prescribe against the deity either by disclaimer or by open and clear assertion of hostile title.

ABDUR RAHIM v. NARAYAN DAS AURARA (40) relied on.

SRINIVASA MOORTHY v. VENKATA VARADA IYYENGAR (39) distinguished.

(29) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 915 (1921).

(30) L. R. 11 I. A. 37; s. c. I. L. R. 6 All. 269 (1883).

(31) 26 C. W. N. 713; s. c. 35 C. L. J. 545 (P. C.) (1922).

(33) [1909] A. C. 615.

(34) I. L. R. 29 Cal. 707; s. c. 6 C. W. N. 825 (P. C.) (1902).

(35) L. R. 48 I. A. 302 at p. 315; s. c. 26 C. W. N. 537 (1921).

(39) L. R. 38 I. A. 129; s. c. 15 C. W. N. 741 (1911).

(40) L. R. 50 I. A. 84; s. c. 28 C. W. N. 121 (1922).

This was an appeal preferred on the 25th of April 1923 against the decree of P. E. Cammiade, Esq., District Judge of Zillah Burdwan, dated the 27th March 1923, reversing the decree of Babu Nagendra Nath Chatterji, the Additional Subordinate Judge of that District, dated the 13th of December 1920.

The facts of the case fully appear from the judgment of Mukerji, J.

Mr. Sarat Chandra Bose (with him Babu Rupendra Kumar Mitter) for the Appellant submitted that the decision in Katyayani's suit on the construction of the deed holding that the house in suit was absolutely given to Makhan is *res judicata* as between the Plaintiffs and the Defendant who is claiming through Makhan. Gopal Lal Sett v. Purna Chandra Basak (42), Badar Bee v. Habib Merican Noordin (33) and Rama Chandra v. Rama Chandra (31).

The construction placed on the deed not only in Katyayani's suit but in other later suits is the true construction.

Makhan was in adverse possession for over 12 years. Sec. 10 of the Limitation Act did not apply, as the property did not vest in the trustees as such for a specific purpose. There is no specific direction in the deed as to this property which vested in the deity. *Vidyavaruthi v. Balusami* (35).

Babu Nagendra Nath Ghose (with him Mr. Jyotish Ch. Pal) for the Respondent.—There was no issue as between the co-Defendants in Katyayani's suit. The latter filed a joint written statement

(31) 26 C. W. N. 713; s. c. 35 C. L. J. 545 (P. C.) (1922).

(33) [1909] A. C. 615.

(35) L. R. 48 I. A. 302 at p. 315; s. c. 26 C. W. N. 537 (1921).

(42) I. L. R. 49 Cal. 449 at pp. 466-467; s. c. 27 C. W. N. 174 at pp. 177-178 (P. C.) (1921).

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which simply denied that Katyayani had any title. Assuming that there was a conflict between the Defendants *inter se*, the Plaintiff's suit was dismissed, and therefore the decision was not necessary to give any relief to the Plaintiff. *Cottingham v. Earl of Shrewsbury* (1), *Kevan v. Crawford* (2), *Sheikh Hassan v. Mahomed Ali* (43) and *Gopal Jew Thakur v. Radha Binode* (21). The test is whether the Defendants other than Makhan could appeal. If Plaintiff's suit was wholly dismissed, there was nothing to appeal against. *Brojo v. Kedar* (20). The condition that the Plaintiff should get some relief for which the dispute amongst co-Defendants must be adjudicated is a corollary to the general requirement of the rule of *res judicata*, that the matter in dispute must be substantially and not incidentally in issue. If the Plaintiff gets no relief whatsoever, then it is immaterial whether Defendant A or Defendant B is held to be the person entitled. The issue as between the Defendants becomes incidental by the result of the suit. Katyayani's suit was not a suit in which all the parties were, as in a suit for partition, substantially Plaintiffs as well as Defendants; the Plaintiff and the Defendants did not invite the Court to construe the deed for the determination of their rights *inter se*.

On the construction of the deed, Makhan and his heir were merely given the right to hold the property as trustee and not absolutely.

As to limitation, sec. 10 of the Limitation Act applied, because there was here an

express declaration of a trust by a trust deed. The Plaintiffs are not the *shebais* of the deity but trustees appointed by the deed. They did not hold the properties by reason of the general fiduciary position attaching to their office, as executors or *shebais* do, but under the express terms of the trust deed. Therefore *Vidyavaruthi's* case (35) does not apply. Moreover, literally interpreted, this decision will repeal sec. 10 of the Limitation Act altogether for India so far as Hindu and Mahomedan religious and charitable trusts are concerned. Later decisions of the Privy Council show that they are not prepared to fully accept all that is laid down in *Vidyavaruthi's* case (35). See *Srinivasa v. Evalappa* (36) and *Subbaya Pandaram v. Maharaj Mustapa* (37). Further, *Vidyavaruthi's* case (35) and *Naina Pillai v. Ramathan* (38) speak of title by estoppel and not by adverse possession, a title which does not enure beyond the life-time of the trustee concerned, in this case beyond Makhan's life-time. Moreover Makhan having taken possession as trustee, assertion of adverse title did not change the nature of his possession. He could not prescribe against himself. Limitation must remain suspended so long as the trustee continues in office. See *Srinivasa Moorthy v. Venkatavarada Iyyengar* (39) and 19 Hals. 165, para. 341.

Babu Rupendra Kumar Mitter in reply, on the question of *res judicata*, refer-

(1) 3 Hare 627 (1843).

(2) L. R. 6 Ch. Div. 29 (1877).

(20) I. L. R. 12 Cal. 580 (1886).

(21) 41 C. L. J. 396 at pp. 398 and 418-419 (1924).

(43) I. L. R. 45 Bom. 206 at p. 216 (1920).

(35) L. R. 48 I. A. 302 at p. 315: s. c. 26 C. W. N. 337 (1921).

(36) 27 C. W. N. 317 (P. C.) (1922).

(37) 28 C. W. N. 493 (P. C.) (1923).

(38) I. L. R. 47 Mad. 337: s. c. 28 C. W. N. 809 (P. C.) (1923).

(39) L. R. 38 I. A. 129: s. c. 15 C. W. N. 741 (1911).

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red to *Hook v. Administrator-General* (29), *Rama Chandra v. Rama Chandra* (31) and *Badar Bee v. Habib Merican* (33). A party against whom a suit has been dismissed may appeal against an adverse finding. *Krishna v. Mahesh* (44). Upon the question of limitation, referred to *Abdur Rahim v. Narayan Das* (40) and submitted that the law as laid down in *Vidyavaruthi v. Balusami* (35) applied to the case. The deed of endowment did not make any difference in its application.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of a suit in which the Plaintiff asked for a declaration that a certain house situated in the town of Burdwan is a part of an estate of which he alleges he is now one of the trustees, and also for recovery of possession thereof.

The trust was created by one Annoda Prosad Ghose by a deed which was called a Niyam-Nirbandhapatra in 1305. He died in the year 1308. Shortly after his death his daughter Katyayani instituted a suit being No. 438 of 1901 wherein she prayed for a declaration that the deed executed by her father was void and inoperative and in the alternative she prayed for construction of the deed. In this suit she impleaded as Defendant her step-mother Haribhabini, and the trustees named in the deed and also other persons in whose favour certain bequests had been

made by the deed. The deed, it may be observed here, purported to dedicate certain properties to the family deity Sri Sri Iswar Sridhar Jieu and creates an endowment for the *sheba* of the said deity and for meeting the expenses for certain religious observances and the feeding of the guests connected with the worship of the said deity. Certain bequests were also made in favour of others. He appointed himself as trustee to act during his life; and, to act after his death as trustees nine other persons were named. No provision was made in the deed as regards Haribhabini and she took no active part in the suit. Three of the trustees named in the deed, namely, Sarada Prosad Chawdhury, Makhan Lal Chawdhury and Kuladananda Roy as well as others with whom we are not concerned at this stage contested the suit. During the trial of the suit Katyayani, the Plaintiff, withdrew her case as to the validity of the deed. She pressed her case so far as the construction of the deed was concerned and the deed was construed. One of the clauses of the deed which dealt with the house which forms the subject-matter of the present suit was construed and it was held that Annoda Prosad Ghose had made an absolute gift of it with the execution of its western room to Makhan Lal Chawdhury, one of the trustees named in the deed. Similarly, all the other clauses of the deed were also construed. Subsequently Kuladananda Roy and Sarada Prosad Chawdhury, two of the aforesaid trustees, took out letters of administration in respect of the properties covered by the deed and administered the properties. The present suit has been instituted by Kuloda Prosad Ray as *shebait* of Sri Sri Sridhar Jieu and as a trustee in respect of the trust properties left as aforesaid by Annoda Prosad

(29) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal 499; 25 O. W. N. 915 (1921).

(31) 26 O. W. N. 713; s. c. 35 O. L. J. 145 (P. O.) (1922).

(33) [1909] A. C. 615.

(35) L. R. 48 I. A. 302 at p. 315; s. c. 26 O. W. N. 537 (1921).

(40) L. R. 50 I. A. 84; s. c. 28 O. W. N. 121 (1922).

(44) 9 O. W. N. 584 (1905).

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Ghose for ejecting the Defendant-Appellant, who is the son of Makhan Lal Chaudhury, on a declaration that the house in question is the *debuttar* property of the said deity. The suit has had a long and chequered career. The decision, which is now under appeal, has been in Plaintiff's favour.

The questions which arise for our consideration, upon the arguments addressed to us, are four in number: 1st, whether the decision in suit No. 438 of 1901 operates as *res judicata*; 2nd, what is the true construction of paragraph 21 of the deed; 3rd, whether the suit is barred by limitation; 4th, whether the Defendant has acquired a title by adverse possession.

The contention of the Appellant on the question of *res judicata* is two-fold: It is urged in the first place that the previous decision operates as *res judicata* as all the requirements for the application of that doctrine as between co-Defendants are present in the case, and next, it is said that even if strictly speaking that doctrine cannot be applied, then the Court having construed the deed in the presence of all the parties interested, its conclusions are binding on them all on general principles. To this contention a preliminary objection is put forward on behalf of the Plaintiff-Respondent. The objection is to the effect that this contention is not entertainable at this stage.

It would be convenient, first of all, to dispose of the preliminary objection. The suit was dismissed in the first instance by the trial Court on the ground of *res judicata*. On appeal the District Judge reversed the decision and remanded the suit for determination of the other issues involved. Those issues were then decided by the trial Court and the records together with the decision on those issues were sent back to the District Judge and

then the appeal was finally decided by him. It is said that the Appellant should have appealed against the order of remand which was founded upon a decision adverse to him on the question of *res judicata*, and that, not having done so, he is now precluded from challenging that decision in this appeal by reason of the provisions of sec. 105, sub-sec. (1) of the Code of Civil Procedure. This preliminary objection must, however, be overruled as the order of remand on the face of it purports to have been one under Or. 41, r. 25 and it was expressly declared by the learned Judge to have been made by him under that rule upon a petition filed by the Appellant with the object of finding out its true nature and effect.

In order to deal with the contention of *res judicata* upon the principle as embodied in sec. 11 of the Code of Civil Procedure and when it is to be applied to parties who were in the position of Defendants in the earlier suit, tests have from time to time been laid down by learned Judges, but these tests owe their origin to a well-known rule which was expressed by Wigram V. C. in *Cottingham v. Earl of Shrewsbury* (1) in these words: "If a Plaintiff cannot get at his right without trying and deciding a case between co-Defendants the Court will try and decide that case, and the co-Defendants will be bound. But if the relief given to the Plaintiff does not require or involve a decision of any case between co-Defendants, the co-Defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the Plaintiff obtains." The same rule was suggested by Jessel, M. R., in *Kewan v. Crawford* (2), when he said: "What right has a Court of justice to in-

(1) 3 Hare 627 (1843).

(2) L. R., 6 Ch. Div. 29 (1877).

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investigate a claim by title paramount by one co-Defendant against another? I am not aware of any. The answer is, if you wish to assert these claims you must assert them in a proper action . . . Where a Plaintiff obtains relief against one or more Defendants, and there are subordinate questions either necessary to be gone into to work out that relief completely for the benefit of the Plaintiff or necessary to adjust the rights of the Defendants consequent on the relief so obtained by the Plaintiff, the Court may, by enquiries in chambers, work out the equities between the co-Defendants. But there is no case produced in which any such enquiries were directed where the Plaintiff's case wholly failed." It is contended on behalf of the Respondents that the observations, which I have quoted above, go to indicate that it is only when some relief is granted to the Plaintiff that the adjudication of a conflict as between co-Defendants will operate as *res judicata* in a subsequent suit as between them. It will be seen, however, that the cases of *Cottingham v. Earl of Shrewsbury* (1) and *Kevan v. Crawford* (2) were both instances where, when after the determination of questions which were necessary to be determined in order to give relief to the Plaintiff and when the Plaintiff was out of the way, as it were, it was sought to have certain matters gone into and adjudicated upon as between the Defendants, it being alleged that the adjudication might be binding between the latter for the future as having finally adjusted their rights. This peculiar feature of the cases, therefore, necessitated those observations. They were not cases in which any question arose as to whether any previous decision operated

as *res judicata* in respect to the cases themselves. To accept the Respondents' contention in this respect would be to hold that a decision will be *res judicata* only if the suit ends in a particular way. Such a position is hardly tenable. On the other hand there are many reported decisions in which notwithstanding the dismissal of the Plaintiff's suit, the decision has been held to operate as *res judicata* as between co-Defendants: e.g., *Venkayya v. Narasamma* (3), *Kandiyil Cheriya Chandu v. The Zamorin of Calicut* (4) and *Yusuf Sahib v. Durgi* (5). The true rule was enunciated by West, J., in his judgment in the case of *Ram Chandra Narayan v. Narayan Mahadev* (6) in these words: "There must be a conflict of interests amongst the Defendants, and a judgment defining the real rights and obligations of the Defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the Defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group." This statement of the rule has been accepted as settled law in the generality of cases. *Maulvie v. Kedu* (7), *Ahmad Ali v. Najabar Khan* (8), *Chhajjin v. Umrao Singh* (9), *Balambhat v. Narayan Shah* (10), *Muhamad Kuni Rowthan v. Visvanathayier* (11), *Magniram v. Mehdi Husain Khan* (12). The rule has been

(3) I. L. R. 11 Mad. 204 (1887).

(4) I. L. R. 29 Mad. 515 (1903).

(5) I. L. R. 30 Mad. 447 (1907).

(6) I. L. R. 11 Bom. 216 (1886).

(7) I. L. R. 15 Mad. 264 (1892).

(8) I. L. R. 18 All. 65 (1895).

(9) I. L. R. 22 All. 386 (1900).

(10) I. L. R. 25 Bom. 74 (1900).

(11) I. L. R. 26 Mad. 387 (1902).

(12) I. L. R. 31 Cal. 95 (1903).

(1) 3 Haro 677 (1843).

(2) L. R. 6 Ch. Div. 29 (1877).

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stated in some other decisions as requiring the fulfilment of three essential conditions: (1) that there should be a conflict of interest between co-Defendants, (2) that it should be necessary to decide on that conflict in order to give to the Plaintiff the relief appropriate to his suit, and (3) that the judgment should contain a decision on the question as between co-Defendants. *Gurdeo Singh v. Chandrakali Singh* (13) and *Jadab Chandra v. Kailas Chandra* (14). Courts are reluctant to apply the doctrine as between co-Defendants unless clear indications appear of the presence of all the requisite conditions, and in the generality of cases where it has been applied, it has been applied with great caution [observations of the learned Judges in the case of *Jadab Chandra v. Kailas Chandra* (14)]. So chary are the Courts of applying this doctrine in the case of co-Defendants that in some cases the Courts have enunciated the rule as limited to cases of active contest, e.g., *Ramanaya Ayyangar v. Narayana Ayyangar* (15), *Kandiyil Cheriya Chandu v. Zamorin of Calicut* (4), *Ramasamy Reddi v. Abhoy Chandra* (16), *Mahoyaddin Ali Saheb v. Bacha Sahib* (17), *Yusuf Sahib v. Durgi* (5), *Nanda Lal Pal v. Naresh Chandra Dev* (18) and *Mohendra Nath v. Shamsunnessa Khatun* (19).

Bearing these principles in mind, when we come to examine the facts of the present case we find that Makhan and Kuloda

were arrayed as Defendants in the suit of 1901. The validity of the deed was challenged by Katyayani, and she also prayed for a construction of the deed on the ground that "if the deed was held to be operative there was a chance of her rights being injured and therefore it was necessary to determine what rights she has in her father's estate under the deed, and if the said deed be not construed, her rights and that of her heirs will not be settled." Makhan, Kuloda and Sarada jointly filed a written statement in that suit presumably for the purpose of defeating the Plaintiff's claim. The whole of the written statement deals with the validity of the deed and challenges Katyayani's right to have it construed. It does not appear that they set up any claim, far less any conflicting claim, to the house which is now in suit. The deed was construed as it had to be for the purpose of finding out what the rights of Katyayani and her heirs were. Under cl. 21, she was found to have no rights and it was held on a construction of the said clause that the house had been made an absolute gift of to Makhan and his heirs. In the decree that was drawn up it was only declared that the deed was construed. To apply the doctrine of *res judicata* to the case a contest will have to be presumed from the mere fact that Kuloda might and ought to have contested the title of Makhan, that is to say, the doctrine of constructive *res judicata* founded upon Exp. IV to sec. 11 of the Code will have to be invoked. The tendency of Courts is to apply this doctrine within very narrow limits even as between Plaintiffs and Defendants, and there is scarcely any room for its application as between co-Defendants. At any rate, there is no authority that the doctrine may be applied as between them in a case

(4) I. L. R. 29 Mad. 515 (1903).

(5) I. L. R. 30 Mad. 447 (1907).

(13) I. L. R. 36 Cal. 193 (1907).

(14) 21 O. W. N. 693 at p. 694 (1916).

(15) I. L. R. 18 Mad. 874 (1893).

(16) [1911] Mad. W. N. 306.

(17) [1918] Mad. W. N. 580.

(18, 2 Pat. L. W. 108 (1917).

(19) 19 O. W. N. 1280 (1914).

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where they made a joint defence to the Plaintiff's suit. The Plaintiff got some relief, which was said to be a "nominal" one in the judgment, but none under cl. 21 of the deed. The view of the Court as to the meaning of the clause was embodied in the judgment—but the course of the proceedings do not suggest that any conflict *inter se* as between Kuloda and Makhan was decided, such as might give Kuloda a right of appeal. One Defendant may under certain circumstances prefer an appeal against another, although the Plaintiff's suit has been wholly dismissed in respect of adverse findings in the judgment; but such an appeal is maintainable only when the adjudication has been upon a real conflict as between the co-Defendants. In the present case no such conflict is discernible. There was a joint defence and the construction of the deed seems to have been made in order to find out the rights of the Plaintiff and her heirs. It is difficult to see how Kuloda could have appealed against the decree as against Makhan; and, if he could not then on the principle laid down in the Full Bench decision of this Court in the case of *Brojo Behary Mitler v. Kedar Nath Majumdar*, (20), the previous decision cannot be held to operate as *res judicata*. This principle has been followed in a recent decision of this Court in the case of *Sri Sri Gopal Jew Thakur v. Radha Binode Mondal* (21).

It is also contended that on the principles which are applicable to suits for partition or for construction of a Will, the decision must be held to be binding as against all the parties to the suit. Suits for partition have always been regarded as standing on a different footing. A decree for partition made in a suit instituted by

a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit. [*Nalini Kanta v. Sarnamoyee* (22)]. A decree for partition is a joint declaration of the rights of persons interested in the property of which partition is sought, and when properly drawn up, it is in favour of each share-holder or set of share-holders having a distinct share; *Pursotam Rao Tantia v. Radha Bai* (23), *Khurshed Husam v. Nabbee Fatima* (24), *Dust Mohamed Khan v. Sayad Begum* (25), *Assan v. Pathumma* (26) and *Ashidbai v. Abdulla Haji* (27). In the last mentioned case, it will be observed, it was laid down that where a Plaintiff brings a suit for partition and fails, it is not open to any of the Defendants to claim that the partition suit should go on in order that the share of one or more of the Defendants may be determined. The difference is probably attributable to the fact that a conflict between the Plaintiff and each Defendant or set of Defendants involves necessarily, in most cases, a conflict between the Defendants or sets of Defendants *inter se*. Where in a prior suit for partition certain parties were arrayed as co-Defendants and the decision in that suit did not decide any question of partition amongst them *inter se* that decision does not operate as *res judicata*. *Mahomed Ahmad v. Zahur Ahmed* (28).

Judgments, orders or decrees which come within sec. 41 of the Evidence Act partake of a conclusive character for certain limited purposes on the footing of

(22) L. R. 41 I. A. 247: s.c. 19 C. W. N. 531 (1914).

(23) I. L. R. 32 All. 469 (1910).

(24) I. L. R. 8 Cal. 551 (1878).

(25) I. L. R. 20 All. 81 (1897).

(26) I. L. R. 22 Mad. 494 (1897).

(27) I. L. R. 31 Bom. 271 (1906).

(28) I. L. R. 44 All. 334 (1922).

(20) L. R. 12 Cal. 580 (1886).

(21) A.C. L. J. 396 (1924).

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their being judgments *in rem*. Cases of construction of deeds which all the parties to a litigation submit before the Court in order to ascertain or adjust their respective rights fall within the principle that where the parties to a litigation submit a question for the decision of the Court and the Court gives a decision on being so invited that decision binds all the parties for the future.

Lastly, it is contended that even if the rule of *res judicata* as embodied in sec. 11 of the Code does not apply the decision is conclusive on the general principles which relate to the conclusive character of judgments *inter partes*. Reliance has been placed as regards this branch of the contention upon certain cases which have now to be considered. The case of *Hook v. Administrator-General* (29) is one of these cases. In this case it was pointed out by the Judicial Committee that the question of *res judicata* is not completely governed by sec. 11 of the Code of Civil Procedure, that the said section prevents the re-trial in a subsequent suit of an issue which was directly and substantially in issue in a previous suit and does not deal with cases where the same issues arise in the same suit but at a later stage of it. Their Lordships quoted with approval the pronouncement of the Board made in the case of *Ram Kripal Sukul v. Rup Kuari* (30) as to the applicability of the general principles which prevent a case being twice litigated. The next case relied upon is that of *T. B. Ram Chandra v. A. N. S. Ram Chandra* (31). In that case it was held that a decision of a competent Court even in proceedings under

the Land Acquisition Act, will operate as *res judicata* and the same question cannot be re-opened in subsequent litigation as between the parties, it having been erroneously supposed in the Courts in India on a misapprehension as to the effect of the decision of the Judicial Committee in the case of *Rangoon Botatoung Company, Ltd. v. The Collector of Rangoon* (32), that the judgment, since it arose out of proceedings under the Land Acquisition Act, could not operate as *res judicata*. The case of *Badar Bee v. Habib Merican Noordin* (33) cited in the judgment of the last mentioned case is also referred to. From the judgment of their Lordships in that case it is clear that there was a previous decision *inter partes* in which it had been held that the Defendants were estopped from questioning a decree which made a certain declaration but they did not appeal from that decision as the interest then at stake was of trifling value and afterwards attempted to question its correctness when the interest at stake was much larger. Their Lordships observed: "It is not competent for the Court in the case of the same question arising between the same parties to review a previous decision not open to appeal. If the decision was wrong, it ought to have been appealed from in due time. Nor can the residuary legatees be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. If such a plea were not admissible there would be no finality in litigation. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute."

(29) L. R. 48 I. A. 187; s. c. I. L. R. 48 Cal. 499; 25 C. W. N. 915 (1921).

(30) L. R. 11 I. A. 37; s. c. I. L. R. 6 All. 269 (1883).

(31) 26 C. W. N. 713; s. c. 35 C. L. J. 545 (P. C.) (1922).

(32) L. R. 39 I. A. 197; s. c. 16 C. W. N. 961 (1912).

(33) [1909] A. C. 615.

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These cases do not in any way qualify the provisions of sec. 11 of the Code of Civil Procedure so far as regards cases which come within the scope of that section, or affect the question of *res judicata*, when a previous decision of a suit is alleged to operate as a bar in a subsequent one as between persons who were co-Defendants in the previous suit. As observed by the Judicial Committee in the case of *Gokul Mandar v. Pudmanand Singh* (34) the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction.

For the foregoing reasons I agree with the learned District Judge in holding that the decision in the suit of 1901 does not operate as a bar on the question of construction of cl. 21 of the deed upon which the title of the Appellant rests.

I now proceed to consider the second question, namely, the construction of the clause. I have very carefully read the deed several times, especially as I have been unable to agree with the view taken of it by several Bengali Judicial Officers whose interpretation of the deed, which is in Bengali, is naturally entitled to every respect. The governing intention of the author of the deed is to create an endowment in favour of the deity Sri Sri Iswar Sridhar Jieu and the feeding of the guests connected therewith, the house is item No. 1 of Schedule *Uma* which along with the properties in the other schedules, namely, *ka* to *gha* are dedicated in cl. 1 for the worship of the said deity and the feeding of the guests connected therewith. Cl. 21 opens with a clear and unambiguous statement making the said house to-

gether with the surrounding lands and trees, etc., as *debotter* property of the deity. To construe the remainder of the clause it will have to be seen whether there is anything therein which is necessarily repugnant to the intention so unequivocally expressed in the opening words. The wording of the whole deed is somewhat clumsy but the meaning of the clause does not appear to be ambiguous. The clause has been put into English by the learned Subordinate Judge and I adopt his translation with some slight variation. It would run thus:—"My Burdwan lodging house (consisting of) a *dalan* (*pucca* building) with lands on all sides and trees, etc., is given to *debotter*. But so long as Sreeman Makhan Lal remains in Burdwan, after educating his son (and) on making him a trustee in his place will enjoy and remain in possession (of the same) *oirup uttaradhikarirupey* and he will remain on paying taxes and making necessary repairs. But the western room in which I put up remains mine. When the trees dry up Makhan Lal will be entitled to use them as fuel. There is a talk of purchasing the lands to the west and north of the *dalan* (*pucca* building) on payment of their price. In future Siman Saroda, Rajendra or Jogesh will be entitled to build houses. But if any (of them) quarrels with each other, the trustees will disappoint them all. (As to) the house and garden given to Mukshoda by me, no one will have any concern therewith. He will enjoy and remain in possession thereof, *putrapoutradhikramey* (from generation to generation)." The learned Subordinate Judge has translated the words "*oirup uttaradhikarirupey*" as "in the same way as an heir" and in this, in my opinion, he was in error. In my opinion the words mean "as successor in the same way,"

(34) *Cal. 707*: s. c. 6 O. W. N. 625 (P. C.) (1902).

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that is to say, as trustee appointed in the place of Makhan Lal and possessing the same rights and privileges as Makhan Lal. It is noteworthy also that these properties find no place in any of the eight schedules at the end of the deed, namely, schedules 1 to 8 wherein bequests in favour of certain persons are specified. Other grounds have been given by learned District Judge in support of the view he has taken and I agree generally with his reasoning. In my opinion, beyond the right to enjoy the properties in the manner indicated and subject to the conditions prescribed, no other right, far less any absolute interest, was created in favour of Makhan.

The question of limitation has next to be considered. On this question the point to be considered is whether sec. 10 of the Limitation Act applies to the case. For this section to apply it will have to be held that the property became vested in Makhan in trust for a specific purpose, that is to say, two conditions must combine; there must be a trustee with an express trust and an estate or interest vested in the trustee; in other words, the trust must have been created for some specific purpose and the property must have become vested in the trustee with the object of carrying that purpose into effect. In this connection the true effect of the deed has to be construed.

The deed expressly dedicates the properties, including the house which is mentioned in Schedule Uma for the worship of Sri Sri Iswar Jieu and the feeding of the guests connected therewith. In the opening lines of para. 21, the house is expressly dedicated to the said deity. In paragraph 2 the trustees are appointed for the purpose of "protecting, managing and so forth" the properties so dedicated. In para. 1 Annoda Prosad Ghose declares

thus:—"To all those properties I shall have in future no right other than that of mere superintendence. All the aforesaid properties shall come under the management of the trustees named below from the moment I shall depart from this place for good." The different paragraphs of the deed lay down rules for the guidance of the trustees. In para. 15 it is repeated that the properties are dedicated for the worship of the deity and the feeding of guests. In several places in the deed the estate is called the *debottar* estate. The effect of the deed clearly, in my opinion, is to vest the properties in the deity and not in the trustees for a specific purpose. The mere use of the word "trustee" is of no consequence if what I have said is the real import of the deed. The distinction between the two classes of cases has been pointed out in the decision of the Judicial Committee in the case of *Vidya-varuti Tirtha v. Balusami Ayyar* (35), where their Lordships after quoting the words of sec. 10 of the Limitation Act observe thus: "The language of sec. 10 gives the clue to the meaning and application of Art. 134. It clearly shows that the article refers to specific trust and relates to property 'conveyed in trust.' Neither under the Hindu law nor in the Mahomedan system is any property conveyed to a *shebait* or *mutwalli* in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mahomedan law the moment a *wakf* is created all rights of property pass out of the *wakif* and vest in God Almighty, the curator, whether called *mutwalli* or *sajja-danishin* or by any other name, is merely

(35) L. R. 48 I. A. 302 at p. 315; s. c. 26 C. W. N. 537 (1921).

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a manager. He is certainly not a 'trustee' as understood in the English system." After this pronouncement it is difficult to maintain that sec. 10 has any application to the case of an endowment in which there is a dedication in favour of the deity, as I hold there has been in the present case. To my mind it is clear that the properties vested in the deity and the management, control and possession remained in the so-called "trustee." Certain passages from some of the later decisions of the Judicial Committee were cited before us on behalf of the Respondent, namely, from the decision in the case of *T. P. Srinivasa Chariar v. C. V. Evalappa Unadatra* (36), *A. S. S. Subbaya Pandaram v. Mahamad Mustapa Maracyar* (37) and *Naina Pillai Marakayar v. T. A. R. Ramanathan Chettiar* (38), as apparently qualifying to some extent the pronouncement of the law as made in *Vidyavaruthi's* case (35). This matter, however, need not be discussed, for so far as regards the cardinal principle to which I have referred, the law must be taken to have been finally settled. For the contention that sec. 10 applies to the case reliance was placed on behalf of the Respondent upon the decision of the Judicial Committee in the case of *Srinivasa Moorthy v. Venkatavada Iyyengar* (39), but that was a case of an executor and trustee appointed under a Will. In the present case as I have already said the mere use of the word trustee signifies nothing. The article which would apply in a case of this nature is either Art. 142

or Art. 144. For this proposition reference may be made to the decision of the Judicial Committee in the case of *Abdur Rahim v. Narayan Das Aurora* (40).

So long as Annoda was alive there is no question that the deity was in possession through him. On the death of Annoda, Makhan came to be in possession, but in view of his knowledge of the deed, it must be taken that he came into possession in the fiduciary character conferred on him by the deed, and the possession of the deity must be presumed to have continued unless it is proved that Makhan set up a title hostile to the deity. The onus is on Makhan to shew that he did not come in in that character or if he did, that his possession subsequently became adverse to the debutter either by disclaimer or by open and clear assertion of a hostile title. It is therefore immaterial whether Art. 142 or Art. 144 applies, and the real question is whether Makhan's possession at any time became adverse and if so has this possession continued for a sufficient length of time to extinguish the Plaintiff's title and create a title in Makhan and the Appellant.

This brings us to a consideration of the last question which arises in this appeal, namely, whether the Appellant and his father Makhan has been in adverse possession for a period of twelve years. On the facts found, Makhan contested the suit of Katyayani, but did not do any other act as trustee under the deed. The learned District Judge remarks in his judgment that in the written statement Makhan claimed the house as his own, but in this he has been in error. Nor, on the other hand, was the learned District Judge, in my opinion, right in treating the filing of the written statement in

(35) L. R. 48 I. A. 302 at p. 315: s. c. 26 C. W. N. 537 (1921).

(36) 27 C. W. N. 317 (P. C.) (1922).

(37) 28 C. W. N. 493 (P. C.) (1923).

(38) I. L. R. 47 Mad. 337: s. c. 28 C. W. N. 809 (P. C.) (1923).

(39) 38 I. A. 129: s. c. 15 C. W. N. 741 (1911).

(40) L. R. 50 I. A. 84: s. c. 28 C. W. N. 121 (1922).

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Katyayani's suit as acceptance of the trusteeship. No doubt an executor trustee by proving the Will is deemed to have accepted the trusts of the Will; *Mucklow v. Fuller* (41). But the filing of a written statement, such as it was in the present case, asserting the validity of the deed and opposing its construction when its validity was challenged by Katyayani, in my judgment, does not go so far. At any rate it was not inconsistent with Makhan having accepted the position of a "trustee" not in respect of all the properties included in the deed but only in respect of such of them which were found by the Court at that time to have been dedicated to the deity. On the question of adverse possession the learned Subordinate Judge held that Makhan through his pleaders in the suit of 1901, must have set up a hostile title to the property, and that as the Plaintiff was one of the pleaders such assertion must have been to the knowledge of the Plaintiff.

Though there is no direct evidence of this assertion of a hostile title, yet all the circumstances point to such an assertion having been made on behalf of Makhan by his pleader and that to the knowledge of the Plaintiff who was also one of the pleaders for Makhan in that suit. The decision of that suit as also of several suits which subsequently came on, all affirmed the view that Makhan was the absolute owner. It is not unreasonable to suppose—in fact any assumption to the contrary would be most unreasonable—that Makhan continued to possess the property with the knowledge of the Plaintiff on the assertion of the title which was found in his favour in several successive suits. No particular form of expression of an intention is necessary to constitute adverse possession; it is always a ques-

(41) [1821] Jac. 198.

tion of *animus* which has to be gathered from all the circumstances. The character of the possession of Makhan since the time of those suits, till the time when the Appellant has been in possession has remained the same, and the one conclusion that follows is what has been found by the learned Subordinate Judge, namely, that there has been adverse possession for over twelve years, and the Plaintiff's title has been extinguished.

The appeal therefore must be allowed, the decree of the learned District Judge reversed, and that of the Subordinate Judge restored with costs in this Court as well as in the lower Appellate Court.

SUHWARDY, J.—In Katyayani's suit she invited the Court to construe the deed of endowment for the purpose of finding if any term of it was invalid so that the property not validly dedicated would descend on her as the heir of the settler. She did not ask the Court to construe the terms of the deed in order to determine the real nature and effect of the settlement. The construction in Katyayani's suit upon cl. 21 of the deed, therefore, is not, in my opinion, *res judicata* as between Plaintiff and Makhan.

I agree with my learned brother in the interpretation of the document and in holding that the Plaintiff's suit is barred by limitation.

N. G.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 98 OF 1926.

GREAVES, J.
C. C. GHOSE, J
1926,
1, February.

SATYA CHARAN MITTAL,
Petitioner,
v.
THE KING-EMPEROR,
Opposite Party.

*Calcutta Police Act (IV of 1866), sec. 78A—
Admissibility of evidence contained in a statement
obtained in contravention of sec. 78A, sub-sec. (3)—*

SATYA CHARAN MITTER v. THE KING-EMPEROR.

Commitment based on such evidence, validity of—Powers of the Police, how regulated, in the Presidency Town, in the mofussil—Police, if they have any general inherent power in matters of investigation into an alleged offence, apart from the powers conferred on them by Acts and Circulars.

A complaint was preferred before the Chief Presidency Magistrate, Calcutta, charging S and others with cheating, forgery, theft, etc. The Magistrate directed an enquiry into the matter. In the course of the enquiry, the Investigating Police Officer went to Howrah and got a statement from S. No requisition was made to the Superintendent of Police, Howrah, in this behalf, under sec. 78A (3) of the Calcutta Police Act. The Magistrate on the evidence contained in the statement committed S for trial at the High Court Sessions :

Held—That the evidence was inadmissible in evidence and the commitment was bad. All investigations of the police must be controlled in Calcutta by the Calcutta Police Act and by any Circular issued on that behalf, and in the Mofussil by the Code of Criminal Procedure; apart from these Acts and Circulars, the police has no general inherent powers in such matters. The Investigating Police Officer in this case had no power to take the statement without requisition being made to the Superintendent of Police, Howrah. The attendance and questionings contemplated by sec. 78A, sub-secs. (1) and (2) of the Calcutta Police Act are intended to take place within the Presidency Town itself but if information has to be obtained from outside the Presidency Town, the procedure laid down in sub-sec. (3) has to be followed.

This was a Rule issued on the 26th January 1926 against an order of commitment of the Petitioner for trial at the Sessions made by the Chief Presidency

Magistrate of Calcutta (T. Roxburgh), on the 21st January 1926.

The facts of the case are briefly as follows :—One Girija Bhusan Sarkar on behalf of his mother-in-law, widow of the late Dr. Satya Saran Mitter of Howrah, preferred a complaint before the Chief Presidency Magistrate, Calcutta, charging the Petitioner, his son Sashibhusan Mitter and one Dayal Hari Banerjee with forgery, theft, cheating, etc. The Chief Presidency Magistrate thereupon took cognizance of the complaint under sec. 190, Cr. P. C., examined the complainant and directed an enquiry. In the course of the investigation, the Investigating Officer went to Howrah and took from the Petitioner a statement, no requisition being made to the Superintendent of Police on that behalf.

The three accused were then produced before the Chief Presidency Magistrate, who after taking evidence, committed them for trial at the High Court Sessions. Before the Magistrate it was urged on behalf of the accused that the statement of the Petitioner obtained by the Investigating Officer was inadmissible in evidence having regard to the provisions of sec. 162, Cr. P. C., and if that statement were excepted, there was no evidence before him for committing the Petitioner for trial. The learned Magistrate while holding that there was not sufficient evidence to go to the jury against the Petitioner if his own statement were excepted, admitted the same as evidence, subject to such objection as might be taken at the trial regarding its admissibility and committed the Petitioner to the Sessions.

The Petitioner moved the High Court against the order of the Magistrate and obtained this Rule.

Mr. B. C. Chatterjee, Babus Mritunjoy

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Chattopadhyaya and Biraj Mohan Ray for the Petitioner.

Messrs. B. L. Mitter (Advocate-General), Khundkar (Deputy Legal Remembrancer), S. K. Sen and Narendra Kumar Bose for the Crown.

Mr. B. C. Chatterjee on behalf of the Petitioner submitted that under sec. 162 of the Criminal Procedure Code, the statement of the Petitioner was inadmissible. Further the statement was obtained without any requisition being made to the Superintendent of Police, therefore the Investigating Officer was not acting under sub-sec. (3) of sec. 78A of the Calcutta Police Act. Sub-secs. (1) and (2) of sec. 78A do not apply to the facts of the present case. Therefore the statement, on both grounds, was inadmissible. Besides the statement there is no other evidence to go to the jury against the Petitioner, so the commitment should be quashed.

The Advocate-General (Mr. B. L. Mitter) for the Crown.—Calcutta Police Act does not contain all the powers vested in the Calcutta Police. They have much wider powers given to them by Circulars. They also have inherent powers besides those given to them by Acts and Circulars. Acting under these powers the Investigating Officer could take the statement as he has done. The statement therefore was admissible. Under the general law, such a statement was admissible in evidence. The commitment was right.

See *Queen-Empress v. Nilmadhab Mitter* (1).

THE JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This Rule was granted by my learned brother Mr. Justice C. C. Ghose sitting with Mr. Justice Mukerji

(1) I. L. R. 15 Cal. 595 (F. B.) (1888).

and the object of the Rule was to secure the quashing of an order of commitment passed by the Chief Presidency Magistrate of Calcutta. The statement contained in the petition upon which the Rule is based is that on the 10th November one Girija Bhusan Sarkar on behalf of his mother-in-law preferred a complaint before the Chief Presidency Magistrate, Calcutta, charging the Petitioner and the Petitioner's son and another person with forgery, cheating, theft, etc., and it is said that the Chief Presidency Magistrate therefore took cognizance of the complaint under sec. 190, Cr. P. C., examined the complainant under sec. 200 and directed an enquiry under sec. 202 and that under these circumstances a certain statement which was taken from the Petitioner by an Investigating Police Officer is not admissible in evidence under the provisions of sec. 162 of the Code of Criminal Procedure. I do not think, however, that this contention is well-founded. If one turns to the original application which was made to the Chief Presidency Magistrate one finds that it is made in general terms. It stated that a certain Satya Charan Mitter died and that he was the holder of certain Government securities and that some difficulties having arisen after his death with regard to these securities it was necessary that certain enquiries should be made, and the actual application that was made to the Chief Presidency Magistrate was for a stop order in respect of the securities referred to in the petition and for a direction on the C. I. D. Police to make enquiry into the matter. The order passed on that application by the Chief Presidency Magistrate was to send the matter to the C. I. D. for enquiry and report, and with regard to the stop order the Magistrate stated that the evidence is not sufficient to

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justify the order at that stage. I think, therefore, that the arguments based on the contention to which I have referred are not well-founded and that the Chief Presidency Magistrate was merely acting under the provisions of sec. 156 (3) of the Code of Criminal Procedure which empower the Magistrate to order an investigation in the terms stated in the section. But the real point that we have got to decide is based on a consideration of the powers of the Calcutta Police under the Calcutta Police Act. The facts being as I have stated they clearly show that sec. 162, Cr. P. C., does not directly apply, for the investigation that was directed was carried on by the Calcutta Police under the provisions of the Calcutta Police Act, and it appears that what happened was that after the Chief Presidency Magistrate made his order the Petitioner's son having been already arrested the Police Officer went to the Petitioner and took from him a statement which is now sought to be used in evidence against the Petitioner, and on the strength of which he was committed by the Magistrate for trial at the Sessions, it being admitted that apart from this statement obtained from the Petitioner the evidence on the record is not sufficient to justify the committal, and indeed the Magistrate very frankly so states.

Turning to the provisions of sec. 78A of the Calcutta Police Act, which is the Act applicable as the Code of Criminal Procedure does not apply to the Calcutta Police except as expressly indicated in that Act, one finds that according to the provisions of sec. 78A (1) the Commissioner of Police, if in the course of any investigation he thinks a cognizable offence has been committed, can by an order in writing require the attendance before himself or any officer serving

under him not below the rank of an Inspector, who is investigating a cognizable offence, of a person within the limits of Calcutta or within a radius of 30 miles. Sub-sec. (2) provides that the Commissioner of Police can examine orally the person who attends in accordance with the order passed under sec. 78A (1) and that the person so attending is bound to answer all questions. Then comes sub-sec. (3). That provides that the Commissioner of Police may forward to the Superintendent of Police of the District in which any person from whom any information is required relating to the facts or circumstances of the case under investigation is believed to be, such questions and such statements as may be necessary for the purpose of obtaining the information desired, that is to say, the scheme of sec. 78A in my reading of the section is to enable the Commissioner of Police to procure the attendance before him or any officer deputed in that behalf of any person for the purpose of obtaining information from such person; and as I have already stated sub-sec. (2) authorises the oral examination of the person whose attendance is procured. Then under sub-sec. (3) the Commissioner of Police is empowered to obtain the assistance of the Superintendent of Police in a District outside Calcutta for the purpose of having questions put to a person from whom information is desired but who for some reason cannot attend. As I understand sec. 78A (1) and (2) the attendance and questionings are intended to take place within the Presidency Town itself; and sub-sec. (3) only comes into force if for some reason it is difficult or undesirable to require the attendance of the person from whom information is desired within the precincts of the Presidency Town itself. Now what the In-

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investigating Officer apparently did in this case was to go to Howrah and take from the Petitioner a statement which contains the evidence upon which the committal order has been made by the Magistrate. I do not think, therefore, that he was acting under the provisions of either sec. 78A (1) or (2), nor do I think that he was in fact acting under the provisions of sec. 78A (3), for I do not understand that any requisition was made to the Superintendent of Police of Howrah for the purpose of procuring the information which was desired, and if in fact the Investigating Officer had been acting under the provisions of sub-sec. (3) he would by virtue of cl. (3) of the Police Act, III of 1888, be acting under the direction of the Superintendent of Police of Howrah and the matter would accordingly be governed by the provisions of sec. 162 of the Code of Criminal Procedure, for that Act of course applies to Howrah. I think, therefore, we are met with this difficulty that if what the Police Officer says he did falls within sec. 78A (3) then sec. 162, Cr. P. C., applies for the reasons I have indicated. But in my opinion the Investigating Officer was not acting under sec. 78A at all, and the question therefore we have got to see is whether he was justified in the course which he took, and whether the statement which he took from the Petitioner is under the circumstances admissible in evidence.

It is suggested by the Advocate-General that the Calcutta Police Act does not contain all the powers vested in the Calcutta Police and then there are in existence certain Circular Orders which give or may give wider powers in this matter than are contained in sec. 78A, but no such order has been produced before us and I do not think we are justified in assuming that such an order exists. Then a further

contention is urged before us. It is said that the power to investigate contains an inherent power to take a statement such as this and that accordingly under the general law this particular statement is admissible in evidence against the accused, and we are referred in support of this argument to the case of *Queen-Empress v. Nilmadhab Mitter* (1), which is a decision of the Full Bench of this Court, as an authority for the proposition that there are certain powers inherent in the Police which are not expressly set out in the four corners of the Calcutta Police Act; for instance, it is said that there is no provision in the Calcutta Police Act providing for the taking of confessions; and yet according to the decision of the Full Bench the confession that was taken in that case was admitted in evidence although as I have stated there was no power to take confession expressly included within the provisions of the Calcutta Police Act. But in that case the confession was taken within the town of Calcutta itself and consequently that case cannot be prayed in aid to support the procedure adopted here. And we are not prepared to assent to the proposition that in criminal matters there is this inherent power such as the Advocate-General contends exists. All investigations by the Police it seems to me must be controlled, in the mofussil, by the Code of Criminal Procedure and in Calcutta by the Police Act itself or by any Circular Orders issued. I am not prepared to say that in a matter of this nature we can safely import a power such as the Advocate-General seeks to import of taking statements generally by the Police apart from the provisions of any Act and then put the statements so taken in evidence against the person by whom they were made. I

(1) I. L. R. 15 Cal. 595 (F. B.) (1888).

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think that would be to strike at the principles, to preserve which the provisions of sec. 162, Cr. P. C., were enacted and would introduce a very dangerous principle.

For the reasons, therefore, we have indicated I think the Rule should be made absolute and the commitment order of the Petitioner should be quashed.

C. C. GHOSE, J.—I agree.

S. N. B.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 482 of 1925.

O. C. GHOSE, J.

DUVAL, J.

1925,

Heard, 20 and

23, November.

Judgment,

1, December.

HARUN RASHID,

Appellant,

v.

THE KING-EMPEROR,

Respondent.

Criminal Procedure Code (Act V of 1898), secs. 236, 237—Trial on charge of abetment of forgery—Conviction for using a forged document, if legal.

In a trial on a charge of abetment of forgery under sec. 467 read with sec. 109, I. P. C., the accused cannot be convicted of using a forged document under sec. 471, I. P. C. Secs. 236 and 237, Cr. P. C., do not warrant such a conviction.

The offence of abetment of forgery is complete when the document is written and signed but the user is a distinct and different offence for which the accused is entitled to be separately charged.

This was an appeal preferred on the 1st August 1925 against an order of the Sessions Judge of Cachar (Mr. A. dec Williams), dated the 4th June 1925, convicting the Appellant under secs. 467/471, I. P. C., and sentencing him to undergo rigorous imprisonment for 6 years.

The facts of the case will appear from the judgment.

Babus Debendra Narain Bhattacharjee and Satyendra Kishore Ghose for the Appellant.

Mr. Ashraf Ali for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellant before us has been convicted by the learned Sessions Judge of Cachar under secs. 467/471, I. P. C., and has been sentenced to undergo rigorous imprisonment for a period of six years. He was put on his trial along with four others—Shajid Ali, Atar Ali, Yakub Ali and Salim Mia, they being charged under sec. 467 with forgery and he being charged under sec. 467 read with sec. 109 of abetment of forgery. The four others were acquitted. The trial was with the aid of three Assessors who found the accused guilty of having abetted the forgery of a certain document.

The case for the prosecution was that the accused Shajid Ali had written out a *kobala* by which Mahomed Yusuf and Sultan Mahomed purported to convey to the accused Harun Rashid 120 bighas of land for Rs. 4,000, the consideration being accounted for as follows, namely, Rs. 2,000 due to Harun Rashid on account of a certain debt and Rs. 2,000 as commission due to him from them. In other words, no money was alleged to have been paid at the time of the execution of the *kobala*. The three witnesses to the execution of the *kobala* were the accused Atar Ali, Yakub Ali and Salim Mia who were discharged by the Judge as not knowing that the deed was a forgery. As regards the accused Shajid Ali, there was evidence that he had written out the *kobala* in question. The Assessors found him guilty of forgery but the learned Sessions Judge, being of opinion that there was nothing to show that Shajid Ali did

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not write out the *kobala bonâ fide* at Harun's request, acquitted him as stated above. The charge against the Appellant Harun Rashid was that he had abetted the forgery of a valuable security which was forged in consequence of his abetment.

The evidence goes to show that he presented the *kobala* for registration at the Sub-Registrar's Office. The Sub-Registrar thereupon called on the alleged executants to attend and thereafter the alleged executants appeared and denied execution of the document. The learned Sessions Judge found on the evidence that there could be no doubt whatsoever that the *kobala* in question was a false document. It was clearly a valuable security and its very nature showed that it was made with intent to cause the alleged executants to part with property. It was therefore a forged document. He found that there was no evidence worth the name that Harun had abetted the forgery by entering into a conspiracy to procure the forgery, but he was of opinion that the transaction as disclosed in the evidence pointed rather to Harun having committed an offence punishable under sec. 471 of the Indian Penal Code, i.e., Harun had used the document as a genuine one knowing that it was a forgery and that the recitals in the said document were all untrue and that his intention was to cause wrongful loss to the alleged executants. The learned Sessions Judge was of opinion that Harun should have been charged under secs. 467/471, I. P. C., the user of the forged document being its presentation to the Sub-Registrar for registration. He accordingly convicted him under the said sections and sentenced him as stated above.

On behalf of the Appellant it has been argued that he having been tried on a

charge of abetment of forgery cannot be convicted under sec. 471 of using a forged document as genuine without a trial having been held on a charge under sec. 471, I. P. C. It appears from the record that the learned Sessions Judge relied upon the provisions of sec. 237, Cr. P. C., as authorising him to convict the Appellant under sec. 471, I. P. C. It therefore becomes necessary for us to examine the provisions of sec. 237, Cr. P. C., and see whether the procedure adopted by the learned Sessions Judge is legal. Sec. 237, Cr. P. C., runs as follows:—"If in the case mentioned in sec. 236 the accused is charged with one offence and it appears in evidence that he has committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." It will be seen that sec. 237 is only applicable to cases which properly fall within the scope of sec. 236 of the Code of Criminal Procedure which says: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." We do not think that sec. 236 and sec. 237 can apply in this case. The charge was abetment of forgery—an offence which is complete when the document was written and signed. But the conviction is for a subsequent act. The forgery purports to be on the 30th March 1924. The date the document was presented for registration and used was the 31st July 1924. The user is therefore a distinct and

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different offence for which the accused is entitled to be separately charged.

Before a person is convicted under a particular section of the Indian Penal Code or of any other enactment it is imperative that subject to the provisions of sec. 237, Cr. P. C., he should be formally charged with having committed the offence specified in the section and be given an opportunity to defend himself against the specified charge. That has not been done in this case and we are constrained to hold that the conviction and sentence in the present case cannot stand. The result therefore is that the conviction and sentence in this case are set aside and the case is sent back in order that the Appellant may be re-tried according to the provisions of the law after framing suitable charges. The Appellant will remain on the same bail as he is on now, pending further orders of the Sessions Judge.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

VISCOUNT HALDANE.)

LORD WRENBURY.

LORD BLANESBURGH.] S. SOUNDARA RAJAN
1925, and ors., Appellants,

Heard, 16 and 18, June. C. M. NATARAJAN and
Judgment, ors., Respondents.

16, July.

Indian Succession Act (X of 1865), secs. 101, 102, 126—Will—Construction—Absolute gift accompanied by void settlement, or estate for life—Gift to daughters for life, remainder to children on attaining 21 years—Gift to class—Perpetuity, rule against, in England and India—Act VIII of 1921.

The testator, a Hindu who died in 1904, bequeathed his estate to trustees with directions to apportion the residuary trust funds into as many equal shares as he might have daughters

living at the time of his death or who having predeceased him should have left issue surviving the testator and to pay the income of each of such shares to his said daughters respectively during their respective lives, and from and after the decease of each of the said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years. All his three daughters having survived him:

Held—That there was no disposition in favour of the daughters of an absolute estate in the respective shares followed by a provision for settlement which became inoperative, within the meaning of sec. 126 of the Succession Act, the principle of which is not substantially different from that laid down in *LASSENCÉ v. TIERNEY* (2).

That the ultimate dispositions in favour of the daughters' children on their attaining the age of 21 years failed altogether as being obnoxious to the provisions of sec. 101 and sec. 102 of the Succession Act, the children of the daughters being intended to take as classes, within the meaning of sec. 102.

The difference between the rule obtaining in England and that laid down in sec. 101 of the Succession Act pointed out.

Whether Madras Act, I of 1914, was ultra vires or not, Act VIII of 1921 of the Indian Legislature made secs. 101 and 102 applicable to the Will.

The provisions of the Majority Act extending the period of minority in cases mentioned therein to 21 years did not validate the disposition, as at the testator's death, one could not be certain whether all or any of the members of the classes in whose favour the disposition was made

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would ever have guardians appointed as contemplated by the Act.

This was an appeal (No. 140 of 1923) from a decree of the High Court at Madras, dated the 16th December 1920, affirming a decree of the said Court in its Original Civil Jurisdiction, dated the 6th November 1919.

The suit was brought by the Appellants for the construction of the Will of their grandfather Colathaor Ratna Mudaliar against the Respondents, the other grandchildren of the testator.

The Will was dated 24th April 1897. The testator, who was a Hindu domiciled in the city of Madras, died in December 1904 leaving a widow and three daughters.

The material portions of the Will are set out in the judgment of the Judicial Committee. The testator's eldest daughter had four children, three of whom were born before 1904 and one after that date.

The second daughter had one child born after 1904.

The third daughter had 6 children all born after 1904.

The Appellants were the three sons of the third daughter.

The trial Judge, Coutts Trotter, J., held on the construction of the Will that the testator gave a life estate to each of his daughters, that the gifts to grandchildren born after the testator's death were void but were validated by Madras Act, I of 1914.

The decree further stated "that the period of distribution is multiple, i.e., there is a distribution *pro tanto* as and when each of the said children reaches the age of 21, and the final distribution is to take place when the last of the children attains the age of 21 or dies.

On appeal the High Court (Wallis, C. J. and Ramesam, J.) were of opinion that

Madras Act, I of 1914, was *ultra vires* and that the dispositions offended the rule against perpetuities and were bad under sec. 101 of the Indian Succession Act. They held, however, that the case came under sec. 126 of the Succession Act and operated as an absolute gift to each of the testator's daughters.

Messrs. Clauson, K. C. and Narasimham for the Appellants.—The Appellate Court was right in holding that the bequests were invalid as being gifts to unborn persons but it was wrong in deciding that there was an intention to confer an absolute gift on each daughter and make a settlement of it.

The true construction is that life estates were given to the daughters; the Appellants and the other grandsons are entitled absolutely to the residuary estate as upon an intestacy.

Sir Walter Schevaba, K. C., Messrs. Upjohn, K. C. and A. M. Talbot for the Respondents.—The Will read as a whole shows an intention to give the daughters a one-third share each absolutely and as the High Court point out the further provisions are just the kind of settlement that a modern Hindu would be inclined to make upon his daughters.

Hulme v. Hulme (3), *Ring v. Hardwick* (4), *In re Mercer's Trusts* (5) and *Whithead v. Rennett* (6).

Whether or not Act I of 1914 (Madras) was *ultra vires* it has been validated by Act VIII of 1921 and the gift to unborn grandchildren was good.

Sec. 102 of the Indian Succession Act does not apply to Madras Hindus.

Bhagabati Barmanya v. Kali Charan

(3) 9 Sim. 644, 649, 650 (1839).

(4) 2 Beav. 352 (1840).

(5) [1876] 4 Ch. Div. 182.

(6) 22 L. J. Ch. 1020 (1853).

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Singh (7), Cally Nath Naugh v. Chunder Nath Naugh (8) and Alangamonjori Dabce v. Sonamoni Dabce (9).

In any event the section does not apply to Respondent No. 4 to whom a guardian had been appointed and who did not attain majority until he was 21.

Mr. Clauson, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—The questions which arise for decision on this appeal relate to the construction and validity of the provisions of a Will, dated 27th April 1897, and made by a Hindu, C. Ratna Mudaliar, who died in 1904. He left a widow and three daughters. One of these daughters, Yasodammall, died in 1907; another, Rajammall, in 1908; and the third, Nilayathatchi Ammal, in 1918. Yasodammall had four children, as to three of them, two sons and a daughter, born before the death of the testator in 1904, and as to one of them, born afterwards in 1907. Rajammall, the second daughter, had a son Tirugnanasambandam, who was born in 1907. This child was constituted a Ward of Court in 1910. Nilayathatchi Ammal, the third daughter, had six children, three sons and three daughters, all born after 1904. Of these various families the three sons of the third daughter were Plaintiffs in the suit and are Appellants to-day. The others were Defendants and are now Respondents.

It will be convenient first of all to set out the material portions of the Will:—

"I give devise and bequeath all my estate and effects immoveable and moveable unto my Trustees Upon Trust that my Trustees shall sell call in and convert into money the same or such part thereof as

shall not consist of money and shall with and out of the proceeds of such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds Upon Trust to set apart thereout and invest in promissory notes of the Government of India such a sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C. Andalammall during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same Upon the Trusts hereinafter declared concerning the residue of my estate. And as to the residue of my estate I direct that my Trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorised to invest trust funds and shall stand possessed of the said residuary trust monies and the investments for the time being representing same (hereinafter called "the residuary trust funds"). In Trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts of shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter Upon Trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid Upon Trust for all the children of the other or others of my said daughters who shall attain the age of twenty-one years as tenants-in-common in equal shares per stirpes. Provided always and I hereby declare that if any daughter of mine shall die in my lifetime leaving lawful issue at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one as tenants-in-common in equal shares per stirpes the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

The suit was instituted in the High Court of Madras for a due construction of the Will and for administration. The

(7) L. R. 38 I. A. 54; s. c. I. L. R. 38 Cal. 468, 15 O. W. N. 393 (1911).

(8) I. L. R. 8 Cal. 378 (1882).

(9) I. L. R. 8 Cal. 157 (1881).

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Plaintiffs, the present Appellants, were, as already stated, grandsons of the testator and children of his third daughter. Their case is that they, along with the sons of the other two daughters, are entitled to succeed to the testator's residuary estate subject to an annuity to the widow and to mere life estates given to the three daughters, who are all now dead. For they contend that the trusts in favour of grandchildren, following in the Will on those for the daughters for life, are void by the law of India. The case of the Respondents, on the other hand, is that the trusts introduced in favour of grandchildren were validly created by the Will, or, alternatively, that the three daughters of the testator in the result took his residue absolutely.

The case was tried before Mr. Justice Coutts Trotter, who decided in substance (1) that the testator gave only a life estate to each of his three daughters, and not an absolute estate, remarking: "It seems to me clear that what the testator wished to do was to divide the income of his estate into three shares for the benefit of his three daughters respectively during their life-time, and thereafter the corpus of each share should belong to such of the children of each daughter as should attain the age of twenty-one years;" (2) that under the provisions of sec. 3 of the Hindu Wills Act, 1870, and the rules laid down by the Lords of the Judicial Committee in the case of *Tagore v. Tagore* (1) and other decisions, the gifts to the grandchildren of the testator born after his death were void; but that the provisions of the Madras Act, I of 1914, which were not in his opinion *ultra vires* of a Provincial Legislative Council, validated the bequest in this respect. The learned Judge was fur-

ther of opinion that the testator's Will did not, for reasons which he gave, contravene the Indian rule against perpetuities in view of the provisions of Act IX of 1875, as amended by the Guardians and Wards Act, 1890.

There was an appeal to the Appellate Civil Jurisdiction of the High Court of Judicature at Madras. Before judgment on that appeal was delivered certain compromises were made between certain of the parties, for the division between them of what might be the fruits of this litigation. Into the terms of the compromise it is not, however, necessary, at this stage of the suit, to enter.

The appeal was heard by the Chief Justice (Sir John Wallis) and Mr. Justice Ramesam. These learned Judges did not agree with the view of the trial Judge as to the effect of the Indian Majority Act, 1875, and of the Madras Act I of 1914 (which they held to have been *ultra vires* of the Provincial Legislature). They were accordingly of opinion that the disposition of the Will could not take effect as regards beneficiaries born after the death of the testator, and, as the provisions in favour of issue of daughters were obnoxious to sec. 101 of the Indian Succession Act, 1865, they thought that the whole disposition in favour of the daughters' children failed as a result of sec. 102 of that Act. They held, however, that upon the true construction of the Will the intention of the testator was, in the first instance, to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement of the gift thus absolutely made, and that consequently under sec. 126 of the Indian Succession Act, 1865, the daughters of the testator took absolutely, when these provisions failed of effect. That section, made applicable to the testator's Will by

(1) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. 359 (1872).

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the Hindu Wills Act (No. 21) of 1870, is as follows :—

"Where a testator absolutely bequeaths a fund, so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee: if that benefit cannot be obtained for the legatee, the fund belongs to him, as if the Will had contained no such direction."

This is an enactment in statutory form of a principle which was already familiar to English lawyers. The case of *Lassence v. Tierney* (2) shows that where, reading the Will as a whole, the intention to confer an absolute estate in the first instance is expressed or implied, and following on that absolute estate there is a provision for settlement which in the event cannot be operative, then the words of prior intention prevail and the absolute estate takes effect notwithstanding the failure of the provision for settlement that follows. In India the words in sec. 126 must be followed as laying down the principle, but the principle is not substantially different from what was expressed in *Lassence v. Tierney* (2). Their Lordships have given consideration to the terms of the Will in the present case. The material directions are those to the trustees "to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them or me surviving." The trustees are then to "pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives. And from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years."

The testator then directs that in the event of any of the daughters dying without leaving lawful issue the trustees are to "stand possessed of the share or shares so appropriated to her or them as aforesaid" on trust for her children who shall attain twenty-one. He goes on to introduce a proviso under which, if a daughter dies in his life-time leaving lawful issue, such issue as shall attain 21 years are to take the share "which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

Reading the Will as a whole their Lordships are unable to agree with the conclusion about the construction of these clauses come to by the Court of Appeal. They think that the first trust for apportionment directs merely division of the fund into as many equal parts or shares as there are daughters living at the testator's death, or sets of issue then living of daughters then dead.

The words of apportionment are introduced for merely arithmetical purposes and so far do not dispose of property. In order to find the interest given under the Will it is necessary to proceed to the further words, and these, in the case of a daughter, confine her interest to a right to income for life. They are followed by words of disposition in favour of the children and issue. This view of what may be called the apportionment clause is even more apparent as regards the suggested gift to issue of a deceased daughter. There is no unqualified gift to them by the apportionment clause. The effective gift in the later words of the Will is to such of a deceased daughter's children as attain 21. And if, of this Will it could be said that the testator had used the words "issue" and "children" interchangeably then the limitation to such

(2) 1 Mer. 551 (1849).

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children only as attained 21 would, if there were a prior gift to them without that qualification, be merely otiose. If so much cannot be said then there is no room for the operation of the rule. Their Lordships are, therefore, unable to find in this Will the absolute bequests required by sec. 126. They think that the three daughters took only for life, and that it must remain to be seen whether the later gifts in favour of their children or other issue are validly made under Hindu law.

Turning to this question, the first observation to be made is that the Will has apparently been drawn by someone familiar with English law, but not with the Indian statutes which apply. If it were only a question of the English rule against perpetuities, there would be no objection to the Will. But there comes in sec. 101 of the Indian Succession Act of 1865. Under this section no bequest is valid whereby the vesting of the thing bequeathed *may* be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority (ending at 18) of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong. The validity of the gifts now in question must be scrutinized as at the death of the testator, *i.e.*, 1904, and if sec. 101 then applied, the disposition subsequent to the life-time of the testator's daughters was invalid, for the children of the daughters take only in classes, and by sec. 102 of the Succession Act, if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the Rules contained in sec. 101, the bequest is wholly void. It being plain that this bequest, tested as at the testator's death, made delay beyond the life-time of the daughters and the minority of some of

their children possible, the bequest in favour of the children was inoperative. It was suggested, however, that this section had no application to the Will of a Hindu by reason of the fact that, as is shown by the *Tagore v. Tagore* case (1) any disposition in such a Will is invalid if the donee is an unborn person at the testator's death. The section, it was said, is only applicable to dispositions which are not otherwise ineffective. One answer to this was that in 1914 the Madras Act above referred to was passed which purported to get rid of the difficulty caused by the *Tagore v. Tagore* (1) decision. This Act provides by sec. 3 that a disposition shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer, or the death of the testator. Questions were raised, as has already been observed, in the Courts below as to the validity of the Madras Act, but these questions are now superseded by the Act of the Indian Legislature, No. 8 of 1921, which has validated the law contained in the Madras Act, and repeats in sec. 5 a provision identical with sec. 101 of the Succession Act, 1865. The result is to make that section applicable to this Will, upon a view which was not contested before their Lordships if the Madras Act or the Act of 1921 were treated as operative. Now in that section, as has been already said, a "minor" means any person who shall not have completed the age of eighteen years. It was, however, pointed out by the Respondents that, by the Majority Act, 1875, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in

(1) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377; 18 W. R. 359 (1872).

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the Indian Succession Act or in any other enactment, be deemed to have attained his majority when he shall have completed his age of 21 years and not before; and this is accompanied by a provision that every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not earlier. These provisions do not, however, in the opinion of their Lordships, help the Respondents. At the testator's death—for this purpose the relevant date—it was not clear, and could not be certain whether all or any of the members of the classes in whose favour the disposition was made would ever have guardians appointed. The provision of the Will fixing 21 in every case as the age of vesting was, therefore, in contravention of sec. 101, and the whole gift is invalid under sec. 102. Their Lordships are unable to agree with the views expressed in some detail on this point by the learned trial Judge.

Their Lordships are of opinion, for the reasons they have given, that the appeal must succeed. There will be a declaration that the Appellants are entitled to their respective shares in the property in suit as upon an intestacy, subject to the life estates (now at an end) in favour of the testator's daughters. This will be without prejudice to the compromises referred to in the decree appealed from, and to the sanction given to them by that decree. The case must go back to the High Court for further inquiry on that footing. Their Lordships do not think it necessary to interfere with the orders as to costs made in the Courts below. They think that the costs of this appeal should, in the same way, be payable out of the estate.

They will humbly advise His Majesty accordingly.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitor: Mr. Douglas Grant for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 116 OF 1924.

GUS ALEXANDER MAC-
KENZIE, Plaintiff,

SANDERSON, C. J.

Appellant,

RANKIN, J.

v.

1925,

HIMALAYA ASSURANCE

18, March.

Co., LTD. and anr.,

Defendants,

Respondents.

Contract of managing agency to Limited Company for a fixed period—Difference between partners of firm of managing agents resulting in deadlock in business—Circumstances justifying dismissal of managing agent before termination of stipulated period—Insubordination and misconduct of managing agent, what constitutes.

The Defendant Company, a limited concern, entered into an agreement with a firm of which the Plaintiff and the second Defendant were the partners whereby the said firm were appointed managing agents for a fixed period of years. Under the agreement, subject to the supervision and control of the directors the managing agents were to manage, conduct and carry on the business of the Company both at the head office and at all branches and agencies and were to have and possess all powers, authorities and discretions necessary for or incidental to the purpose. Before the termination of the period of contract difference arose between the Plaintiff and the second Defendant and the latter cancelled the power-of-attorney which he had given to the Plaintiff whereby the Plaintiff was conducting the affairs of the Company and those of the firm of managing agents and served him with a

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notice of dissolution of partnership and the Plaintiff in his turn cancelled the power-of-attorney in favour of the second Defendant, removed certain books and documents from the office which, in consequence of the situation created, was closed. The directors thereupon passed a resolution whereby the second Defendant was appointed the managing agent of the Company.

The Plaintiff sued to recover damages for the alleged breach of the agreement whereby the managing agency was created alleging that the second Defendant had acted in concert and collusion with the directors. The Defendant Company amongst others alleged specific charges of misconduct and insubordination on the part of the Plaintiff:

Held—That the Plaintiff failed to prove the second Defendant's collusion with the directors and the Company also failed to prove misconduct and insubordination on the part of the Plaintiff; but having regard to the state of affairs which had arisen it was necessary to appoint somebody as managing agent and the Defendant Company were justified in putting an end to the managing agency agreement and the Plaintiff was not entitled to recover damages from the Company.

What constitutes insubordination and misconduct of managing agent discussed by PEARSON, J.

This was an appeal preferred on the 13th May 1914 against the judgment of Mr. Justice Pearson, dated the 17th April 1924, passed in the exercise of Ordinary Original Civil Jurisdiction.

The facts will appear from the judgment of PEARSON, J., which was as follows:—

PEARSON, J.—The Plaintiff sues to recover damages from the Defendant Com-

pany upon an alleged breach of a managing agency agreement made between the Company and the firm of which Plaintiff and the second Defendant, Rajabally, were partners.

The Plaintiff had been some 20 years or more in the Insurance Department of Messrs. Bird & Co., when the second Defendant, who had formed the idea of floating an Insurance Company, persuaded the Plaintiff to join him for the purpose of managing the Company. An agreement accordingly was entered into between them, dated the 24th September 1919, which provided for the commencement of the partnership business in the name of "Mackenzie and Rajabally" from the date of registration of the Company. A term of 35 years was fixed or longer if the firm continued as managing agents of the Company, and commission was to be fixed at Rs. 7½ per cent. on net premiums, with a minimum annual remuneration over and above establishment of Rs. 50,000 which at some later stage was altered to Rs. 25,000.

The Company was registered on the 27th October 1919, and the provisions contemplated in the last mentioned agreement were embodied in the Articles of Association. Art. 112 provided for the appointment of the managing agents for a period of 35 years certain and thereafter until they should be removed by an extraordinary resolution of the Company of which not less than 12 months' notice should be given. On the 30th December 1919, a formal managing agency agreement between the Company and the firm was signed, and on the 29th May 1920 a fresh partnership agreement was made between the Plaintiff and second Defendant, the period fixed being 99 years. Some time in 1921 a branch office in Bombay was opened. From September 1921

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to March 1922 the Plaintiff was in Europe. On the 4th July 1922 a directors' meeting was held, at which the accounts of the Company were criticised and a sub-committee was formed to go into the accounts and formulate a plan of retrenchment. One director, a Mr. Habib Mahomed, complained of Mr. Rajabally going off to Bombay and the increase of European assistants in the Calcutta office. The result of the sub-committee's efforts was that in a very short time the staff was reduced by getting rid of some of the Europeans and some Indians as well. The second Defendant came from Bombay about 15th July. On the 26th July the directors at a meeting decided to sanction only Rs. 5,000 upon account of Plaintiff's travelling expenses to Europe in place of the Rs. 10,000 (or Rs. 16,000 as it was originally) claimed as chargeable to the Company under that head, and the Plaintiff was to repay the difference at the rate of Rs. 200 a month. They discussed also the report of the sub-committee, dated the 23rd July. On the 12th August the second Defendant wrote a letter to the Plaintiff suggesting that in the best interests of the Company the Plaintiff ought to retire from the firm, calling on the Plaintiff not to act on behalf of the Company or the firm, and cancelling his power-of-attorney. On the 13th, a Sunday, the Plaintiff visited the office with Mr. Warden, an assistant. In order to get in he had to break an extra padlock which had been placed on the office door by Mr. Rajabally. Having got in, he removed a certain number of papers from the office. On the 14th August Plaintiff again went to the office with Mr. Warden, and removed the Company's current cheque books and also two cheques. The second Defendant went to his solicitor and wrote Plaintiff a letter purporting to dis-

solve the partnership as from that date. He also went and summoned Mr. Barry, a director, who went round to the office, made enquiries and took down the statements of those present. In the afternoon of 14th August a directors' meeting was called by Mr. Barry at which a resolution was passed whereby "in the face of the dissolution of the firm," second Defendant should be asked to carry on the business for the managing agents. A notice was then published on 15th August which is set out in para. 8 of the plaint.

"The Himalaya Assurance Co., Ltd.

Notice is hereby given that the firm of Messrs. Mackenzie and Rajabally have ceased to be the managing agents of the above Company and the undersigned has this day been appointed as the sole managing agent of the said Company.

By order of the Board of Directors.

(Sd.) N. Rajabally.

Dated 15th August 1922.

5, Misson Row, Calcutta."

Also on the same date a notice was advertised over the name of second Defendant stating that he had severed connection with the firm and had cancelled the power-of-attorney in favour of the Plaintiff. From the 15th August onwards the directors were occupied hearing statements and explanations from the various persons concerned, and the Plaintiff and second Defendant in particular. On the 30th August 1922, second Defendant filed a suit for dissolution against the Plaintiff (Suit No. 2858 of 1922), and the present suit was filed on the 26th June 1923. In para. 7 of his plaint the charge levied against the Company is put thus: "At some time during the first half of the year 1922 the directors (other than the Plaintiff) decided to oust the Plaintiff from the said managing agency and to appoint the Defendant Rajabally sole managing agent,

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and also decided to dismiss all the European staff from the service of the Company and in furtherance of such designs in concert and collusion with each other they carried out the following plan of action :'' then are described the events following on the letter of the 12th August 1922. Then in para. 16 of his plaint he says : " By reason of the wrongful acts of the Defendant Company as aforesaid the Plaintiff has suffered loss and damage." The foundation then of the Plaintiff's case as above set out is that there existed a conspiracy (though the word is not used) in which the directors and the second Defendant were parties, whose object was to get rid of the Plaintiff.

The case for the Defendant Company is broadly speaking this : that no legal partnership existed between the Plaintiff and second Defendant, or legal agreement between the Defendant Company and the partners. If it did, the dismissal was justified because the partners had made it impracticable as between themselves to carry on the Company's business, and in any event it was justified by certain acts of misconduct on the part of the Plaintiff in dealing with the Company's affairs.

It is contended in the first place that the partnership deed of the 29th May 1920 is invalid. Cl. 2 provides for the partnership to continue for 99 years. That in itself is unobjectionable. Cl. 12 is as follows :—

" In the event of the death or retirement (such retirement shall not be in the first three years) of either partner the partnership will not be dissolved and the surviving partner shall carry on the business under the same name and style by admitting and taking into the firm one or more new partner or partners so that there shall at no one time ever be less than two partners and the surviving partner

shall pay to the heirs, executors and administrators of the deceased partner in each and every year a sum of money equal to one-third of the amount which would have accrued and been due in such year to the deceased partner had he been still alive, but in every case the minimum payable to either partner or his heirs should not be less than Rs. 500."

The argument is that this provision avoids the whole agreement inasmuch as it creates a trust in favour of the heirs, executors and administrators of a deceased partner for a period of 99 years, and offends, against the rule against perpetuities. The case of *In re Flavell* (*Murray v. Flavell*) (1) is relied upon as showing that what has been created is a trust, so that the person nominated, although a third party, acquires an equitable interest in the funds of the business, and can enforce the right. It is to be observed, however, that in *In re Flavell* (1) there was an express provision that the annuity should be constituted a charge on the net profits of the business. The result of that is that it becomes something more than a mere contract between two parties that one of them is to pay a particular sum to a third party; a trust fund is constituted, and the interest of a *cestui que* trust established. In the present case provision is made for payment by a surviving partner of a certain sum to the heirs of the deceased partner, and the sum payable is ascertainable by reference to what his share would have been had he been alive. It would be doing violence to the language to say that a clause in these terms laying down the mode of ascertainment was to be construed as creating a charge upon the profits or as constituting them a trust fund. It is argued that reading cl. 12 with the rest of the agreement as a

(1) 25 Ch. Div. 89 (1883).

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whole, you must read into cl. 12 a payment "out of the profits:" that in order to support the business efficacy of the transaction such as must have been intended by the parties, these words must be implied [*The Moorcock* (2)], because if there is no trust it remains a merely contractual right unenforceable by a third party. In my opinion this question cannot be so disposed of. I think, that the clause has to be interpreted according to the plain language employed, and the intention of the parties ascertained from that language as it stands. There is no reason that I can discover for reading into the clause something which is not there. As I read it, the clause is personal to the two original contracting parties, and creates no equitable right in any third party.

A similar argument is put forward as regards the managing agency agreement, dated the 30th December 1919, and it is said that because the firm and its successors are provided with a remuneration at the rate of $7\frac{1}{2}$ per cent. as commission on the annual net premia, therefore, the firm gets an equitable interest in the net premia, which are constituted a trust fund, and the period of 35 years provided for the currency of the agreement is in excess of the period allowed by law [*London & S. W. Railway Co. v. Gomm* (3) and *Ramasami v. Chinnan* (4)]. The same reasoning is applicable, in my opinion, as in the case of the partnership agreement, and I cannot agree that any such result is to be arrived at upon the proper construction of the document, nor has any argument been put forward as to any ground on which it could be said that such agreement was *ultra vires* the Company.

I now proceed to consider the question of what has been called the conspiracy between the directors and the second Defendant to get rid of the Plaintiff. Before July the second Defendant had already expressed his expectation of criticism when the draft accounts should be placed before the directors, especially as to the debit of Rs. 16,000 for travelling expenses. When the directors' meeting of 4th July was held the second Defendant was in Bombay looking after the branch office there, but he had sent his representative Pirbhoy to watch. At that meeting the accounts formed the subject of unfavourable comment, and the retrenchment sub-committee was formed, while objection was also taken by Mr. Habib Mohamed to the "desertion" of the second Defendant to Bombay, and to the size and expense of the European staff. Mr. Pirbhoy thereupon communicated with Mr. Rajabally in Bombay with the result that he arrived in Calcutta on the 18th July. No doubt he called on the directors. Then on the 17th or 18th July there is an interview between Plaintiff and second Defendant, of which Mr. Daud, a friend of the Plaintiff's, has given evidence. According to this, the second Defendant said the directors had refused to sign the accounts, and some of them were antagonistic to the Plaintiff, so Rajabally proposed to appear to fall in with their views in order to spy out the land and find out what their views were. Rajabally also stated, according to this witness, that some of the directors had suggested that some kind of a charge could be got up against the Plaintiff so as to get rid of him. I do not think that one can rely upon the evidence of this witness as to all the details of this interview unreservedly though it may well be that by that time the Plaintiff understood that there was some dissatisfaction with

(2) L. R. 14 P. D. 64 (1889).

(3) 1 Ch. Div. 562 (1882).

(4) I. L. R. 24 Mad. 449 (1901).

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him on the part of one or more of the directors in connection with the accounts. The report of the retrenchment sub-committee (Ex. 2) was really drawn up by Mr. Gregory, one of the directors, and signed by the other members, and amongst the various items commented upon is that of Rs. 9,999-11-0 for Plaintiff's travelling expenses during his visit to Europe, incurred without reference to the directors and spread over a period of far longer than was necessary to transact any business at home referable to the Company's interests; besides which he had business at home on the part of Sukhlal Kernani which in the event of the success of certain negotiations would have been extremely profitable to the Plaintiff. At the meeting on the 26th July the minutes show that the sum allowed for travelling expenses was cut down to Rs. 5,000 subject to which the accounts were passed. It also appears that the Plaintiff protested at the meeting, and on the same day a letter dealing with various points raised and annexing a detailed account of the travelling expenses is signed both by Plaintiff and second Defendant, and forwarded to the directors. Up to this point the Plaintiff and second Defendant undoubtedly stood together, and the action taken by the directors was not aimed more against one than the other, but affected both as partners of the firm. The reduction of establishment which followed dealt not only with the European staff but also with the Indian, and lends no strength to the suggestion of conspiracy against the Plaintiff himself. I believe that the reduction was resolved upon and carried out as an economy and pursuant to the suggestions of the sub-committee, which they held to be desirable in the interest of the Company. The period from the 26th July to the 12th August is devoid of incident, and

so far as the Plaintiff is concerned, he says he retained the same feelings of friendship to the second Defendant as he had previously, right up to the time of the receipt of the letter. The second Defendant says that he was going through the accounts, and found that a certain commission was not credited to the company over some Agra Mill's business of which more hereafter. Then on the 10th August the second Defendant says he saw a letter from the Imperial Bank of India, dated 9th instant, enclosing a copy of a letter from the London office, dated 20th July, asking for a special resolution to be forwarded from the directors authorizing the managing agents to borrow money against the Company's securities. Rajabally says he asked the Plaintiff about this, and the Plaintiff brushed the matter lightly aside "as if he were the sole proprietor of the Company," and in effect expressed his contempt for the directors. To this attitude on the part of the Plaintiff Rajabally decided not to be a party (Mr. Gregory corroborates him here), and accordingly wrote in as he did on the 12th, possibly in the hopes of inducing a more reasonable attitude in him towards the directors. At any rate the events of the 12th, 13th and 14th show that the feeling between the Plaintiff and second Defendant became more accentuated and more strained, and Mr. Mackenzie clearly desired, in all that he did, to prevent the second Defendant from taking any part in the further administration of the office or the handling of the cash or securities, and secondly, to safeguard his own personal interests. To that end he cancelled his power-of-attorney, removed cheque books and other documents, and called into his aid some of the former European assistants. When the meeting of the directors is held on the

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14th, the second Defendant makes a statement of what had taken place at the office on that morning, and when the Plaintiff is asked if he wishes to make any explanation, he does so without a shadow of suggestion that the whole thing is a conspiracy between the directors and Rajabally. Nor do I find any such suggestion emerging from anything that appears in the minutes of the subsequent days. Mr. Gregory denied the existence of any such conspiracy, and no attempt was made to suggest specifically who the other members of it might be. It cannot in my opinion be said that any conspiracy such as is alleged in the plaint has been proved either directly or inferentially.

The question then arises, in the state of affairs as it existed on the 14th August, was the Defendant Company bound to continue the employment of the Plaintiff having regard to the disputes and dissensions which had arisen between him and his partner? There had been Rajabally's letter of the 12th August, the cancellation of the power-of-attorney, notice of dissolution of partnership, the Plaintiff's action in consequence, the visit to the office on the 13th, tearing off the second Defendant's padlock to obtain admission, and removal of certain things to protect his own interest, another visit on the 14th with Mr. Warden, the cancellation by the Plaintiff of his power-of-attorney to the second Defendant. I think there can be no doubt that conflicting and contradictory orders were given to the office staff by the Plaintiff and second Defendant. As one of the witnesses said: "There was more than an earthquake." Mr. Gregory's account gives some indication of how they felt to each other on the 14th. Both said the position was such that they could not work with each other, because neither could trust the other, and Macken-

zie had ordered the clerks not to obey the orders of Rajabally, and Rajabally had dissolved the firm and would not work with him any more. Plaintiff's conduct in cancelling the power-of-attorney and breaking the padlock shows his attitude. He admits that in order to resume friendship with second Defendant the latter would have to fall in with his views, otherwise the rupture must continue. He would have given him a fresh power-of-attorney had he "come to reason;" his intention was to prevent him acting for the Company or the firm except in the way of canvassing and bringing in business. He admits that his visit on the 13th was because he did not trust the 2nd Defendant to get his hands on the contents of the safe, and he says he considered the second Defendant "capable of any dishonesty then." He admits he had lost faith in him, and even now if any question of reinstatement were raised, he admits it would only be on the footing that Rajabally should have no power at all. It is not surprising that in such circumstances, the directors should be anxious about the interest of the Company, with the partners pulling different ways, and that they should take steps to remedy it according to their own ideas. The partnership had not, in law, been dissolved, but it seems that the prevailing opinion was that as a result of what had happened the partnership had actually come to an end. At least Mr. Gregory thought so, though perhaps the Plaintiff and the second Defendant were at first uncertain as to the position. Had that been the case, the directors were undoubtedly within their rights in making immediate arrangements for the protection of the interests of the Company, and, in appointing the second Defendant temporarily as manager pending further steps for a for-

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mal appointment [*Robson v. Drummond* (5)]. I am not called upon to consider the case where the partners have fallen out among themselves, and the breach has been subsequently patched up. No such situation ever arose here. Nothing that the Plaintiff ever did after the 12th August appears to have been directed towards conciliating his partner or smoothing the difficulties that had arisen, except possibly his warning him in an aside at one meeting that he had better be careful or he would find it would be his turn next. The position on the 14th was that the partners had fallen out in such a way as to make it clear that mutual confidence had been destroyed, and it was no longer possible for them to exert their joint zeal in the best interests of the Company. Everything in fact pointed the other way, to the probability that they would be mutually obstructive in the carrying on of the Company's affairs. Apart from anything else there was a conflict of interests between the Plaintiff and second Defendant, and between the Plaintiff and directors, and the ensuing actions of the Plaintiff were upon that footing. In my opinion the directors were justified, in the position of affairs as they then stood, in considering that the interests of the Company were jeopardised, and in taking the action they did. Nothing that happened afterwards threw any duty on them to reconsider the position, and the Plaintiff in some of the letters which he afterwards wrote to them used expressions which were the reverse of conciliatory.

Apart from the points already discussed the Defendant Company has contended that it was justified in terminating the Plaintiff's employment on ground of one or more of the specific acts of misconduct which are particularised in paras. 14 and

15 of the written statement, and in the letters from Defendants' attorneys, dated the 10th and 15th January 1924. There is no fixed rule of law defining the degree of misconduct which will justify dismissal [*Clouston & Co., Ltd. v. Corry* (6)]. Therefore one must have regard to the agreement forming the basis of the contract of employment and consider the surrounding circumstances, and if the misconduct is inconsistent with the express or implied conditions of service, or incompatible with the due and faithful discharge of the servant's duty to his master [*Pearce v. Foster* (7)], the dismissal will be justified.

One of the most serious charges against the Plaintiff is his removal of documents and papers. He had some letters and letter files in his houses in the ordinary course of business before the 13th August. There is no harm in that. On Sunday he removed a number of securities and papers from the safe, and he also removed the two cheque books and the letters of appointment of Messrs. Warden and Watson, two former assistants. Some of these, with the cash, he made over to the bank or returned to the directors at the subsequent meetings, and so far he was reasonably seeking to protect himself against possible machinations of his partner, or protecting the Company's interests, I should not impute misconduct to him. But he does admit in cross-examination that he kept some letters of Lloyd's under-writers, belonging to the Company, for the purpose of his case; and, further on, that there are quite a number of the Company's papers which were taken away by him (*vide* Ex. 9) and when asked in evidence why did not return them, though letters were written in

(6) [1908] A. C. 122 (1908).

(7) 17 Q. B. D. 589 (1886).

(8) 3 B. & Ad. 808 (1881).

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that behalf in the following September, October and November, he replied it was because he thought them necessary for his own protection, and the protection of his firm's interests. He says that he removed everything that he thought might be of use to him.

Next it is said that it was misconduct for the Plaintiff to re-appoint Maclean to the service of the Company. In pursuance of the scheme for retrenchment, Maclean's employment had been terminated on the 28th July. The Plaintiff took him to the office on 14th August, not, as he says definitely re-appointing him, but in case he could be of help and with the prospect of getting the directors later on to consent to re-appoint him. It was to him in company with Warden that the Plaintiff committed the task of checking the contents of the cash-book. The minutes of the directors' meeting on the 14th contain the record of a statement made by the Plaintiff that he had re-appointed Maclean to assist him in the working of the Company. That note the Plaintiff suggests is wrong. I am not prepared to hold that in the position of affairs that existed between the Plaintiff and second Defendant the calling in of Maclean on that occasion should be characterised as misconduct. I do not think it was a case of a deliberate attempt on the part of the Plaintiff to resume the services of a dismissed servant of the Company in defiance of his employers.

Next there is the question of the travelling expenses charged up against the Company for his expenses in Europe between September 1921 and March 1922. There was no formal sanction taken from the directors for this leave. One of the purposes of his going home was to use his endeavours to settle a claim in connection

with a steamer on behalf of Rai Bahadur Sukhlal Karnani upon terms of Rs. 7,500 paid down and 10 per cent. of any amount recovered. The negotiations were in fact a failure. So far as the Company's business was concerned the Plaintiff had the idea of making arrangements in the matter of re-insurance facilities with Lloyd's under-writers. Before leaving for Europe the Plaintiff drew Rs. 10,000 and subsequently other amounts making about Rs. 16,000 in all. The amount was debited against the Company in the draft accounts, and exception was taken to it by the auditors, as no sanction had been taken from the directors. Ultimately the auditors allowed it to be included in the accounts as a separate item, so that the directors and share-holders could deal with it as they liked. It was, however, reduced to Rs. 10,000, and subsequently allowed by the directors for Rs. 5,000 only. However much the Plaintiff's conduct may be open to comment, and I consider it is open to comment, the matter was finally settled by allowing him the Rs. 5,000, and I do not think it can be brought up again now as misconduct justifying the directors' action in August. At the same time it is a circumstance which might reasonably influence their attitude at that time, taken in conjunction with the other circumstances. Similarly I look in the same light upon an item of freight and duty on a motor car of the Plaintiff's wife debited against the Company (Ex. 33) amounting to some Rs. 3,000. The auditors refused to pass this, and the amount was repaid by the Plaintiff. When this fact was brought to the notice of the directors in August it was not calculated to inspire them with confidence in the Plaintiff. Ex. 12, a letter of 13th June, does not impress me very favourably even if it represents a method by which the amount might

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become reasonably chargeable to the Company.

Then there is the complaint about the transfer of certain securities belonging to the Company. When the Plaintiff went to England in 1921 he intended to make certain arrangements, in connection with the Company's business, with Lloyd's under-writers. He instructed Warden to transfer a batch of securities from the Imperial Bank of India in Calcutta to the branch in London. This was done and they were transferred "through a mistake of the bank," as the Plaintiff puts it, into his personal account. No sanction of the directors was taken to the transfer at all. I by no means accept the statement that the mistake was the bank's; if it was, it was at any rate accepted without demur by the Plaintiff, and the interest on the securities was actually paid into his account. The bank later on wrote explaining that only the Plaintiff could overdraw against them and not the Company, and it required the personal request of the Plaintiff for the bank to retransfer them into the Company's name. Ultimately the matter was cleared up and the transfer made. I do not think any dishonest purpose is imputable to the Plaintiff with reference to his dealing with these securities, but again I think his conduct was undoubtedly open to comment, and would be a matter for the directors to consider along with the other matters placed before them.

Another item of alleged misconduct is as follows. Mr. Chari was a director of the Defendant Company and also a member of Chari & Co., Managing Agents of the Agra Mills. An insurance proposal was made by Mr. Chari on behalf of the Mills as he wanted to place the business with or through the Company. In point of fact the insurance was placed not by the Company, but by the Plaintiff himself, and he

drew the commission, a considerable amount, on what he effected. According to the Plaintiff this situation arose because the insurance would have to be placed with tariff Companies (otherwise there might be difficulties with the banks who would not accept non-tariff policies as security against advances), and as tariff Companies will have no dealing with non-tariff Companies in such matters, the only way out of it was to place it personally, to which he says Mr. Chari agreed. The result was that Mr. Chari's intention of benefiting the Company failed. It is said that this commission, whatever it amounted to, should have been made over to the Company by the Plaintiff, and this was one of the items brought up against the Plaintiff at the directors' meeting in August. I am not prepared to hold that this incident amounted to misconduct justifying dismissal, because, among other things, Mr. Chari has not been called to contradict the Plaintiff's statement.

These are the main matters which have been argued before me as constituting misconduct. There are others of lesser importance with which I need not specifically deal. Upon the whole I am of opinion that in the circumstances the individual instances that have been alleged would not be sufficient to constitute misconduct in itself justifying dismissal. But they disclose a course of conduct which might well give pause to a director of the Company and they are important to be borne in mind in so far as they were in the knowledge of the directors (like the question of travelling allowance) or were brought to their knowledge in August, because, apart from the question of the relations existing between the partners at that time, they do also bear materially upon the question how far the directors were justified in the action which they took

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The suit is dismissed with costs on Scale No. 2.

In the partnership suit, there must be a decree. The partnership was not in law dissolved by the notice of dissolution and the events of the 13th August and following days. Sec. 254 of the Indian Contract Act lays down when a partnership may be dissolved by the Court at the suit of a partner, and that section in its cls. (5) and (6) is in my opinion wide enough to cover a case such as the present where there has been a complete destruction of mutual confidence, and it is impracticable to continue the partnership business with advantage to the partners, or they could no longer perform their duties as laid down in sec. 257 of the Indian Contract Act. In *Harrison v. Tennant* (8) that principle was acted upon, and the partnership was dissolved; and Lord Cairns, L. C., in *Atwood v. Maude* (9), said: "It is evident, however, that in every partnership . . . such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either. That state of things may be occasioned by the fault of either or both of the partners; but when it is admitted that this state of feeling does exist, it becomes immaterial by whom the bill is first filed."

There will be the usual decree for dissolution and accounts and the usual order for costs in a partnership action.

Messrs. Pugh, Langford James and Westmacott for the Plaintiff.

Messrs. B. C. Mitter, A. N. Chaudhuri, B. K. Ghose, T. A. Bradley and J. C. Hazra for the Defendant Company.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by the Plaintiff Mr. Gus Alexander Mackenzie against the decision of my learned brother Mr. Justice Pearson which was delivered on the 17th of April 1924.

The Plaintiff sued to recover a large sum of money as damages from the Himalaya Assurance Co., Ltd., for the alleged breach of an agreement by which the Plaintiff and the second Defendant, Rajabally, were appointed managing agents of the Company.

The second Defendant was joined as a party to the suit, because it was alleged that the Plaintiff had requested Rajabally to join as a Plaintiff in the suit but Rajabally had declined so to do. Therefore the Plaintiff had joined him as a Defendant.

The Plaintiff and Rajabally were in partnership. There were two agreements which dealt with the matter of partnership. The first was dated the 24th of September 1919 and the second one was dated the 29th of May 1920. In the interval, the Company had been registered on the 27th of October 1919 and the agreement, dated the 30th December 1919, between the Defendant Company and the firm of Mackenzie and Rajabally, had been entered into. By the agreement the firm of Mackenzie and Rajabally were appointed managing agents of the Company for a period of at least 35 years. The agreement contains provisions about remuneration which are not material for the purpose of this appeal: cl. 5 provides that "the managing agents shall, subject to the supervision and control of the directors, manage, conduct and carry on the business of the Company both at the head office and at all branches and agencies wheresoever situated" and then it provides that they "shall have and pos-

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possess all powers, authorities and discretions necessary for or incidental thereto, and, without in any way limiting or restricting the general powers hereby conferred upon them, the managing agents shall in particular possess and enjoy the following powers."

Mr. Mackenzie and Mr. Rajabally were also appointed directors of the Company.

The suit, as I have already said, was brought on the ground of an alleged wrongful breach of the managing agency agreement.

In the plaint there was an allegation in para. 7 that "at some time during the first half of the year 1922 the directors (other than the Plaintiff) decided to oust the Plaintiff from the said managing agency and to appoint the Defendant Rajabally sole managing agent and also decided to dismiss all the European staff from the service of the Company and in furtherance of such designs in concert and collusion with each other they carried out the following plan of action: On the 12th of August 1922 the Defendant Rajabally wrote and addressed a letter to the Plaintiff suggesting that the latter should retire from the said partnership but the Plaintiff declined to do so."

It is material to notice that in the letter of the 12th of August, amongst other things, Rajabally cancelled the power-of-attorney which he had given to the Plaintiff whereby the Plaintiff was conducting the affairs of the Assurance Company and those of the firm of Mackenzie and Rajabally.

The plaint further alleged that "on the 14th August 1922 the Defendant Rajabally caused his attorney K. B. Ghose to address a letter to the Plaintiff purporting to give the latter notice that the partnership would be dissolved as from that date and informing the Plaintiff that in

default of his consenting to that course within 24 hours the said Rajabally would file a suit for dissolution of the firm." It then alleged that the directors had passed a resolution on the same day whereby Rajabally was appointed the managing agent of the Company.

The learned Judge came to the conclusion that the Plaintiff had not proved that Rajabally was acting in concert and collusion with the directors as alleged in the plaint: and, he also came to the conclusion, shortly stated, that such a situation had arisen on the morning of the 14th of August 1922 between Rajabally on the one hand and Mackenzie on the other that the directors were justified in putting an end to the agency agreement.

The position seems to me to be as follows: The agreement between the Company on the one hand and the Plaintiff and Rajabally on the other was admitted. There was no doubt that that agreement was put an end to by the directors of the Company.

The onus, therefore, was on the Company to justify the action which the directors took in terminating the agreement. The agreement was alleged to have been terminated because of the deadlock which had been created by the action of the members of the partnership. It would then be for the Plaintiff to prove, if he could, that the situation which undoubtedly existed on the morning of the 14th of August 1922 had been brought about or engineered by the directors or that they had been parties to the scheme which it is alleged Rajabally had conceived, and which, in fact, he carried out.

I am of opinion that the learned Judge's decision, that the Plaintiff had not proved that Rajabally was acting in concert with the directors of the Company in bringing

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about the situation which existed on the 14th of August 1922, was correct.

The learned Counsel for the Plaintiff-Appellant in his argument (which, if I may say so, was a very able argument) placed great reliance on the letter of the 12th of August 1922 which was written by Rajabally to the Plaintiff. He urged that only one inference could be drawn from the terms of that letter, and that was that Mr. Rajabally had made up his mind to bring the partnership to an end in one way or another, and that for the purpose of doing so he had beforehand consulted the directors and had obtained their consent to that course.

The learned Counsel made some severe criticisms upon the evidence of Rajabally; and, argued with much insistence that the explanation which Mr. Rajabally had given for the writing of that letter was one which should not be accepted.

It is not necessary for me to give any decision upon that point, because, even if we reject the reason which Rajabally gave for the writing of the letter of the 12th of August 1922, and even if it be assumed that Mr. Langford James' argument was correct that Rajabally's evidence ought not to be relied upon, that is not sufficient for the Plaintiff. The Plaintiff had to go much further than that: it was necessary to show that the only inference that could be drawn from the facts of this case was that the directors were a party to the course which Rajabally took on the 12th and the 14th of August.

I agree with the learned Judge that that has not been proved.

Even if Mr. Daud's evidence be accepted to its full extent it merely amounts to this, that in July 1922 Rajabally in Mr. Daud's presence told Mackenzie that some of the directors were very antagonistic towards Mackenzie and that he had been

asked by one or two of the directors (without naming them) if it was possible for Rajabally to lay any charge against Mackenzie whereby the directors might be in a position to get rid of him, and that (then turning towards Mackenzie) Rajabally said: "If at any time I appear to side with the directors, that is not so: it was only to find out what their plans may be towards you."

As I understand, it was common ground that at that time Rajabally was on good terms with Mackenzie.

It is not possible for the Court to hold, by reason of the above-mentioned conversation between Rajabally and the Plaintiff in July 1922, that the Board of Directors were acting in concert with Rajabally in the action which he took on the 12th and the 14th of August.

Therefore, as I have said already, I agree with the learned Judge's finding that the Plaintiff had not proved that the Company was responsible for the action which was taken by Rajabally on the 12th and the 14th of August.

There remains the question whether the Company was justified in putting an end to the agency agreement.

Having read the evidence I have come to the conclusion that the learned Judge summed up the situation accurately in his judgment. He said as follows: "There had been Rajabally's letter of the 12th August, the cancellation of the power-of-attorney, notice of dissolution of partnership, the Plaintiff's action in consequence, the visit to the office on the 18th, tearing off the second Defendant's padlock to obtain admission, and removal of certain things to protect his own interest; another visit on the 14th with Mr. Warden, the cancellation by the Plaintiff of his power-of-attorney to the second Defendant. I think there can be no doubt

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that conflicting and contradictory orders were given to the office staff by the Plaintiff and second Defendant. As one of the witnesses said, 'There was more than an earthquake' Mr. Gregory's account gives some indication of how they felt to each other on the 14th. Both said the position was such that they could not work with each other, because neither could trust the other, and Mackenzie had ordered the clerks not to obey the orders of Rajabally, and Rajabally had dissolved the firm and would not work with him any more. Plaintiff's conduct in cancelling the power-of-attorney and breaking the padlock shows his attitude."

In discussing this part of the case, I desire to make it clear that I am not deciding which of the two parties was responsible for bringing about the deadlock. It may be that everything which the learned Counsel for the Plaintiff urged as regards Mr. Rajabally was correct; on the other hand, we have not heard what the learned Counsel for the Company, Mr. Chaudhuri, had to say on that point. Assuming however for the sake of argument, that Rajabally was in the first instance in the wrong, it seems to me that the Plaintiff, by the action which he took, played into the hands of Mr. Rajabally; and, the result was that such a situation was created that it was necessary for the directors of the Company to take action immediately. It is clear to my mind that the business of the Company could not be carried on, having regard to the action which had been taken by Mr. Rajabally and by Mr. Mackenzie. The office had been closed on the 14th August and the Company had to take steps at once with a view to carrying on the business. In my judgment, they were justified in putting an end to the partnership business; and, they carried that out by the resolution

which they passed. That resolution was as follows:—

"Resolved that having regard to the position now and in the face of the dissolution of the firm of Messrs. Mackenzie and Rajabally and the difference existing between them, Mr. N. Rajabally be asked to carry on the business as the managing agent"

It is true that Mr. Mackenzie had stated that the firm was not dissolved. On the other hand, Mr. Rajabally had given notice of the dissolution and he was asserting that it was dissolved, although he declared that his solicitors had advised him that it would be necessary to take legal proceedings to make it effective. There is no doubt about the position which existed in the office on that day; and, there is no doubt about the difference which was existing between these two parties; each of them declared that it was impossible for him to work with the other. It seems to me that it became absolutely necessary for the directors to appoint some body to carry on the business of the Company. The facts that they appointed Mr. Rajabally to carry on as managing agent until the share-holders could be communicated with and a meeting held either to confirm him or to appoint another managing agent, cannot be said to be unreasonable. This was a Company, which had been promoted to a large extent by the efforts of Mr. Rajabally, and, having regard to the state of affairs which had arisen, it was necessary to appoint somebody as managing agent and I cannot say that it was unreasonable for them to appoint Mr. Rajabally.

For these reasons, I agree with the decision at which the learned Judge arrived that the Defendant Company were justified in putting an end to the managing agency agreement, and, consequently the

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Plaintiff is not entitled to recover damages from the Company.

In the pleadings specific charges of misconduct and insubordination were made by the Defendant Company against the Plaintiff: and, the Defendants added allegations of misconduct and dishonesty, by a letter which was dated the 10th of January 1924, from the Defendant's attorney to the Plaintiff's attorneys.

The learned Judge came to the conclusion that the Defendant Company's case as regards the allegations of insubordination, misconduct and dishonesty failed, and that none of the allegations which the Defendant Company put forward was sufficient to justify the action which the Company took on the 14th of August.

It is not necessary for me to deal with any of these points, except as regards the costs. It seems to me that the learned Judge, with great respect to him, ought to have made some provision in the decree with regard to the costs of the issues relating to the particular charges levelled against the Plaintiff which had failed. It must be obvious that the length of the trial was considerably increased by those charges being made and by the investigation which was necessary in respect of them.

In fairness to the Plaintiff it seems to me that it should be made clear that he was absolved with regard to the charges of misconduct, insubordination and dishonesty, except that it may be said that he may have been indiscreet in assuming in some respects more authority than he was justified without consulting the directors, and in respect of those charges he should get costs from the Defendant Company.

(After discussion.)

As regards the costs of the issues on which the Plaintiff succeeded, it has been

left to this Court by the learned Counsel appearing for both parties to decide the amount.

We have already expressed our opinion that the Plaintiff ought to have some costs in respect of those issues. That would mean the reduction to some extent of the Defendants' bill of costs and the awarding of some costs to the Plaintiff. After taking all matters into consideration and what the learned Counsel have said, we have arrived at the conclusion that the Defendants' taxed bill of costs in the trial Court shall be reduced to five thousand rupees.

The appeal in all other respects is dismissed: and the Plaintiff-Appellant must pay the costs of the Defendant Company in the Appeal Court.

RANKIN, J.—I agree.

Messrs. Orr, Dignam & Co., Solicitors for the Plaintiff.

Mr. K. B. Ghose, Solicitor for the Defendant Company.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

JURY REF. NO. 48 OF 1925.

CHOTZNER, J.

MUKERJI, J.

1926,

Heard, 28 and

29, January.

Judgment,

29, January.

THE KING-EMPEROR

v.

GARIB HARI, Accused.

Criminal Procedure Code (Act V of 1898), sec. 164—Confession, record of—Investigation under Chap. XIV at the request of the police within whose jurisdiction offence is committed—Sec. 307, Cr. P. C.

The Sessions Judge of Burdwan disagreeing with the unanimous verdict of the jurors found the accused guilty of the offence of causing grievous hurt on grave and sudden provocation under sec. 385, 1. P. Code and submitted the case to the High

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Court under sec. 307, Cr. P. Code. The main item of evidence, relied on by the learned Sessions Judge, was the confession made by the accused before a Presidency Magistrate at his residence in Calcutta in the course of an investigation made by the Calcutta police at the request of the Burdwan police. This confession was not taken down in the form prescribed for the Magistrate's guidance in recording confessions. The only warning given to the accused by the Magistrate was that he asked him whether he was willing to make a voluntary confession and that such confession might be used against him without informing him that he was a Magistrate, nor did he put to the accused questions to enable him to find out whether the confession was a voluntary one or not. The confession was taken down in a narrative form :

Held—Although the investigation under Chap. XIV of the Criminal Procedure Code was being held by the Burdwan police, the accused's arrest in Calcutta and his production before the Magistrate in Calcutta must be considered as something done in the course of and not apart from that investigation which was being held in Burdwan and the officer of the Calcutta police merely lent his services to the Burdwan police who were holding the investigation. The Magistrate was therefore bound to record the confession strictly in compliance with the provisions laid down in sec. 164, Cr. P. Code, and the Rules and Circular Orders issued by High Court. Though he might have given the warning required by the first part of cl. (3) of sec. 164 he had done nothing which he was bound to do under the latter part of that clause.

Nor was there such enquiry in the case as was necessary for the Magistrate to make, in order to enable the High Court

to form an opinion as to whether the confession was a voluntary one or not apart from the provisions of sec. 164, Cr. P. Code.

This was a Reference under sec. 307, Cr. P. C., by the Second Additional Sessions Judge of Burdwan (Mr. Jatindra Chandra Lahiri), dated the 15th September 1925, as he disagreed with the verdict of the jury who have found the accused not guilty of the charge framed against him under sec. 304, I. P. C.

The accused was tried by the Second Additional Sessions Judge of Burdwan of the offence of culpable homicide not amounting to murder, under sec. 304, I. P. Code. The learned Sessions Judge disagreed with the unanimous verdict of the jury and being of opinion that the accused should be convicted of the offence of causing grievous hurt on grave and sudden provocation under sec. 335, I. P. Code, submitted the case to the High Court under the provisions of sec. 307, Criminal Procedure Code.

The Calcutta police, in the course of investigation, under Chap. XIV of the Code of Criminal Procedure, made at the request of the Burdwan police where the offence was committed, arrested the accused in Calcutta in the afternoon of the 16th April 1925 and shortly afterwards took him to the residence of an Honorary Presidency Magistrate when the accused, though smelling of liquor was not in a drunken state. The Honorary Magistrate recorded the accused's confession not in the form prescribed for recording confessions but he put down the whole confession in English in a narrative form without recording the questions put to the accused by him as also the answers which the accused gave to his questions, though the Honorary Magistrate was a Bengalee gentleman and the accused spoke in Ben-

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galee; nor did the Magistrate remember what were the exact words used by the accused. The only warning which the Magistrate gave to the accused was that he asked the accused whether he was willing to make a voluntary confession and that if he made a confession that might be used against him. He did not inform the accused that he was a Magistrate. He did not put to the accused questions to find out whether the confession which the accused was about to make was a voluntary one or not.

Laldu Panchanan Choudhury for the Accused.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a Reference by the Second Additional Sessions Judge of Burdwan under the provisions of sec. 307, Cr. P. C. The accused Garib Hari was tried for an offence under sec. 304, I. P. C., for having caused the death of one Kiranbala Harini who is said to have been his mistress and to have been in his keeping for a number of years. The prosecution case is that on the day of the alleged occurrence there was a quarrel of some sort between the accused and the deceased and that on account of the provocation which the accused received in the course of the quarrel he struck her with a knife, the result of which was that she died. The jury brought in a unanimous verdict of not guilty and the learned Judge being of opinion that that verdict should not be accepted but that the accused should be convicted under sec. 335, I. P. C., has made this Reference to us.

The learned Judge in his letter of Reference has very clearly and carefully set out the different items of evidence upon which

the prosecution relied for the purpose of showing that the accused was guilty of the offence. The first item of evidence relates to the confession which the accused is said to have made on the day shortly after his arrest. The accused was arrested about 4 or 4-30 in the afternoon of the 16th April 1925. He was thereafter taken to the Jorasanko Thana and the Police Officer in charge of that thana took him to the residence of an Honorary Presidency Magistrate, Mr. B. N. Mitter, and at his house the confession was recorded. The evidence of the Police Officer is to the effect that at the time when he was so taken the accused was smelling of liquor but that he was not in a drunken state. The confession was not recorded in the form prescribed for recording confessions and it does not contain the questions which were put by the Magistrate to the accused; nor the answers which the accused gave to those questions but the whole confession was put down in a narrative form. The warnings, such as they are said to have been administered to the accused, also do not appear on the record of the confession. The Honorary Magistrate is a Bengali gentleman, and the accused spoke in Bengali and yet the confession was recorded in English. No explanation also appears to have been given as to why instead of waiting till the next day and producing the accused before a Magistrate who was sitting in Court, the accused was produced before the Honorary Magistrate that very night at his residence and the confession was recorded there. Under these circumstances it is necessary to scrutinise the evidence of the Magistrate with some degree of care in order to find out what he exactly did or whether he did really comply with those formalities which have been from time to time laid down for the guidance of

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Magistrates in the matter of recording confessions. The Magistrate in the course of his evidence stated that he remembered only the gist of the confession, and that the accused did not say for what time he had been in police custody. The Magistrate also stated that he does not remember what the exact words were that were used by the accused; nor does he profess to remember the exact questions that were put to the accused or the order in which they were put. The only warning that he gave to the accused appears to have been this that he asked him whether the accused was willing to make a voluntary confession and that if he made a confession that might be used against him. He does not appear to have even informed the accused that he was a Magistrate and he certainly did not put to the accused questions in order to find out whether the confession which the accused was about to make was a voluntary one or not. Under these circumstances it is difficult for us to hold that there was such enquiry as was necessary for the Magistrate to make in order to enable us to form an opinion as to whether the confession was voluntary or not. This is the view that I take of the confession apart from the provisions of sec. 164, Cr. P. C. But in my opinion the learned Magistrate has failed in the present case to record the confession strictly in accordance with the provisions of that section. The accused was arrested in Calcutta in pursuance of a request made by the police at Burdwan who evidently were holding the investigation with regard to this matter under the provisions of Chap. XIV of the Code of Criminal Procedure. The arrest of the accused by the officer of the Calcutta Police and his production by that officer before the Magistrate must be taken to have been an act done in the process of the investi-

gation that was being held; and if that is so, the Magistrate was bound to comply with the provisions of sec. 164, Cr. P. C., in the matter of the recording of the confession. Though he may have given the warnings required by the first part of cl. (3) of sec. 164, Cr. P. C., he has done nothing which he is bound to do under the latter part of that clause which provides that "no Magistrate shall record any such confession, unless upon questioning the person making it he has reason to believe that it was made voluntarily." It has been urged by the learned Deputy Legal Remembrancer that although there was an investigation which was being held by the Burdwan Police the arrest of the accused and his production before the Magistrate in Calcutta must be considered as something done not in the course of that investigation but apart and quite detached from the investigation that was being so held. I am unable to accept this contention as I think the proper view of the matter is that the officer of the Calcutta Police merely lent his services to the Burdwan Police who were holding the investigation. But assuming for a moment that that was so and that the police officer had authority to act in this matter apart from the investigation that was being held by the police at Burdwan there was no reason whatsoever why the Magistrate who has got to record the confession made by the accused should not comply with those statutory rules which have been embodied in sec. 164, Cr. P. C., and why he should not proceed on the lines indicated in that section and in conformity with the Rules and Circular Orders issued by this Court.

On the whole, we are not satisfied that the record of the confession that is before us is one upon which we can act, nor is the record such as would enable us to say

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in disagreement with the verdict of the jury that it was a confession made by the accused person voluntarily and that it should be acted upon.

The next item of evidence is the evidence of P. W. No. 2 Gobinda Hari, the son of the deceased. He is the only witness who speaks to the occurrence itself. He is a boy aged 12 and he professes to have been present at the time of the occurrence. He states that he was in the kitchen at the time when there was an altercation between his mother, the deceased, and the accused on the *verandah* adjoining the kitchen and that in that altercation the accused inflicted the injury upon his mother. In cross-examination, however, he stated that he did not see the actual stabbing and he did not notice how many times the accused struck his mother, and he stated also that it was quite dark at the time. The evidence of this witness is practically all the evidence that we have on the record as to the actual occurrence. Having regard to the statement made by this witness in his cross-examination to which I have referred I am not of opinion that the evidence is so very convincing that it should be right for us dealing with this case under the provisions of sec. 307, Cr. P. C., to accept it as conclusive in view of the fact that the jury evidently were of opinion that it was not sufficient to fix the guilt upon the accused.

The third item of evidence referred to by the learned Judge relates to the evidence of certain witnesses who spoke to the fact that shortly after the occurrence P. W. No. 2 Gobinda told them that he was an eye-witness to the occurrence and that the accused had inflicted the injury upon his mother. Having regard to what I have said as to the value of the evidence of Gobinda himself I do not think that

the third item of evidence, even if it be accepted as true, carries the case very far.

The last item of evidence is that of the P. W. Nos. 6 and 11 who say that on the day of the alleged occurrence and shortly before it took place the accused was seen in the village where the occurrence took place. This no doubt is a piece of circumstantial evidence; but if we are not prepared to rely on the confession of the accused and if we are not satisfied with the evidence of Gobinda, it cannot be said that the mere fact that the accused was seen in the village where the occurrence took place shortly before the time of the occurrence is a fact upon which the conviction of the accused can possibly be founded.

There are certain other matters which present some difficulty to us, though perhaps if we were to deal with the case independently of the verdict of the jury we might not regard them very seriously. Though the injury was inflicted on the *verandah* of the kitchen the deceased was found lying with the knife beside her at no less a distance than 130 feet from that place. It may be that she ran after the assault and was chased by her assailant who dropped the knife when she fell, or it may be that she ran with the knife sticking on to her and then she pulled out and threw the knife and herself fell. But these are mere theories, for there is no evidence on the point, and indeed we do not know whether it was possible for her to run this distance after the injury she had received. The learned Deputy Legal Remembrancer has argued on the presence of blood in the *verandah* and the fact that there were blood spots on the cloth which the accused was wearing at the time of his arrest. So far as the presence of blood on the *verandah* is concerned that only goes to show, if that evidence is accepted,

THE KING-EMPEROR v. GARIB HARI.

that the occurrence took place there : and as regards the presence of blood on the cloth which the accused was wearing at the time of his arrest the chemical examiner's report is to the effect that although blood spots were found on the cloth, the origin of the blood could not be determined.

The evidence on the record is not of a very convincing character and we are of opinion that in this case we should not be justified in interfering with the unanimous verdict of the jury. The Reference is accordingly discharged, the verdict of the jury upheld and the accused Garib Hari is acquitted and directed to be set at liberty.

II. D. C.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD ATKINEON.

LORD CARSON.

SIR JOHN EDGE

MR. ANEER AI.

1925,

Heard, 23 and

24, March.

Judgment,

20, March.

SEVAK JERANCHOD

BHOOLAL and ORS.,

Appellants,

v.

THE DAKORE TEMPLE

COMMITTEE and ORS.,

Respondents.

Public Temple—Scheme of management, authorising Temple Committee to change rules, with sanction of District Court Power given to High Court upon application to change rules—Rules sanctioned by District Judge, appeal against, if lies to High Court—Appeal erroneously entertained by High Court because appeal not objected to—Original application to High Court refused—Appeal to Privy Council, if lay, and on what ground—Letters Patent (Bombay), cls. 15 and 39—"Judgment," meaning of, in civil cases.

A scheme for the management of a public Hindu temple, confirmed by Order in Council on 14th May 1912, provided inter alia for the appointment of a Temple Committee with powers to make rules for

the guidance of their business and for the management of the temple and for other purposes specified in the scheme, which on being sanctioned by the District Court were to have the same force as if they were part of the scheme. By another clause (cl. 20) of the scheme it was provided that the provisions of the scheme might be altered, modified or added to by an application to the High Court. A body of rules framed by the Temple Committee was after certain alterations sanctioned by the District Court. An appeal preferred against the order of the District Court sanctioning the rules treating the same as an order under sec. 47 of the Civil Procedure Code and an application under cl. (20) to the High Court for modification of the rules came on before a Judge of the High Court, who, in spite of doubts as to whether the appeal lay against the order sanctioning the rules, entertained the appeal because no objection was taken thereto, and having considered the rules in the appeal, dismissed the application under cl. (20) of the scheme :

Held—That the appeal did not lie and, as jurisdiction cannot be conferred by consent or acquiescence, should have been rejected. But the High Court could alter, modify or add to the rules sanctioned by the District Judge upon the application under cl. (20) of the scheme.

That there was no right of appeal to His Majesty in Council from the decision of the High Court except on the sole ground that the judgment of the High Court and the decree drawn up thereon were incompetent.

The term "judgment" in the Letters Patent of the High Court means, in civil cases, a decree and not a judgment in the ordinary sense.

SEVAK JERANCHOD BHOJILAL v. THE DAKORE TEMPLE COMMITTEE.

This was an appeal (No. 95 of 1923) from a decree, dated the 11th April 1919, of the High Court at Bombay, varying an order, dated the 5th December 1914, of the District Judge of Ahmedabad.

The Appellants represented the hereditary custodians of the temple of Shri Ranchhod Raiji at Dakore. The Respondents Nos. 2 and 3 represented the Gors, a community of devotees who for many years have been priestly guides to escort pilgrims to the shrine and to worship on their behalf. The 1st Respondent was the committee of management of the temple.

In 1880 the Gors brought a suit against the *shevaks* for an account, the appointment of a receiver, and the framing of a scheme. The judgments in that litigation are reported in I. L. R. 12 Bom. 247 and L. R. 26 I. A. 199.

As a result of the litigation a receiver was appointed, who was succeeded by the present 1st Respondent, and a scheme ordered to be framed. The scheme was eventually approved by the Privy Council in 1912. (See 15 Bombay Law Reporter, p. 13).

The 1st Respondent purporting to act under that scheme framed rules, amongst which they authorised fees to be paid on entrance to the *nij mandir*. To this the Gors objected.

These rules were modified by the District Judge who decided amongst other things that fees should be levied on Gors unless they were accompanying pilgrims.

On appeal from this decision the High Court on the 11th April 1919 held that the levying of fees for passes was illegal.

Messrs. L. DeGruyther, K. C. and Parikh for the Appellants.—The appeal is incompetent as the High Court had no jurisdiction. The orders of the District Judge must therefore be restored.

Messrs. Dunne, K. C. and Wallach for 1st Respondent supported the above argument. They referred to *Tata Co. v. Chief Revenue Authority* (1) in support of their contention that no order had been made by the High Court, the jurisdiction exercised having been merely consultative.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the 2nd and 3rd Respondents (the Gors).—The scheme is a step in the action and the Gors' application was under sec. 20 of the scheme and was a proper one. All parties accepted the jurisdiction of the High Court and cannot now challenge it. Even if the High Court are wrong, there is no appeal from their order and no power to set aside what they have done.

Mr. L. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This case has come before their Lordships in the form of an appeal to His Majesty in Council from an order of the High Court of Bombay. On the 31st March 1920, the High Court certified that the appeal involved a substantial question of law and was otherwise a fit one for appeal to His Majesty in Council, and on the 26th July 1920, the High Court admitted the appeal and ordered notice to be given to the Respondents. The question which their Lordships have to consider is whether the appeal lay. For that purpose it is necessary to refer as briefly as possible to the history of the case to see if any appeal in this case to His Majesty in Council arose or was admissible.

The case relates to the management of a public Hindu temple at the village of Dakore which is within the jurisdiction of

(1) L. R. 50 I. A. 212, 225, 220: s. c. 28 C. W. N. 307 (1923).

SEVAK JERANCHOD BHOGILAL v. THE DAKORE TEMPLE COMMITTEE.

the Court of the District Judge of Ahmedabad. In the temple is installed the Idol of Shri Ranchhod Raiji, which is much revered by Hindus. Disputes arose as to the management of the temple and at least two suits were brought in respect of the management, one of which came on appeal to His Majesty in Council as to a scheme for the management which had been sanctioned by the High Court of Bombay. On the 14th May 1912, the Board, having made some alterations in the scheme and having advised that the scheme as altered should be affirmed, His Majesty with the advice of His Privy Council, confirmed the scheme, as altered by the Board, and made an Order in Council accordingly.

The Dakore Temple scheme so confirmed by His Majesty's Order in Council of the 14th May 1912 provided, amongst other things, for the appointment of The Dakore Temple Committee to consist of five members who should be Hindus professing faith in Shri Ranchhod Raiji, and empowered the Committee to take the temple property into their custody and to make rules for the guidance of their business and for the management of the temple and for other purposes. The purposes for which such rules might be made were specified in cl. 12 of the scheme, and it was provided that the rules, when sanctioned by the District Court of Ahmedabad, should have the same force as if they were part of the scheme.

Cl. 20 of the scheme, as confirmed by His Majesty's Order in Council, is as follows :—

"20. The provisions of this scheme may be altered, modified or added to by an application to His Majesty's High Court of Judicature at Bombay."

The Temple Committee, having been duly appointed, framed a body of rules, as

the Committee was empowered to do, and those rules came before Mr. B. C. Kennedy, as the District Judge of Ahmedabad, for the sanction of his Court, and he, on the 5th December 1914, made certain alterations in the rules, and, as altered by him, sanctioned the rules. On the 23rd March 1915, certain members of the Trawadi Mewada Brahmin caste, who had exercised certain rights in the temple or were otherwise interested in the management of the temple, presented to the High Court of Judicature at Bombay an "Application under cl. 20 of the scheme for modification of the rules sanctioned by the District Judge." To that application the managing member of the Temple Committee and another were made Respondents. The sanction given by the District Judge to the rules was apparently considered in the High Court, although erroneously, to be an order made under sec. 47 of the Code of Civil Procedure, 1908, and appeals from it were presented to the High Court at Bombay. The appeals, and the application, came before a learned Judge of the High Court for disposal, and he, obviously doubting that the appeals lay, said in his judgment of the 22nd September 1919, as follows :—

"These appeals and applications relate to the rules which have been framed under cl. 12 of this scheme and sanctioned in 1914 by Mr. Kennedy, the District Judge of Ahmedabad. The appeals have been filed as appeals from Orders in execution passed under cl. 12 (?) of the scheme by the District Judge of Ahmedabad. We think we ought to deal with them as such as no objection has been taken. No Orders need therefore be passed on the applications filed *ex majore cautela* as applications under cl. 20 of the scheme reserving general power of interference to the High Court."

Thereupon the learned Judge wrote and delivered a judgment in which he expressed his views as to the rules which had been sanctioned by the District Judge. The appeals to the High Court did not lie and should have been rejected.

SEVAK JERANCHOD BHOGILAL v. THE DAKORE TEMPLE COMMITTEE.

The learned Judge should have remembered that parties cannot by acquiescence or consent confer upon a Court a jurisdiction which it has not got. The High Court at Bombay had power conferred upon it by cl. 20 of the scheme confirmed by His Majesty's Order in Council upon an application made to it with that object to alter, modify or add to the rules sanctioned by the District Judge, but it had no other power, and that power it did not exercise; it may, however, still be exercised upon application properly made to it.

There was no right of appeal to His Majesty in Council from the judgments of the High Court of the 11th April 1919, and 22nd September 1919, or from any decrees which were drawn up, except on the sole ground that the judgments or decrees were incompetent. The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. This appeal to His Majesty in Council should not have been admitted.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the judgments or decrees be set aside, as these judgments appealed from were incompetent. There will be no costs of this appeal.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitor: *Mr. Ed. Delgado* for the 1st Respondent.

Solicitors: *Messrs. Downer and Johnson* for the 2nd and the 3rd Respondents.
G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD SUMNER.

SIR JOHN EDGAR.

MR. AMER ALI.

LORD SALVESSEN.

1925,

Heard, 21 and

22, May.

Judgment,

22, May.

BAI MONGHIBAI and
ors., Appellants,

v.

PRAGJI DAYAL HARIANI,
Respondent.

Privy Council—Practice—Concurrent findings of fact, review of.

Where the Courts in India concurrently found that the testator was of sound disposing mind when he executed the Will and that it was truly his Will, being fully alive to the suspicious circumstances attending the execution and to the principles of law in accordance with which the question was to be tried, the Judicial Committee found nothing in the nature of the case to bring it within the limited and rare class of exceptional cases which have occasionally induced the Board to review concurrent findings. The fact that the character of the Will appeared to both the Courts below to have been somewhat of an injustice on the part of the testator towards his wife and children was not a circumstance justifying a departure from the rule.

This was an appeal from a decree, dated the 10th March 1922, of the High Court of Bombay in its appellate jurisdiction which reversed a decree, dated the 31st March 1921, of that Court in its testamentary and intestate jurisdiction, directing probate of the Will of Vassanji Madhavji to issue to the present Respondent.

The testator, a wealthy Hindu inhabitant of Bombay, died on the 21st November 1919 leaving the bulk of his estate to

BAI MONGHIBAI v. PRAGJI DAYAL HARIANI.

charity and only small bequests to his widow and infant sons.

The Respondent, one of the executors, applied for probate. The widow (Appellant) entered caveats on behalf of herself and her sons. The proceedings were contested and on the 31st March 1921 the trial Judge (Marten, J.) pronounced in favour of the Will. On appeal the High Court (Macleod, C. J. and Coyajee, J.), while differing from some of the deductions drawn by the trial Judge decided that they were not entitled to disregard his opinion and dismissed the appeal.

Leave to appeal to His Majesty in Council was granted by Shah, Acting C. J., and Crump, J., who intimated that although it was difficult to say that there was any substantial question of law involved in the appeal, yet they were of opinion that it was a fit case for the exercise of their discretion under sec. 109 (c) of the Code of Civil Procedure, 1908.

Sir G. Lowndes, K. C., Messrs. De-Gruyther, K. C. and Douglas McNair for the Appellants.—The issue in the lower Courts was whether or not the testator was in a fit condition to make a Will.

Neither the trial Judge nor the Judges on appeal have directed their minds to the true issue, and the onus *probandi* has not been satisfied by legal evidence.

Tyrrell v. Painton (1).

Moreover, the Judges of the Appellate Court while of opinion that the evidence is in favour of the caveat yet have not given effect to their own views.

Manladad Khan v. Abdul Satlaq (2).

Messrs. Luxmoore, K. C. and E. B. Raikes for the Respondent.—No appeal lies. The question before the Court has been throughout purely a question of fact

and on that question there are concurrent findings of the lower Courts.

Tassaduq Rasul Khan v. Manik Chand (3) and *Ram Anugra Naran v. Hanuman Sahai* (4).

Their LORDSHIPS' JUDGMENT was delivered by

LORD SUMNER.—It is unnecessary to go into the circumstances of this matter at any length. A Will was propounded. The trial Judge, so far as their Lordships can see after a very careful examination of his judgment, approaching the question with a mind fully open to the suspicious circumstances attending the execution and fully open also to the principles of law in accordance with which it was his duty to try the question, came to the conclusion that the testator was of sound disposing mind when he executed the Will, and that it truly was his Will. This was his finding of fact and he passed a decree accordingly. On appeal that decree was affirmed. The learned Judges in the High Court reviewed the facts with minds even more alive than the trial Judge's mind had been to the suspicious circumstances, and, in spite of what has been said without, in their Lordships' opinion, ignoring any rule of law or misdirecting themselves in any way, and especially so in attaching importance to the fact that the trial Judge had accepted as true the evidence given before him by a solicitor, whose report of the transaction, if it was believed, was sufficient by itself to sustain the grant that had been made. It was argued that there was some error in law involved or some substantial question of law raised in this appeal, but, after every possible

(3) L. R. 30 I. A. 34, 39; A. C. I. L. R. 25 All. 109; 7 C. W. N. 177 (1902).

(4) L. R. 30 I. A. 41; A. C. I. L. R. 30 Cal. 303; 7 C. W. N. 225 (1902).

(1) L. R. [1-94] P. 151, 158, 159.

(2) I. L. R. 39 All. 423, 426 (1917).

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attempt had been made in that direction, it became quite clear that there was no issue except an issue of fact. Even the learned Judges of the High Court, who granted their certificate that the case was a fit one for appeal under sec. 109 (c) of the Civil Procedure Code, said, in terms that make this certificate somewhat unusual in their Lordships' experience, that they could not see what the question of law was. Their Lordships for their part can find none. They consider that the case was entirely one of evidence, and of the conclusion to be drawn from evidence, and the two Courts concur in their finding. There is nothing apparent upon an examination of the nature of this case to bring it within the limited and rare class of exceptional cases, which have occasionally induced the Board to review even concurrent findings of fact. The real complaint against the transaction is not that the execution of the Will was in any way extraordinary, but that the character of the Will was such as seemed to both the Courts below to have been somewhat of an injustice on the part of the testator towards his wife and children. With this their Lordships have nothing to do. The only result in their opinion which can follow in a case of this kind is that the appeal must fail, with the usual consequences as regards costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Ashurst, Morris, Crisp & Co.* for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD BLANESBORGH; RAJA GANESH
SIR JOHN EDGF. NARAYAN SABI DEO;
MR. AMER ALI. Appellant,
1927, r.

Heard, 25, May. MANIK LAL CHANDER
Judgment, 25, May.) and ors., Respondents.

Privy Council—Appeal—Concurrent findings that irregularities in sale were waived—Irregularities, if may be made grounds of appeal to Privy Council.

Where the Courts in India concurrently found that the irregularities in relation to a sale in execution of a decree caused by non-publication of the proclamation or otherwise, on which the Appellants before the Privy Council relied in support of their appeal, had been waived:

Held—That no question of law arose until these findings were re-opened, which it was not in accordance with the rule of the Board to do.

This was an appeal (No. 129 of 1924), from an order of the High Court at Patna, dated the 25th May 1923, affirming an order of the Court of the Subordinate Judge of Ranchi, dated the 3rd September 1921.

In execution of a decree the Appellant's interest in Pargana Barwe was sold and purchased by the Respondent T. C. Ambler. The judgment-debtor applied on the 21st May 1921 under Or. 21, r. 90 of the Code of Civil Procedure to set aside the sale. His application was dismissed by the Subordinate Judge who held that the judgment-debtor had waived his right to raise objections and that the auction-purchaser had not been made a party to the proceedings to set aside the sale. An appeal from the order of the Subordinate Judge was dismissed by the High Court.

Sir G. Lowndes, K. C. and Mr. W. Wallach for the Appellant.

RAJA GANESH NARAYAN SAHI DEO v. MANIK LAL CHANDER.

Messrs. A. M. Dunne, K. C. and T. B. W. Ramsay for the Respondents. [ORDINARY ORIGINAL CIVIL JURISDICTION.]
SUIT No. 210 OF 1925.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—In this case a preliminary objection has been taken to the effect that there is no question of law involved in the issue before the Board, and that, therefore, no appeal lies to His Majesty in Council. On the point being investigated it appears that the judgments of both Courts below were based upon a waiver by the present Appellant of any right that he might have had to object to irregularities in relation to the sale caused by non-publication of the proclamation, or otherwise, it having been found by both Courts that these irregularities had been expressly waived by the Appellant. Sir George Lowndes, on his behalf, states that if he were to proceed with the appeal it would be necessary for him to rely in support of it upon some, at least, of the irregularities which the Courts below have, each of them, held to be waived.

In these circumstances, it appears to their Lordships that this appeal is barred by concurrent findings of fact in the Courts below and that no question of law can arise until these findings are re-opened, which is not in accordance with their Lordships' rule.

Accordingly they will humbly advise His Majesty that the appeal should be dismissed and that the Appellant should pay the costs of the Respondents to be taxed separately so far as the Registrar, in his discretion, thinks right.

Solicitors: Messrs. W. W. Box & Co. for the Appellant.

Solicitors: Messrs. Indermaur & Brown for the 6th Respondent.

Solicitors: Messrs. Downer & Johnson for the 1st, 2nd, 3rd and 5th Respondents.
G. D. M.

PEARSON, J.

1925,

Heard, 30, November, 1, 2, 3, 4, 7, 8, 9, 10, 11, 14 and 15, December.

1926,

Judgment,

25, January.

ALBERT BONNAN,
Plaintiff,

v.

IMPERIAL TOBACCO CO.
(INDIA), LTD.,
Defendants:

Civil action brought maliciously and without reasonable and probable cause—Damage to property and trade resulting in consequence—Temporary injunction obtained in such suit—Maliciously causing detention of goods in the Customs house—Sea Customs Act (VIII of 1878), secs. 18, 19A—Cause of action—Civil Procedure Code (Act V of 1908), sec. 95—Limitation Act (IX of 1908), Arts. 42, 36, 26, 48.

Where upon representations made by the Defendant maliciously and without reasonable and probable cause, the Collector of Customs detained goods imported by the Plaintiff under sec. 19A of the Sea Customs Act:

Held—That the Defendant was liable in damages to the Plaintiff for the injury the latter suffered in consequence.

NEMI CHAND v. WALLAOE (1) referred to.

In a suit brought maliciously and without reasonable and probable cause, the Defendant obtained a temporary injunction which resulted in damages to the Plaintiff's trade:

Held—That the proceedings having formed part of a suit which itself was affected by malice in its entirety, the Defendant was answerable for such damages, apart from the question whether a cause of action existed independently for these proceedings. A suit lies for damages caused by wrongful interference with the

(1) I. L. R. 34 Cal. 495; s. c. 11 O. W. N. 637 (1907).

ALBERT BONNAN v. IMPERIAL TOBACCO CO. (INDIA). LTD.

property rights of the Plaintiff resulting from a proceeding in Court brought maliciously and without reasonable and probable cause.

MOHINI MOHON v. SURENDRA NARAYAN (2), BISHUN SINGH v. WAYATT (4), BHUT NATH v. CHANDRA BINODE (5), NARENDRA NATH v. BHUSAN CHANDRA (6), MADRAS STEAM NAVIGATION CO. v. SHALIMAR WORKS, LD. (7), CLISSOLD v. CRATCHLEY (8), KISSORYMOHAN v. HURSOOK DASS (9) and SMITH v. DAY (10) referred to.

No inference that such a suit does not lie can be reasonably drawn from the provisions of sec. 95 of the Civil Procedure Code, nor is the existence of Art. 42 of the 1st Schedule to the Limitation Act in itself an argument that a suit is maintainable for damages for an injury caused by an injunction wrongfully obtained, for a Limitation Act cannot create a cause of action, if it does not already exist independently.

The suit in so far as it related to detention of the goods by the Collector was governed by Art. 36 of the Limitation Act and not by Art. 48, since the detention was not by the Defendant but by the Collector who could not be looked upon as the Defendant's agent. In so far as the cause of action might be slander of title or slander of goods, Art. 36 applied and not Art. 25.

The Plaintiff A. Bonnan purchased a large number of cases of Gold Flake cigarettes in England from the Army and

Canteen Stores in 1921. In February and March 1922 the Plaintiff imported some of these cases in Bombay and in Calcutta. Some of the cases which arrived in Bombay were detained by Customs authorities at the instance of the Defendant Company and on 23rd May 1922 the Defendant Company obtained an injunction from the High Court in Bombay restraining the Plaintiff from importing or selling the cigarettes. The other cases which arrived in Calcutta were detained by the Customs authorities here at the instance of the Defendant Company, and on 11th May 1922 the Defendant Company obtained an injunction restraining the Plaintiff from importing or selling the cigarettes. The suit in which the last mentioned injunction was obtained was dismissed by Pearson, J., by the appeal Court and by the Privy Council. The suit in the Bombay High Court was similarly dismissed following the said judgments. The Plaintiff alleged *inter alia* that the Defendant Company caused a rumour to be circulated to the effect that the Gold Flake cigarettes imported by the Plaintiff were inferior in quality to those sold by the Defendant Company and that the Defendant Company further threatened the dealers in cigarettes in the market that if they purchased the cigarettes imported by the Plaintiff they would be boycotted by the Defendant Company. By reason of the conduct of the Defendant Company the Plaintiff averred that he failed to find out a market for those cigarettes imported by him and was otherwise put to a considerable loss and damage. The Defendant Company denied liability.

Mr. S. C. Mitter (with Mr. C. Bagram) argued on behalf of the Plaintiff that the conduct of the Defendant Corporation, throughout the proceedings, is charac-

(2) I. L. R. 42 Cal. 550: s. c. 18 C. W. N. 1189 (1911).

(4) 16 C. W. N. 510: s. c. 14 C. L. J. 515 (1911).

(5) 18 C. L. J. 34 (1912).

(6) 31 C. L. J. 495 (1920).

(7) I. L. R. 42 Cal. 85 (1914).

(8) [1910] 2 K. B. 244.

(9) L. R. 17 I. A. 17 (1889).

(10) 51 Ch. Div. 421, 428 (1882).

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terised by malice and want of reasonable and probable cause. Correspondence relied on by both sides, the different representations made by the Corporation before the Collector of Customs and the High Courts of Bombay and Calcutta when interim injunction was obtained, the steps that had been taken by the Tobacco Company to crush out of existence the infant organization of Bonnan, in the fair name of competition, the desperate attempts on their part to malign and kill Bonnan's business, the series of obstructions thrown in his way without any justification—all these went to show the *malâ fides* of the Defendant Corporation. Apart from the question of malice, the very fact of a person's wrongfully obtaining injunction is sufficient cause of action. [Cited *Bishun Singh v. Wayatt* (4), *Bhut Nath v. Chandra Binode* (5), *Narendra Nath v. Bhusan Chandra* (6), *Kissorymohan v. Hursook Dass* (9), *Clissold v. Cratchley* (8) and *Smith v. Day* (10)].

There was no substance in the point of limitation taken by the Defendants. In a case like this, although there may be different acts on the part of the Defendants to which exceptions had been taken, really it was one continuous cause of action, which ought not to be split up in different water-tight compartments.

Further sec. 95 of the Civil Procedure Code had no application for the simple reason that the damages claimed were more than one thousand rupees.

Mr. L. P. E. Pugh (with him *Messrs. N. N. Sircar and W. W. K. Page*) argued on behalf of the Defendants that there

was no cause of action. There was no malice or want of reasonable and probable cause. Assuming there was malice, even then, on the authorities no suit for damages can lie [cited *Mohini Mahon v. Surendra Narayan* (2) and *Quartz Hill Mining Co. v. Eyre* (3)].

So far as the action of the Collector goes, it was a judicial act of the Collector of Customs and the Company cannot be held responsible for it. [Cited *Nemi Chand v. Wallace* (1)].

On the question of limitation, the suit was barred. Art. 42 of the Limitation Act does not give rise to a cause of action where there is none. So far as the proceedings before the Collector were concerned, the remedy was barred under Art. 36 of the Limitation Act.

So far as regards the statements and rumours circulated by and at the instance of the Defendants to malign the Plaintiff's goods, that remedy also was barred either under Art. 25 or Art. 36. Lastly on the question of damages the Plaintiff had failed to substantiate his claim.

Mr. C. Bagram, in reply, argued on the question of damages.

The JUDGMENT OF THE COURT was as follows:—

PEARSON, J.—This is a suit for damages arising out of certain acts of the Defendant Company alleged to be wrongful and malicious. The Defendant Company had been formed in 1910 to take over the business for importing and selling within the limits of India various cigarettes under the manufacturers' brand of W. D. and H. O. Wills including this Gold Flake

(4) 16 O. W. N. 540; s. c. 14 C. L. J. 515 (1911).

(5) 16 C. L. J. 34 (1912).

(6) 31 C. L. J. 495 (1920).

(8) [1910] 2 K. B. 244.

(9) L. R. 17 I. A. 17 (1889).

(10) 21 Oh. Div. 421, 428 (1882).

(1) I. L. R. 34 Cal. 495; s. c. 11 O. W. N. 537 (1907).

(2) I. L. R. 42 Cal. 550; s. c. 18 O. W. N. 1189 (1914).

(3) 11 Q. B. D. 674 (1883).

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brand. On the 1st September 1910 an agreement was executed with that object, the parties being the British-American Tobacco Co., Ltd., the British-American Tobacco Co. (India), Ltd., and the Defendant Company. No actual document of assignment or transfer was executed until the 11th April 1922. The shares in the Defendant Company were owned to the extent of some 80 per cent. or 90 per cent. by the vendor Company, and from 1910 onwards the sale of these brands in India was entirely in the hands of the Defendant Company acting under the agreement. At the termination of the war the Army Canteen Authorities found themselves in possession of a very large stock of cigarettes purchased from the British-American Tobacco Co., and from elsewhere: accordingly they took steps to sell them off, but imposed on purchasers the restrictive condition that the goods should not be disposed of in Great Britain. The Plaintiff was one of those who came forward and made considerable purchases of these cigarettes of the Gold Flake Brand from the Canteen Authorities through Venis & Co., Ltd. and M. Drapkin. Some he disposed of in Europe, Egypt or Palestine. Others he imported into India for sale through Calcutta or Bombay. The first arrivals in India were at the end of February and beginning of March 1922. By the middle of March 1922 the Defendant Company too was alive to the Plaintiff's intrusion and the effect it might have on its trade. On the 12th April 1922 the Defendant Company moved the Collector of Customs in Calcutta for confiscation of some of these goods which had arrived and were lying in bond. The goods were accordingly detained by the Collector of Customs under his statutory powers, and the usual period of 30 days was later extended by 10 days at the

request of the Defendant Company. On the 10th May 1922 the indenture of assignment (dated 11th April 1922) was executed in Calcutta by Mr. Abbott as agent of the British-American Tobacco Co., Ltd. and by Mr. Abbott and another as directors of the Defendant Company: the 10th May 1922 was also the date of registration of that document in Calcutta.

On the next day, the 11th May 1922, the Company filed a suit in the High Court here against the Plaintiff and A. Bonnan & Co. claiming an injunction to restrain him from selling his goods. The Defendant Company in that suit based its claim upon an exclusive proprietary right in the brand and also upon the allegation that the Gold Flake cigarettes had acquired amongst purchasers in India the reputation of being goods imported by the Company and that the Plaintiff in selling his goods in India would be deceiving purchasers by passing off his goods as those imported by the Defendant Company. The Company also gave notice of motion for an injunction and obtained an interim order for injunction covering the 100 cases then in the Customs in Calcutta, the Plaintiff giving the usual undertaking in damages. This injunction was dissolved by an order of 8th June when the Plaintiff undertook to place a certain sum of money out of the sale proceeds on deposit of receipt with the Bank and lodged the receipt in Court. The suit in Calcutta was dismissed on the 18th July 1922, the appeal on the 10th April 1923 and the appeal to His Majesty in Council on the 13th May 1924.

Similar action was taken by the Defendant Company in Bombay. On the 1st May 1922, application was made to the Collector of Customs in regard to 60 cases by S. S. "Australia." An order for detention for one month was passed, but this

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was recalled and the goods were released after 48 hours' notice from the 5th May. An unusual feature was that in this instance in addition to the usual indemnity bond, a Bank guarantee was taken from the Company. On the 22nd May the Defendant Company filed a suit in the High Court in Bombay against the Cigarettes Importers Agency and Bonnan & Co., under which names the cigarettes had been imported, claiming an injunction and other relief similar to that in the suit filed in Calcutta. Notice of motion was given on the 23rd May for an injunction restraining the Defendants in that suit from importing, advertising, exposing for sale or selling their goods. On the 19th June 1922 when the motion came on, it was ordered by consent that it should stand over to the hearing on the 17th July 1922 and it was further ordered by consent that pending the hearing of the suit the Defendants undertook not to dispose of or in any other way deal with the cigarettes then lying in Bombay or to arrive in the interim and it was further ordered by consent that the Plaintiffs' undertaking as to damages should continue pending the final disposal of the suit. On the 2nd August 1922 an order was passed staying the suit until after disposal of the appeal in the Calcutta suit, the Defendants' undertaking was also vacated, they having agreed to keep an account of sales. Subsequently on the 25th September 1923 an order was passed discharging the Defendants' undertaking of 2nd August 1922 to keep account of the sales. Finally on the 9th January 1925 a consent decree was made in the suit whereby the suit was dismissed with cost, "without prejudice to the Defendants' rights, if any, to claim and recover damages from the Plaintiffs in any other proceedings."

On the 21st January 1925 the present

suit was filed against the Company to recover damages in regard to the detention of the Plaintiff's goods by the Collector of Customs in Calcutta and Bombay : damages in respect of the injunction and restraint on the goods in the High Courts of Calcutta and Bombay : and damages for injury to his trade and reputation caused by untrue and disparaging statements as to the quality, etc., of the Plaintiff's goods.

One of the important questions which arises in the suit upon the facts is whether malice finds place in the action of the company in procuring the Collector of Customs to exercise his powers of detention over the goods, and in instituting and carrying on the proceedings in the two suits in the High Court. From the correspondence before me I find that on the 15th March the Company in Calcutta was writing to the British-American Tobacco Co. in London with whom constant communication was maintained, that 60 cases had arrived of Gold Flake cigarettes. The letter is headed "competition" and shows that it was realised then that the goods were those of the British-American Co.'s manufacture, made in United States of America and Mr. Abbott, the writer, adds : "Evidently the cigarettes form part of some more stocks and they may cause us some trouble here." On the 16th March the Company's Bombay office informed the Calcutta office of the arrival of 80 cases there, intimating that "the goods though old are still sound." On 23rd March 1922 Mr. Abbott again wrote to London with news of the Bombay consignment of which 10 cases had been sold to dealers at Rs. 20 per thousand (the Company's selling price for Gold Flake cigarettes being Rs. 36 per thousand). "This," says Mr. Abbott, "is most annoying, but we cannot

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so far as we can see do more than warn our dealers that we accept no responsibility for these goods." He also says that it is possible there may be a difficulty in disposing of the Plaintiff's goods in the carton packing for which the demand is limited; "if however they get below the Scissors price" (which was Rs. 19 per mille) "they may cause no trouble." On the 23rd March the Bombay office through Mr. Selfe wrote that these importations "will certainly have had effects on the sale of our Gold Flake and Capstan on account of the cheap rate at which they are being or will be marketed." Mr. Selfe also stated in his weekly report that these importations had affected the sales of Gold Flake Magnums. On the 28th March Mr. Abbott wrote to London asking for particulars of the stocks of Gold Flake cigarettes available on the Continent or elsewhere.

On the 4th April 1922 the Company received a telegram from a Mr. Macnaughten of the Legal Department of the British-American Tobacco Co. in London in reply to Mr. Abbott's letter of the 15th March:—

"60 cases Gold Flake the sale of these cigarettes is infringement of your mark and if the bond customs should be asked to destroy them if owners will not re-export."

Until that moment it never seems to have occurred to Mr. Abbott or anybody else that they possessed any right in law to which recourse was possible in order to stifle the competition of the Plaintiff's cigarettes. The reason for that was that so far as they knew, they had no such right: that is clear from a passage in Mr. Abbott's letter of 10th May, where he says, "We may say that as soon as the first shipment of 'Gold Flake' came to our notice, we immediately questioned

ourselves as to what was our position. A few years ago some 'Three Castles' cigarettes were imported into Rangoon from Singapore, and the legal advice we then had was that we were not in a position to prevent them from being imported. As the Gold Flake shipment was on a par, as far as we know, with that of the 'Three Castles' from Hongkong, we felt it was no use taking the matter up from a legal point of view." This is an important statement of the Company's state of mind and knowledge with reference to the period to which it refers.

Mr. Macnaughten's telegram, based on what materials I do not know, was on the 4th April. The Bombay weekly report of 7th April brought the information that the whole consignment of 80 cases had been disposed of to dealers, and the anticipation that the goods, if not disposed of before the monsoon, would probably not hold out; on the 12th April 1922 came the application to the Collector of Customs in Calcutta to confiscate the 60 cases arrived by the "Sardinia." The ground expressed in the application itself was that the importation of Plaintiff's goods was "infringement of our trade mark in W. D. & H. O. Wills brand of Gold Flake cigarettes," but Mr. Ryan had already been down himself to interview the Collector on the subject before the application was put in. Sec. 18 of the Sea Customs Act, 1878, deals with the classes of goods whose importation is prohibited and whose detention or confiscation may be allowed under sec. 19A of the Act. It is admitted that the endeavour in the present case was to bring the Plaintiff's goods under sec. 18 (d) which relates to "goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Merchandise

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Marks Act." Mr. Ryan, a solicitor, who is in charge of the legal department of the Company in Calcutta says that his opinion was that the Plaintiff's goods could be brought under neither category. Mr. Abbott though he must have known Mr. Ryan's views says that he charged the Plaintiff's goods as being counterfeit before the Collector and if he did so before the Collector, it is difficult to think that he would restrain himself otherwise. Some attempt has been made to whittle away the offensive meaning, but from any point of view it is a dangerous word for one trader to use of the goods of another. That that was the view which they desired to impress on the Collector and in which they succeeded, is clear from paras. 4 and 5 of the Collector's order, dated the 19th June 1922, where reference is made to the earlier application.

Then there are two letters, dated the 12th April 1922 and 19th April 1922 from the British-American Tobacco Co., and received on the 8th and 10th May respectively. The last named Company played a prominent part throughout in this correspondence and apparently took upon itself to advise if not to dictate the course to be followed by the Defendant Company. The intrusion of the Plaintiff's goods affected the one as much as the other. These two letters refer to Mr. Abbott's previous question as to the amount of old stocks and the passages in them are as follows:—"We believe there is still a very large quantity of old stocks of this description in various parts of the world, and if you do not take steps to stop their importation in India now, it is very probable that you will be having constant repetitions of this trouble." Then in the letter of 19th April is this: "We regret to say that it is impossible to estimate what quantities of goods of this

description are available in different parts of the world but we may say that it is probable that they are very large indeed. This makes it all the more important that you should establish the fact as soon as possible that goods of this nature cannot be imported in India, otherwise those at present holding stocks will very soon hear that they can dispose of them in India, and there is no saying to what extent the trouble may grow." There is no doubt that the steps initiated by the Company were all calculated to make it "as difficult as possible for the Plaintiff to market his goods" (see Exb. LL.) and so further representations were made to the Collector of Customs after suit with the object of obtaining from him an assessment of the Plaintiff's goods to duty at the same rate as that paid by the Defendant Company. The Collector, however, ultimately allowed an assessment based on the invoice value of the Plaintiff's goods.

Mention must be made of an interview which took place between Bonnan and Abbott on the 6th May, as to which the oral evidence is somewhat conflicting. The Plaintiff's version was not put to Mr. Abbott, but Mr. Ryan was present on the occasion; his version of the story is borne out by a letter written to the British-American Tobacco Company on the 10th May which summarises the result of the interview, and may be assumed to be substantially true, namely, that the Company wanted an undertaking from the Plaintiff not to remove the goods from bond, to which the Plaintiff was agreeable if the Company would pay him Rs. 13-8 per thousand in bond for what arrived. I have little doubt that there may have been suggestions by the Plaintiff in the course of the interview as to the Company taking over the whole of his purchases at their own selling rate of Rs. 36 per thousand

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but the letter of 15th May bears out the Company's story of the interview quite sufficiently. The offer was not accepted by the Company, however, as they "felt certain that the British-American Tobacco Co. would not listen to this." The result was the filing of this suit on the 11th May.

Para. 11 of the plaint alleges the circulation by the Defendant Company of statements and rumours in the nature of slander of the Plaintiff's goods, that they were inferior in quality, not in a sound and merchantable condition, and not genuine and also that the Company would boycott dealers purchasing or selling the Plaintiff's cigarettes. As regards the quality of the cigarettes themselves, I do not forget the Plaintiff's own representations to the Collector as to his cigarettes being entirely different in quality and everything else, the Plaintiff's explanation of which in his evidence I find it difficult to accept. But the evidence clearly shows that in fact there was no difference; also that the condition of the Plaintiff's cigarettes was somewhat inferior due to age, the chief effect of that being that they would deteriorate quicker than fresh stock and be more easily affected by adverse climatic conditions, such as those prevailing in the monsoon. At the same time there is no doubt that the Plaintiff's cigarettes on arrival in this country were sound, smokeable, and at their price freely merchantable. Mr. Abbott in his letter of 10th May says he can quite believe that Buksh Ellahi would be a willing purchaser of Plaintiff's goods, and further mentions that they are in surprisingly good condition though to Mr. Abbott's rival palate they "smoke rather nasty." Khodadad, one of the dealers, says that when he was first shown them he consi-

dered them as good as the Company's both in quality and condition. Mr. Selfe when he says in para. 8 of his affidavit in the Bombay suit that the Plaintiff's cigarettes are "old, inferior in quality and in preparation and packing" is not strictly accurate. They are indeed old, and the packing was inferior, because the Company had air-tight tin containers, for the smaller quantities within the tin-lined cases, whereas the Plaintiff had not: but the quality was the same, both of the cigarettes and of their preparation. The Plaintiff has called a witness named Corr, a servant in 1922 of the Company who stated that it was his business in particular to look out for competition. He says that Mr. Selfe's instructions were to warn the various dealers about the Plaintiff's cigarettes as being old stock and inferior in quality, and that he could do anything he liked so long as he stopped competition, and kept the market for the Company. Khodadad says that he was visited by Corr who informed him that Plaintiff's cigarettes were not genuine but imitations imported from Basra, and he would get into trouble and be involved in litigation with the Company if he continued. Corr's evidence taken by itself would hardly be safe to act upon. He is apparently now a dismissed servant of the Company, over some monetary defalcation in regard to which he seems to have put forward two different explanations, added to which his demeanour in the box could not be described as well-balanced or impartial. The details given by Khodadad are difficult to accept because they are not put to Mr. Abbott or spoken to by Corr. It is, however, difficult to brush it aside entirely having regard to the other evidence which goes to support it, and to the way in which the Company had already overstepped the

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mark in the matter of the applications to the Collector. Two Calcutta dealers Kalipada Roy and Narendra Nath Chakraverty, father and son, gave evidence that they had been visited by officials from the Company and had had it impressed on them that the goods were "bad" (*kharab*) which I think was used not so much applying to their quality as to their merchantability having regard to the litigations that were going on. The evidence of these witnesses was to some extent damaged by their identification in Court of Mr. Ryan as one of the persons whom they had seen on the occasions in question, whereas I am quite clear that Mr. Ryan's denial must be accepted and those witnesses are consequently mistaken in that particular. There is some further evidence of the same nature from other dealers. Undoubtedly the Company's servants were going round warning dealers that they would not be responsible for the Plaintiff's goods. There is no harm in that, and they could probably employ the whole of their organisation in broadcasting it to the dealers. There seems to be no doubt, however, that they went further and wrongly impressed on dealers a non-existent difference in the quality of the goods; and also made full use of the litigation in Bombay and Calcutta with its attendant threat of trouble to others as an obstruction to the Plaintiff and as a deterrent. That is a clear impression which I retain after hearing the evidence. Considering these matters to which I have referred I hold that the conduct of the Company in regard to the proceedings before the Collector was malicious and without reasonable and proper cause. Between the application to the Collector and the filing of the suit nothing has emerged, though privilege has been claimed for certain docu-

ments, to show that the Company can say it was now in any better position as regards the filing of the suit. I have supported the claim of privilege, but I am certainly not going to assume in the Company's favour that the documents in question would support its case on the question of malice or want of reasonable and probable cause. Looking to the evidence as it stands, I hold that in filing the suit and proceeding with it as it did the Company was acting maliciously and without reasonable and probable cause. These findings also apply to the Bombay proceedings both before the Collector and in Court. I also find that the Company did make and circulate the statements in para. 11 to the extent already mentioned. In connection with the question of malice I should mention a further fact that was relied upon as evidence of malice, namely, the filing of the suit in Bombay when the Company were already amply protected by the suit instituted in Calcutta and the injunction there. The contention, I think, is unsustainable, having regard to the fact that the injunction in Calcutta was limited to the Calcutta goods, the Plaintiff being apparently not then within the jurisdiction, and also to the fact that the Plaintiff was using different names or styles for his importations, so that the parties to the suits were nominally different, though in fact, as it turned out, the Plaintiff alone was interested. That the Plaintiff suffered damage by reason of malicious acts of the Company cannot I think be reasonably contested. A certain amount of delay occurred in consequence of the Collector's action and the injunction and undertakings and other proceedings in the suits, while Plaintiff had to cancel a very favourable contract with one of his buyers and had also to arrange to submit a cancellation of some of the goods he had still

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to take up from his own sellers under his original purchase contracts. He started off very well in Bombay : it made a lot of difference to him if he could dispose of his perishable goods before the arrival of the monsoon and the Company knew it. But instead of finding a fair field for his goods he found himself faced with obstruction after obstruction maliciously raised by the Company, courses of delay, disparagement of his goods, assertion of unfounded rights—all of which interfered with his right to trade his goods in the ordinary way.

It is argued by the Company that notwithstanding the injury he has suffered, the Plaintiff cannot recover. So far as the action of the Collector goes, it is said that it was a judicial act of the Collector and the Company cannot be held responsible for it. I think that *Nemi Chand v. Wallace* (1) supports the opposite contention that such a suit will lie, at any rate where, as in the present case, there is evidence of malice, and no reasonable and probable cause exists.

As to the suits and the proceedings in them the same contention is made by the Company, that no action will lie for damages, even if malice was present and reasonable and probable cause was absent. In support of this the case of *Mohini Mohan Misser v. Surendra Narain Singh* (2) is cited. That is a suit where damages were claimed against the Defendant for having previously instituted an action against the Plaintiffs for an injunction to restrain them from erecting a building on a certain land. An interim injunction had been granted but the action had ultimately

terminated in favour of the Defendants in the action. The Defendants were sued for damages for malicious prosecution of the suit for an injunction. The question of the maintainability of such a suit was raised and Fletcher, J., came to the conclusion that there was no authority for the proposition that a suit was maintainable for maliciously and without reasonable and probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. He relied upon *The Quartz Hill Mining Co. v. Eyre* (3), while pointing out that there are certain exceptions where the proceedings involve either scandal to reputation or the possible loss of liberty to the person. In *Bishun Singh v. Wayatt* (4), a case of wrongful attachment, Mookerjee, J., in the course of his judgment remarks that the statement that the institution of an ordinary civil action, however unfounded, vexatious and malicious it may be, is not a good cause of action must be qualified where there has been arrest of person or seizure of property. In *Bhutnath v. Chandra Binode* (5), the Plaintiff sued for damages for an injunction, wrongfully issued against him at the instance of the Defendants, restraining him from erecting a building. It was there held that such a suit was maintainable on the ground that the Defendants had unlawfully interfered with the exercise of his property rights by the Plaintiff. The Defendants therefore committed an act in the nature of trespass to the property, "and are consequently liable in an action for trespass; it is not necessary for the Plaintiff to prove any malice or want of reasonable or probable cause." In *Narendra Nath*

(1) I. L. R. 34 Cal. 495 : s. c. 11 C. W. N. 537 (1907).

(2) I. L. R. 143 Cal. 550 : s. c. 8 C. W. N. 1199 (1914).

(3) 11 Q. B. D. 674 (1883).

(4) 16 C. W. N. 540 : s. c. 14 C. L. J. 515 (1911).

(5) 16 C. L. J. 34 (1912).

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Koer v. Bhusan Chandra Pal (6), the Plaintiff sued for damages for wrongful attachment and wrongful detention of certain chattels belonging to him. The question was raised of whether *Bhutnath v. Chandra Binode* (5) was correctly decided having regard to other decisions of this Court including *Madras Steam Navigation Co. v. Shalimar Works, Ltd.* (7) and the case, already cited, of *Mohini v. Surendra* (2). The point was accordingly referred to a Full Bench, which however disposed of the case by re-affirming the general principle that a suit does not lie for damages against a Defendant for maliciously and without reasonable and probable cause instituting a civil action; as also the other principle that a person who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable for damages in an action for trespass. I may draw attention here to that portion of the judgment of the learned Chief Justice in the referring judgment of *Narendra v. Bhusan* (6), where he indicates that the Defendant in his view should not be held liable because the injunction under which the chattels are detained was an act of the Court "and inasmuch as it has been held that there was no *malâ fides* on the part of the Defendant and as there is no finding that there was an absence of reasonable and probable cause." So in the case of *Madras Steam Navigation Co.* (7) already mentioned, an action *in rem* against a vessel had been instituted in this Court in its admiralty jurisdiction.

The vessel was arrested but the suit was subsequently dismissed for want of jurisdiction. In a suit by the owners for damages for the arrest on the footing of trespass, Sir Lawrence Jenkins, C. J., held that the action based on trespass would not lie, and he also refers to the fact that the "arrestment of the ship is a judicial act of the Court and an ordinary step in an action *in rem*. So where it constitutes a legal grievance it is not an independent wrong but an integral part of an action *in rem* in which there was malice or its equivalent entitling the aggrieved person to seek compensation either in the admiralty proceedings or by separate action" and (at p. 109) he adds that "in the absence of proof of malice or its equivalent the suit, treated as one for trespass, will not lie in the circumstances of this case."

So *Clissold v. Cratchley* (8) referred to in some of the cases in this Court cited above shows that a wrongful seizure of goods under a writ of *fi. fa.*, where the judgment is already satisfied, may make a party liable in trespass, whether malice is present or not; but that where it is an action on the case the Plaintiff must fail unless he can also prove malice. In *Kissory Mohan Roy v. Hursook Das* (9) a case of wrongful attachment of the goods of a third party for which damages were claimed, it was argued that the Plaintiff could not recover unless he proved malice and want of probable cause. "That," says Lord Watson (at p. 27), "is a rule which obtains between parties to a suit when the Defendant suffers loss through its institution and dependence." It is unnecessary for me to consider further the cases in this Court above referred to in so far as any of them may seem to afford

(2) I. L. R. 42 Cal. 550; s. c. 18 C. W. N. 1189 (1914).

(5) 16 C. L. J. 34 (1912).

(6) 31 C. L. J. 495 at p. 500 (1920).

(7) I. L. R. 42 Cal. 85 (1914).

(8) [1910] 2 K. B. 244.

(9) L. R. 17 L. J. 17 (1889).

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ground for the contention that a suit may lie for damages for wrongful interference with the property rights of another by obtaining an order from a Court, even though no malice is proved. It is enough that in the circumstances of this case malice has been proved and want of reasonable and probable cause, both in regard to the proceedings before the Collector in Bombay and Calcutta, as also in regard to the proceedings in the two suits instituted and carried on in those places. That damage resulted to the Defendant in consequence is clear, and in my view he has a good cause of action, on which a suit is maintainable.

As regards the injunction, it may be a question whether it is to be regarded as separate and independent or as a part of and a step in the suit itself which as I have held bears the taint of malice. It is argued that no action will lie in respect of damages arising out of the injunction. If there was reasonable and probable cause or absence of malice, it may be that is so; if otherwise, what is the position? The Defendant relies upon *Mohini v. Surendra* (2) to show that even then no suit is maintainable. I am not satisfied that that principle is applicable to the facts of this case, and if necessary I should say that the circumstances place the matter on a different footing, otherwise it might be that in the case of perishable goods they might be utterly destroyed, yet the Defendant for all his malice could shelter behind the injunction as the act of the Court and get off scot-free. True it is obtained on evidence on which the Court will say that a *prima facie* case is established, but that evidence is afterwards shown to be unacceptable. As already stated, the injunction of this Court only

affected 100 cases then in Calcutta and continued from the 11th May till the 8th June. An undertaking was given by the Company in damages. That undertaking might have been acted upon by the Court on application of the Plaintiff in that suit. In *Smith v. Day* (10), Brett, L. J., says that if the injunction had been obtained fraudulently or maliciously the Court would give exemplary damages. No case, however, has been shown to me where upon such an enquiry as to damages the Court has consented to assess damages upon the footing that the suit had been maliciously carried on, where such malice had not arisen as an issue for decision in that suit. It is argued that the fact that the undertaking is embodied in the order is itself an indication that apart from it the Defendant could not recover. Similarly that when sec. 95 of the Civil Procedure Code allows limited damages in the case of an injunction being obtained on insufficient grounds, it is because apart from such provision of law, no such damages would be recoverable. On the other hand, it may be argued that the undertaking is inserted because it gives a quicker remedy, and so with the application under sec. 95. As to the latter and the inference to be drawn, it seems illogical to allow a Defendant who has incurred Rs. 1,000 damages to recover Rs. 1,000 and only allow the same to a Defendant who has incurred Rs. 10,000. I agree that the existence of Art. 42 of the 1st Schedule to the Limitation Act is in itself no argument that a suit is maintainable for damages for an injury caused by an injunction wrongfully obtained, because such an Act cannot create a cause of action if it does not already exist independently. Nevertheless in the circumstances of the present case I think that a cause of action may exist in respect

(2) 12 L. R. 42 Cal. 550: S. C. 18 C. W. N. 1189 (19 4)

(10) 21 Ch. Div. 421, 428 (1882).

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of the injunction and the resulting damages to the Plaintiff's trade: but whether that be so or not the Plaintiff can obtain his relief in respect of it as a proceeding forming part of the suit which is itself affected by malice in its entirety.

As regards the Bombay suit the order of 19th June 1922, made upon the notice of motion, dated 23rd May, for interim injunction, was a consent order, the Defendant in the suit undertaking not to deal with the goods in Bombay or to arrive, and the Plaintiff Company giving an undertaking in damages. The Defendant's undertaking was vacated by the order of 2nd August, without prejudice to his rights in damages. As to this part of the case I think that the Plaintiff's remedy, if at all, would be limited to the enforcement of the undertaking in the suit in which it was given, and that as he submitted to the making of the order by giving his consent, he has no separate cause of action in this respect although he may say his consent was accorded only under pressure of the circumstances maliciously brought about by the Company.

Next, it is contended that even if the present suit is maintainable it is barred by limitation, whatever the cause of action may be. That appears to be so partly. I think that limitation intervenes in so far as the proceedings before the Collector are concerned. The detention terminated not later than June 1922. Art. 36 is the general article which provides a period of two years' limitation for a suit to recover damages in tort, unless any specific article provides otherwise. Art. 48 has been referred to but in my view does not apply, if for no other reason because the Defendant Company never had possession of or control over the goods and the Collector cannot be looked upon as the Com-

pany's agent. In so far as the cause of action may be slander of title or slander of goods the limitation would be either one year under Art. 25 or two years under Art. 36, the latter is in my opinion applicable in the circumstances, for I think the action would be on the case. Nevertheless I think it is a fair inference to draw from the evidence that the statements alleged and complained of, continued, to the extent already mentioned, to be repeated within two years before suit, particularly having regard to the continuance of the previous suits which throughout were designed as a disparagement of the Plaintiff's goods and in obstruction to the unfettered exercise of his rights as a trader, of which I have no doubt the Company made the fullest use the whole time the litigation lasted, and whenever occasion so required. I am not prepared to say that in any view of the matter the Company is excused by the principle that a trader is entitled to protect his own property and his own interests, because I think in this case there was *malâ fides* and ulterior motive from the beginning until the end.

There remains the question of damages. One head of damages is that for loss of trade and business based upon the suggestion that the Plaintiff might have established himself in the tobacco trade in India, at any rate to the extent of the remaining canteen war stocks of cigarettes which were very large indeed. He says that it was his intention to do so, but the evidence does not appear to me to be sufficient to enable me to hold that he has established his case in this particular, or that his failure in this respect could be said to be the proximate effect of the Defendant's action. Similarly he has claimed damages under certain other heads which I think are inadmissible. These are the

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items at the end of his schedule of claim, namely, (1) living expenses in India for 642 days, (2) travelling expenses to and from India and also in India, and (3) difference between party and party costs allowed to him in the previous suit, and his attorney and client costs.

As regards the remainder of the claim I think that the Plaintiff must recover damages substantially according to the headings of his schedules. Ex. O is a convenient resume furnished to me by Plaintiff's Counsel of the goods that came to India, and their disposal as well as the other goods contracted for of which the Plaintiff lost the benefit owing to cancellation of the contract. The sales effected by the Plaintiff after he had undertaken to keep an account show that in many instances he was able to dispose of his goods at so high a rate as Rs. 30 per thousand. At the end of March he started his sales to Sheriar & Co. and other Bombay dealers at rates of Rs. 18 and Rs. 20 per thousand; while he contracted to sell 220 cases to Shoriar at the rate of Rs. 23-8. The Company argues that the sales in paper packets of these Gold Flake cigarettes are shown from their own experience to be very small in India, and therefore the Plaintiff would have had the greatest difficulty in disposing even of what he had actually brought out; but that argument could only have weight if the Plaintiff were selling at the same rates as the Company, whereas he was in a position to undersell them heavily. It leaves out of account the attraction of a bargain price. Besides, if there was any substance in the argument the best course for the Company would have been (subject to warning their dealers) total passivity. The best answer is the conduct of the Company itself, the passages from the letters already referred to, and the

considerable sales to the Bombay dealers. There would be no doubt a certain amount of deterioration, particularly in the rains, once the cases are opened, and indeed, I find the Plaintiff writing to the Collector about the end of the rains claiming further reduction of duty on the ground of substantial deterioration; but I believe upon the evidence before me that but for the Defendants' action Plaintiff would have been able to dispose of his goods that had already come out here before the monsoon season, and as regards those at home they would still have been saleable by the time they were brought out. Still, there would necessarily have been some amount of deterioration among them in the matter of condition.

On the question of damages I am not inclined to attach much weight to the evidence of the interview of 8th May, even accepting the Company's version of it, because that took place when the interference through the Collector was actually in existence, and the impending litigation was held over the Plaintiff's head. The Plaintiff's claim under the headings with which I am now dealing is based upon the assumption that he would have been able to dispose of his goods at the uniform rate of Rs. 30 per thousand. Taking the various matters into consideration I have endeavoured to put myself in the place of a jury and arrive at a fair and reasonable figure which may be taken as an average rate to form a basis for the calculation of damages, and in the circumstances I think an all round figure of Rs. 23-8 would not be excessive. The Defendant Company does not admit the items of the account as set out in the schedule to the plaint, so that subject to the rate of Rs. 23-8 which I have fixed, there must be a reference to ascertain what is the

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amount of damage under the claims numbered 1 to 5 in the schedule. The decree will be made accordingly and the Plaintiff will have his costs of the suit on Scale No. 2.

Messrs. Orr, Dignam & Co., Solicitors for the Plaintiff.

Messrs. Sanderson & Co., Solicitors for the Defendant Company.

P. D.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 978, 979, 981 AND 982 OF 1923.

<p>SCHRAWARDY, J. MUKERJI, J. 1925, 10, November.</p>	}	<p>DEBENDRANATH SINHA, Defendant, Appellant, v. NAGENDRANATH SINHA SAHA ROY, Plaintiff, Respondent.</p>
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Bengal Tenancy Act (VIII of 1885), sec. 158, order if decree - Limitation, if runs from date of order or decree - Limitation Act (IX of 1908), sec. 5 - Appeal filed beyond time under wrong legal advice - "Sufficient cause."

Under sec. 158, cl. (3) of the Bengal Tenancy Act, the order on any application made under that section should be regarded as a decree under Sch. III, cl. (4) and time for appealing therefrom should run from the date of such order. Formal decrees following such orders are not necessary to be filed along with the memorandum of appeal.

KAMALA DAS v. TARAPADA MUKHERJI
(1) considered and dissented from.

If the Appellants relying on the advice of their pleader filed the appeals within 30 days from dates of decrees, they should be excused under sec. 5, Limitation Act.

SUNDERBAI v. THE COLLECTOR OF BELGUM (2) followed.

(1) 15 C. L. J. 498 (1910).

(2) I. L. R. 43 Bom. 376; s. o. 23 C. W. N. 763 (P. C.) (1918).

The true guide is whether the Appellant acted with reasonable diligence in the prosecution of the appeal.

BRIJ INDAR SINGH v. KANSHI RAM (3) followed.

This was an appeal preferred on the 9th of March 1923, against the decree of Mr. Yusuf, Esq., District Judge of Zillah Midnapur, dated the 9th of December 1922, affirming the decree of Babu Amrital Mukerji, Subordinate Judge, 1st Court of that District, dated the 24th of July 1922.

The facts of the case will appear from the judgment.

Babu Pyarimohan Chatterji for the Appellant.

Mr. Ram Chandra Majumdar, Babus Panchanan Ghose and Giris Chandru Banerji for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SCHRAWARDY, J.—We regret very much that the unsatisfactory nature of the judgment passed by the learned District Judge has necessitated a remand for a re-hearing of the matter. These four appeals arise out of four suits under sec. 158, Bengal Tenancy Act. The suits were decreed by the Subordinate Judge by his order, dated the 24th July 1922. On the 10th August 1922, decrees were prepared embodying the results of the decision of the Court. The appeals were filed before the District Judge on the 11th September 1922 and admittedly they were within time under cl. 4, Part II of Sch. III of the Bengal Tenancy Act, if time is calculated from the dates of the decrees. At the hearing of the appeals an objection was taken that the appeals were filed out of time inasmuch as they should have been

(3) I. L. R. 45 Cal. 94; s. o. 23 C. W. N. 109 (P. C.) (1917).

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filed within 30 days from the dates of the orders and not from the dates of the decrees. The learned District Judge held that it should have been so. The pleader appearing for the Appellants then applied under sec. 5 of the Limitation Act for extension of the period on the ground that the clients were advised by their pleaders that the time for filing the appeals should be reckoned from the dates of the decrees. No enquiry was held into this allegation but the learned Judge being of opinion that the Appellants were not justified in relying upon the advice of the pleader rejected the applications, and in the result dismissed the appeals as filed out of time. On this part of the case the learned Judge made the following observation :—"The substantial ground urged in these applications is that the respective Appellants having been informed by their pleaders that limitation would run from the dates of the decrees, acted *bonâ fide* in filing the appeals within 30 days from the date of the decrees. It is, however, impossible for me to hold that the Appellant's belief was formed with due care and attention." The learned Judge apparently by this expression of opinion means that though the Appellants might have been advised by their pleader that the appeals could be filed within 30 days from the date of the decrees they should have taken due care and attention to verify that advice; and since they did not do so, they were not entitled to the extension of time under sec. 5 of the Limitation Act.

Two points have been urged before us by the learned vakil for the Appellant. It is argued in the first place that appeals filed within the time reckoned from the dates of the decrees must be taken to be competent as filed within 30 days from the dates of the decrees. It is maintained that though the order passed under sec. 458,

Bengal Tenancy Act, may be treated as a decree, when the decrees were prepared by the Court, time should run from the dates of such decrees, and in support of this contention reliance is placed on the case of *Kamala Dasi v. Tarapada Mukherji* (1). In that case the appeal arose out of proceedings under sec. 47, C. P. C. Subsequent to the order passed under that section by the lower Court, a decree was passed in which the costs payable by the judgment-debtor to the other parties were set out—the previous order having only directed that the judgment-debtor should pay costs to the Respondent. The learned Judges held that in an appeal from such an order it was necessary to file not only the order passed under sec. 47, C. P. C., but the decree that was prepared in pursuance of that order showing the amount of costs payable by the judgment-debtor; and they were of opinion that as it was necessary to file the decree, the time for filing the appeal might be counted from the date of such decree. In that case also there was an application before the learned Judges for extension of time under sec. 5. After an expression of this opinion, the learned Judges further proceeded to hold that the Appellant's application should succeed also under sec. 5 of the Limitation Act. The learned Judges made the following remark :—"We desire to add that even if time be taken to run from the date of the judgment ample grounds have, in our opinion, been made to justify an order in favour of the Plaintiff under sec. 5 of the Limitation Act." The opinion expressed by the learned Judges with regard to the necessity of filing the decree in a case like that before them and the calculation of time from the date of the decree and not from the date of the order therefore becomes an *obiter*

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dictum. It is due to the high respect to which the judgment of the learned Judges is entitled that I have given my best consideration to this matter. But I am unable to accept the view expressed therein. Under sec. 158, cl. (3), Bengal Tenancy Act, the order on any application made under that section shall have the effect of, and be subject to, the like appeal as a decree. The plain meaning of the section is that such an order should be regarded as a decree under Sch. III, cl. 4 and time should run from the date of the order. I am conscious that in the Courts below in cases where the order itself is a decree, formal decrees are drawn up in order to show the result of the litigation. But I am unable to hold that such decrees must be filed along with the memorandum of appeal and that time for presentation of appeals ought to be calculated from the dates of such decrees. It is not necessary in the present case to pursue the matter further and I propose to leave it with the expression of the above opinion because I think that the Appellant ought to succeed on the second ground.

The second ground urged by the learned vakil for the Appellants is that the learned Judge in the circumstances of this case should have held that the Appellants were able to make out a proper case for the exercise of the Judge's discretion under sec. 5 of the Limitation Act. They filed a verified application before the District Judge in which they stated that they were advised by their pleader that they would be within time if the appeals were filed within 30 days from the date of the decree. The learned Judge, from his remark which I have quoted above, seems to think that the language of sec. 158, Bengal Tenancy Act, is so plain that the Appellants' belief in the correctness of the advice of their pleader was not formed with

due care and attention. I cannot say that in the present state of the law either the Appellants or their pleader acted without due diligence. If the pleader was aware of the ruling in *Kamala Dasi v. Tarapada Mukherji* (1) referred to above, he was not wrong in advising his clients that the appeals would be competent if filed within 30 days from the dates of the decrees; and I think his clients would also be justified in believing that the advice given to them was correct. Apart from it, it has been held by their Lordships of the Judicial Committee in the case of *Sunderbai v. The Collector of Belugum* (2) that if a party files an appeal in a wrong Court under the advice of his pleader, he is not precluded from showing that it was owing to the reliance placed on such advice that he could not present the appeal in the proper forum within the proper time; and their Lordships relied on the previous decision of theirs in the case of *Brij Indar Singh v. Kanshi Ram* (3) where they laid down the general rule that the true guide is whether the Appellant acted with reasonable diligence in the prosecution of the appeal. In view of this decision and in view of the facts of this particular case, it cannot be said that the Appellants were not justified in relying on the advice of their pleader and filing the appeals within 30 days from the dates of the decrees. But it appears that the learned Judge in this case has not enquired as to whether such advice was given by the pleader; and it is therefore necessary that a further enquiry should be made in this matter. I therefore propose to send the appeals back to the District Judge of

(1) 15 C. L. J. 498 (1910).

(2) I. L. R. 43 Bom. 376: s. c. 23 C. W. N. 753 (P. C.) (1918).

(3) I. L. R. 45 Cal. 91: s. c. 22 C. W. N. 169 (P. C.) (1917).

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Midnapur for enquiry into the allegations made in the petition presented by the Appellants under sec. 5 of the Limitation Act; and if they are found to be correct to give effect to such plea.

The result is that the decrees passed by the District Judge dismissing the appeals before him should be set aside and the matter enquired into in the light of the observations made above.

Costs to abide the result. We assess the hearing-fee at one gold mohur in each case.

MUKERJI, J.—I agree.

H. C.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD SALAW.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

1925,

Heard, 15, 16 and

18, June.

Judgment,

21, July.

SURENDRA MOHAN

SINHA and ors.,

Appellants,

v.

HARI PRASAD SINHA

and ors.,

Respondents.

Sonthal Parganas Regulation III of 1872, as amended by Regulations V of 1893 and III of 1898, secs. 5, 6—Civil Court at Bhagalpur, if competent to entertain suit to enforce mortgage of properties partly in Sonthal Parganas and partly in Bhagalpur—Interest awardable—Post litem interest, award of, discretionary—Civil Procedure Code (Act V of 1908), sec. 34—Sec. 11, Expt. IV, object of—Omission to claim relief in previous suit, claim barred—Preliminary decree refusing to award interest post litem—Final decree, if may award same—Hindu law—Mithila School—Debt incurred by heads or branches of joint family—Pious obligation of descendants to pay.

The joint family property of certain Hindus who were governed by the Mithila School of Hindu law, the greater portion of which was situated in the Sonthal Parganas and the remainder in the District of Bhagalpur, was mortgaged in 1896.

A suit to enforce the mortgage by sale of the property brought in 1904 in the Court of the Subordinate Judge of Bhagalpur was dismissed as incompetent by the Privy Council in 1914 in view of sec. 5 of Reg. III of 1872 as amended by Reg. V of 1893; a personal decree, to the passing of which sec. 5 of Reg. III of 1872 would be no bar and which was prayed for in the plaint, was not passed in that suit owing to Plaintiff's omission to press for it. The statute was amended by Reg. III of 1908 which only excluded from the jurisdiction of the Civil Courts suits to be instituted between the date of a notification in the Gazette that a settlement shall be made of the whole or any part of the Sonthal Parganas and the date on which the settlement shall, by similar notification, be declared to have been completed. In 1915, the mortgagees instituted the present suit in the Court of the Subordinate Judge at Bhagalpur upon the mortgage bond praying for the same reliefs:

Held—That in view of the change in the law, in the absence of proof that at any time the mortgaged property was notified for settlement and not notified as settled, the Court had jurisdiction to entertain the suit within the meaning of sec. 6 of Reg. III of 1872 as amended by Reg. V of 1893.

That in dealing with the suit the Court would be bound to give full force and effect to the provisions of sec. 6 of the Regulation in regard to interest.

RAM CHANDRA MARWARI v. RANI KESHOBATI KUMARI (1) approved.

Where the preliminary decree refused to award post litem interest upon the amount decreed on foot of a mortgage, the Court had no power to award such interest by the final decree.

(2) 1 C. L. J. 183 (1905).

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The allowance of interest post litem is, by sec. 34 of the Civil Procedure Code, within the discretion of the Court and the High Court having in the exercise of such discretion refused such interest, the Privy Council declined to interfere with that decision.

That the prayer for a personal decree could not be granted in this suit in view of Expt. IV to sec. 11 of the Civil Procedure Code, the Plaintiff having omitted to claim this relief in the previous suit.

It is the policy of the Code of Civil Procedure of 1908, as it was the policy of the Code of 1882, that parties should not split up a cause of action against Defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit.

Where the several heads of the four branches of a joint Hindu family governed by the Mithila School of law jointly incurred a debt, a descendant of one of them is not released from the pious obligation to pay such debt of his ancestor, by reason of the debt having been jointly incurred with others, the authority of the Vivada Chintamani in that behalf applying only to debts incurred jointly with a stranger.

These were consolidated appeals (No. 136 of 1924) from a decree of the High Court, dated the 12th April 1922, varying a decree, dated the 17th June 1918, of the Court of the Subordinate Judge of Bhagalpur.

The suit was brought by the Plaintiffs, (Appellants in the 1st appeal and Respondents in the 2nd), against the Defendants, a joint Hindu family governed by the Mithila School of law and residing in the Sonthal Parganas. The suit was to enforce a mortgage, dated the 21st December 1896.

The Plaintiffs claimed over Rs. 11 lacs as due for principal and interest on the said mortgage. The principal sum secured was Rs. 3½ lacs of which Rs. 1,36,000 was advanced in cash, the balance being the amount due on a previous bond.

The Subordinate Judge made a preliminary decree for over 15 lacs of rupees, and a personal decree for Rs. 44,164.

The High Court disallowed compound interest and interest in excess of the principal under the provision of sec. 6 of the Sonthal Parganas Regulation, 1872, and reduced the amount of the mortgage decree to Rs. 3,90,000 and of the personal decree to Rs. 23,270. The greater portion of the mortgaged properties was situated within the Sonthal Parganas, and the mortgagors pleaded that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the suit. That contention had been upheld in the previous litigation—*Maha Prasad v. Ramani Mohan* (1)—but both Courts in India rejected this contention in the present suit in view of changes in the law. The Defendants further contended that the claim for a personal decree would not lie inasmuch as no such claim had been incorporated in the earlier suit and was now prohibited by Or. 2, r. 2 of the Civil Procedure Code, 1908. The High Court overruled this plea, being of opinion that such relief had been claimed in the previous suit so that Or. 2, r. 2 did not apply. Both parties appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and Hyam for the Plaintiffs.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

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Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—These are two consolidated appeals, from a decree of the 12th April 1922, of the High Court at Patna, which varied a decree of the 17th June 1918, of the Subordinate Judge of Bhagalpur.

The suit in which these consolidated appeals have arisen was instituted in the Court of the Subordinate Judge of Bhagalpur on the 5th February 1915. The Plaintiffs claimed Rs. 11,81,811 principal and interest alleged to be then due under a mortgage bond of the 21st December 1896, for Rs. 3,50,000, of which Rs. 1,36,142 were advanced in cash, the balance being money alleged to be due under a previous bond of the 3rd October 1883, and for moneys advanced at various times, and for interest at various rates. The bond in suit provided that the principal sum of Rs. 3,50,000 was to carry 7½ per centum compound interest with yearly rests. The principal was repayable in the month of Phagon 1310 Fasli, the last day of which month was the 11th March, A.D. 1903. The bond was executed by all the adult male members of the joint family, the members of which family lived in the Sonthal Parganas, and was also executed by them on behalf of all the minor members of the joint family as their guardians. It was intended that the bond should bind all the members of the joint family and the property mentioned in the bond. All the Defendants, except as later in this paragraph is mentioned, are members of the joint family. The joint family is governed by the Mithila School of Hindu law. The grantee of the bond, who was the mortgagee, was Surja Narain Singh, Bahadur, of the District of Bhagalpur, by profession a pleader, who had occasionally acted for the joint

family, and knew its financial position; he died long before this suit was brought, and the Plaintiffs are his representatives and are the persons in whom are vested his rights under the bond. The Defendant, Dwarka Prasad Singh, was by birth a member of the joint family. Since the bond was made he was adopted into another family. The other Defendants, who are not members of the joint family, claim through the joint family. The executants of the bond, in addition to granting the rights of a mortgagee to Surja Narain Singh, declared by the bond that they should jointly and severally pay the principal and interest, simple and compound, for which the bond was given.

A previous suit on the same mortgage bond of the 21st December 1896 had been brought in the Court of the Subordinate Judge of Bhagalpur on the 20th June 1904, by the then representatives in interest of Surja Narain Singh, the deceased mortgagee, against the then members of the joint family and others who claimed title through members of that family. That suit of 1904 came on appeal to His Majesty in Council and was dismissed by His Majesty in Council acting upon and adopting the advice tendered to His Majesty in a judgment of the Board which was delivered on the 19th May 1914 by Lord Moulton. In considering the advice which it will be the duty of their Lordships to tender to His Majesty in these consolidated appeals, it will be necessary to refer at some length to the judgment of the Board of the 19th May 1914. *Vide Maha Prasad v. Ramani Mohan* (1).

In each of the suits the main claim was for a decree which might be executed by a sale of the mortgaged property on default of payment by the mortgagors of the

(1) L. R. 41 I. A. 197, s. c. I. L. R. 42 Cal. 116; 18 O. W. N. 994 (1914).

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amount decreed to be due under the mortgage bond. In each of the suits there was a claim for such other relief as the Plaintiffs might be entitled to, which would include a decree on the personal liability under the mortgage bond of the persons who might be the mortgagors. The property mortgaged was the joint property of the joint family, the greater part of which was situate within the Sonthal Parganas. That joint property extended from the Sonthal Parganas into the District of Bhagalpur, and the smaller part of the joint property thus happened to be situate within the local limits of the ordinary jurisdiction of the Subordinate Judge of Bhagalpur. The mortgage bond was executed in Bhagalpur and was registered in the Bhagalpur Registry.

The mortgage bond has been translated, and to that translation their Lordships will refer. By their bond the mortgagors declared that they would repay to the mortgagee the said sum of Rs. 3,50,000 in the month of Phagon 1310 Fasli, and further declared that they should pay interest on the Rs. 3,50,000 at the rate of $7\frac{1}{2}$ per centum per annum on the 1st Phagon 1304 Fasli, and thereafter every year on the 1st Phagon, and that if they should fail to pay such interest the interest should be treated as principal, and interest on interest should be charged at $7\frac{1}{2}$ per centum per annum and converted into principal after the 1st of Phagon, and the compound interest should be paid by them to the mortgagee, and that even after the expiry of the due date of payment (the 1st of Phagon 1310 Fasli) they should pay such compound interest, and that "the rates and stipulations as regards interest should in no case be reduced and changed either before or after a decree is passed."

The mortgage bond also contained,

amongst others, the following agreements by the mortgagors :—

"6. We do declare that we shall be jointly and severally bound to pay the principal, interest, compound interest as well as costs incurred in Court or privately, by the said Rai Bahadur, for realisation of the debt.

"7. For payment of the principal, interest, compound interest and costs referred to above, we the executants have mortgaged and hypothecated the properties mentioned in Schedule No. 2 of this deed to the said Rai Bahadur subject to the mortgage lien created under the bond dated the 11th Assin, 1299 F. This is the first mortgage, and in support of continuation of the mortgage, the said bond has been left with the said Rai Bahadur and the amount due on the said bond has been included in this bond. Save and except the amount due under this bond there is nothing due by us to the said Rai Bahadur. If we do not pay the money due to the said Rai Bahadur as stipulated in this bond, he shall be at liberty to bring a suit and to realise his dues together with costs, if any, by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. We the executants shall not put forward any plea that the mortgaged properties should be sold first and after that the amount with costs be realised from our person and other properties. The said Rai Bahadur shall be at liberty to bring the mortgaged properties to sale first or last.

"8. If the interest be not paid as stipulated in this bond, the said Rai Bahadur shall be competent to bring a suit and to realise the interest and compound interest by sale of all or any of the mortgaged properties or any portion thereof or from our person or other properties. The mortgaged properties which will be sold for realisation of the interest will be sold free of encumbrances of the balance of the loan and future interest and the same will be considered to have been sold. If there be any surplus sale proceeds after satisfaction of the interest and compound interest for which a suit might have been brought, the same shall be taken by the said Rai Bahadur towards payment of his (principal) dues. We the executants or any other person shall have no right to the said surplus sale proceeds. By the stipulations contained in this paragraph the said Rai Bahadur shall not be bound to sue for interest and compound interest (alone) but shall be at liberty to sue for the interest and compound interest or to sue for the same along with his suit for the principal, when he will be entitled to do so."

Cl. 16 of the bond is as follows :—

"16. This loan has been taken at Bhagalpur. The

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said Rai Bahadur shall be at liberty to bring suit in the Court of District Bhagalpur and to realise his entire dues or the interest by sale of the mortgaged properties. We the executants shall raise no objection as to the suit being tried in the Court of District Bhagalpur. If we do so the same shall not be entertainable. Some of the Mauzas, i.e., the mortgaged properties No. 1, mentioned in Schedule No. 2, lie in the District of Bhagalpur, and some in the District of Sonthal Parganas."

The Sonthal Parganas were in 1872 and are still a backward District, and the Government of India considered that the inhabitants of the Sonthal Parganas and their properties in the Sonthal Parganas required some protection from the operations of money-lenders beyond the protection which was afforded by the law generally then in force in India, and enacted the Sonthal Parganas Regulation No. III of 1872 (known as the Sonthal Parganas Settlement Regulation), which came into force on the 1st May 1872, and so far as it was material was in force until Regulation No. V of 1893, and the Sonthal Parganas Settlement (Amendment) Regulation, 1908 (III of 1908) were, as later is mentioned, enacted.

Sec. 5 of Regulation No. III of 1872 was as follows :—

"5. Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act 6 of 1871 in regard to any land or any interest in or arising out of any land, or for the rent or profits of any lands, or regarding any village-head-ship or other office connected with the land, except as hereinafter provided; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under sec. 2 of the said Act 37 of 1855, or by the Settlement-officers hereinafter mentioned according as the said Lieutenant-Governor shall from time to time direct."

Sec. 6 of Regulation III of 1872, as amended by Regulation V of 1893, was and is as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely :—

"(a) interest on any debt or liability for a period exceeding one year shall not be decreed at a higher rate than 2 per cent. per mensem, notwithstanding any agreement to the contrary, and no compound interest arising from any intermediate adjustment of account shall be decreed.

"(b) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

"(1) Explanation.—The expression 'intermediate adjustment of account' in cl. (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal.

"(1) Illustration.—A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75, Rs. 50 only will bear interest, and the limit of the claim on the bond will be Rs. 100."

As has been mentioned, the previous suit on the mortgage in question which came before the Board in 1914 was instituted in the Court of the Subordinate Judge of Bhagalpur, on the 20th June 1904, and he tried the suit and made his decree therein on the 12th February 1906. No notification that the settlement mentioned in sec. 5 of Reg. III of 1872 had been completed and concluded was ever made in the *Calcutta Gazette*. In the suit of 1901, the two material issues to be determined were : (a) whether the Bhagalpur Court had jurisdiction in the suit, and (b) whether the mortgagees were precluded by sec. 6 of Bengal Regulation III of 1872, as amended in 1893, from recovering compound interest or interest exceeding in amount the principal advanced. The Subordinate Judge, by his judgment delivered on 12th February 1906, found all the issues in favour of the mortgagees, and

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made a decree under sec. 86 of the Transfer of Property Act, 1882 (Act IV of 1882) for payment and for sale in the event of non-payment. From that decree the mortgagors appealed to the High Court at Calcutta, but at the hearing of that appeal the arguments were confined to issue (b). That appeal was heard by Harrington and Mookerjee, JJ., who dismissed the appeal, holding themselves bound by some unreported decision of their Court to the effect that the words in sec. 6 of Reg. III of 1872—"The Court having jurisdiction in the Sonthal Parganas"—meant a Court situate in that District and constituted under the Regulation, and did not include a Court situated outside, but exercising jurisdiction to order the sale of mortgaged property situated within that District. From that decree of the High Court there was the appeal to His Majesty in Council, which was before the Board in 1914. It appears that there were also then two other appeals to His Majesty in Council, one of which was from a decree of the High Court which reversed a decree of the Subordinate Judge with regard to the amount of interest recoverable under the decree of the Subordinate Judge as drawn up. Such was the position of the suit when the appeal to His Majesty in Council came before the Board in 1914.

The appeal to His Majesty in Council was elaborately and exhaustively argued by the learned Counsel for the parties, and the carefully considered judgment of the Board was delivered by Lord Moulton. Much of that judgment related to the history of legislation, which had ceased to apply to the Sonthal Parganas, and to which their Lordships need not now refer. In referring to that judgment of the Board, their references are to those portions of the judgment which express the decision of the Board on questions of

law which are material to the right understanding of the appeal which was before the Board. If it be the fact that some of that was *obiter*, as the High Court at Patna thought, it is not to be assumed that any of the conclusions expressed in the judgment were unsound.

In the judgment which was delivered by Lord Moulton, their Lordships then constituting the Board having mentioned that the jurisdiction of a Judge of the Courts established under the Bengal, United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871, extended to "suits of which the value exceeds Rs. 1,000, and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force," said that:—

"they were clearly of opinion that these words of exclusion refer to sec. 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under sec. 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and suits in regard to land which is not in districts that have been notified as being completely settled are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purposes of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts."

Later in the judgment the Board said:—

"The information supplied to their Lordships by the parties as to the notifications appearing in the *Calcutta Gazette* show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not settled. It is clear, therefore, that the suit came within the provisions of sec. 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction

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of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the *Calcutta Gazette* to have been completed and concluded. The Court of Bhagalpur had, therefore, no jurisdiction to entertain the suit, and this appeal should be allowed."

"Reliance was placed by counsel for the Respondents on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. The Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of sec. 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of that jurisdiction."

The judgment of the Board also dealt with the question of the right of the mortgagees to claim compound interest. That question was also before the Board in one of the other appeals as to which the Board had to tender advice to His Majesty, and their Lordships held that—

"Apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of sec. 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any compound interest arising from any intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan."

The Plaintiffs in the suit of 1904 did not specifically ask the Subordinate Judge of Bhagalpur, or the High Court or the Board, to grant them a decree for money in their general claim for further relief on the personal undertaking in the mortgage bond of the mortgagors to pay the debt and interest.

Their Lordships in considering the present consolidated appeals will, where necessary, follow and apply the judgment of the Board which was delivered by Lord Moulton in the previous suit, but the question as to the jurisdiction of the Court of

the Subordinate Judge of Bhagalpur to entertain the present suit depends on circumstances which did not exist when the previous suit was instituted on the 20th June 1904.

By Regulation III of 1908, secs. 5 and 5A were substituted for sec. 5 of Reg. III of 1872. Sec. 5 which was substituted for sec. 5 of the Regulation of 1872 is as follows:—

"5. (1) From the date on which, under sec. 9, the Lieutenant-Governor declares, by a notification in the *Calcutta Gazette*, that a settlement shall be made of the whole or any part of the Sonthal Parganas, until the date on which such settlement is declared, by a like notification, to have been completed, no suit shall lie in any Civil Court, established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to:—

(a) any land or any interest in, or arising out of, land, or

(b) the rents or profits of any land, or

(c) any village headship or other office connected with any land,

in the area covered by such first-mentioned notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it.

"(2) Between the dates referred to in sub-sec. (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under sec. 2 of the Sonthal Parganas Act, 1855, or sec. 10 of this Regulation, according as the Lieutenant-Governor may from time to time direct; and such officer shall hear and, even though during the hearing the settlement may be declared to have been completed, determine them."

Sec. 5A does not bear on this question of jurisdiction, and need not be considered.

Their Lordships agree with the High Court that the effect of sec. 5 of Reg. III of 1908, which replaced sec. 5 of the Regulation of 1872, has been to exclude for the future after that substitution the jurisdiction of the Civil Courts to try cases relating to any lands in the Sonthal Parganas only during such period as that land should be under settlement, the period being reckoned from the time when the land is notified as under settlement to

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the time when the settlement is completed. The mortgagors were the Appellants in the appeal before the High Court, and the High Court found on the evidence that the Appellants in the appeal before the High Court had failed to prove that at any time the mortgaged property was notified for settlement and not notified as settled and that the defence that the Subordinate Judge of Bhagalpur had no jurisdiction to entertain the present suit failed. In their Lordships' opinion it is not shown that on the facts before the High Court the High Court came to a wrong conclusion that the Subordinate Judge of Bhagalpur had jurisdiction to entertain this suit, which was instituted on the 5th February 1915. But in entertaining this suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of sec. 6 of the Reg. III of 1872, as amended in 1893.

As the mortgage was made in Bhagalpur and some part of the mortgage lands are within the local limits of the jurisdiction of the Court of the Subordinate Judge of Bhagalpur, and as the jurisdiction of the Court of the Subordinate Judge to entertain the suit on the mortgage was not on the facts of the case, which were accepted by the High Court as proved, not excluded by the substituted sec. 5 of the Regulation of 1872, their Lordships accepting the findings on that question of the High Court as correct, hold that the Subordinate Judge of Bhagalpur had jurisdiction to entertain the present suit, which was instituted on the 5th February 1915. In entertaining the suit the Subordinate Judge was a Court having jurisdiction in the Sonthal Parganas within the meaning of sec. 6 of Reg. III of 1872, as amended by Reg. V of 1893, and was bound in making a decree in favour of the mortgagees to comply with that section,

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which limited his powers. Issue 11, as amended by the Subordinate Judge, was—
“ Are the Plaintiffs (the mortgagees) entitled to (a decree for) compound interest or to one (a decree for interest) exceeding the principal (amount lent)? ” The Subordinate Judge in this suit made a decree for the Plaintiffs which included interest, both simple and compound, and such interest exceeded the amount of the original debt or loan. His decree in favour of the Plaintiffs was for Rs. 15,27,997-8-3 in respect of the mortgage debt and interest thereon, and for Rs. 44,164 as a personal decree in respect of the declaration in the mortgage bond that the mortgagees would personally pay the Rs. 3,50,000, which included Rs. 12,968-11-3, which he held was not secured on the mortgaged property. From that decree the mortgagees and other Defendants affected by it appealed to the High Court, not only as to the interest which had been allowed, but also as to the personal decree.

The appeal was heard by Sir Dawson-Miller, C. J., and Mr. Justice Bucknill. These learned Judges carefully considered the facts of the case and applied sec. 6 of Reg. III of 1872 as amended in 1893. They disallowed all the compound interest on the actual debts, and thereby reduced the amount of Rs. 15,27,997 to Rs. 3,88,673, and similarly reduced the amount of the personal decree from Rs. 44,164 to Rs. 23,181. Assuming that sec. 6 of Reg. III of 1872, as amended in 1893, applied, it is not disputed that those reductions were correctly arrived at by the High Court. In their Lordships' opinion sec. 6 of Reg. III of 1872, as amended, applied.

It was also contended in the appeal to the High Court that some of the money claimed, Rs. 12,968-11-3, as a debt, was not advanced for a necessity of the joint

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family and was not an antecedent debt for which the joint family property was liable under the mortgage bond. As to that Rs. 12,968-11-3 the High Court agreed with the Subordinate Judge that the mortgaged property was not liable in respect of it, and that it might be recovered under a personal decree, but the High Court, by disallowing compound interest on it, reduced the personal decree which had been made from Rs. 44,164 to Rs. 23,181.

The High Court allowed no interest on the principal loan, as the interest which had been paid or was included in the Rs. 3,50,000 amounted to more than the money lent or advanced, and made a decree for the Plaintiffs for Rs. 3,90,157, and decreed that the mortgaged property or a sufficient part of it should be sold if that amount should not be paid on or before the 11th October 1922, and if paid on or before the 11th October 1922, the Plaintiffs should deliver up to the Defendants or to such persons as they should appoint all documents in their possession, or power, relating to the mortgaged properties, and should, if so required, re-transfer the same to the Defendant free from the mortgage and from all incumbrances created by the Plaintiffs or any person claiming under them. And it was further ordered and decreed that the Plaintiffs should realise from the persons and properties of the Defendants Nos. 1 to 5 the sum of Rs. 23,270 on their personal liability, and also ordered and decreed that the Plaintiffs, Respondents in the appeal to the High Court, should pay to the Defendants the sum of Rs. 6,012 being the proportionate costs incurred by the Defendants in the High Court.

From that decree of the High Court these consolidated appeals have been brought. The reasons alleged by the

Plaintiffs in their case are, so far as it is necessary to refer to them, that sec. 6 of the Reg. III of 1872, as amended in 1893, does not apply; that the payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, and that in any case the High Court should have allowed interest at Rs. 6 per centum from the date of the institution of the suit. The reasons alleged by the Defendants in their case are, so far as it is necessary to refer to them, that the claim for a personal decree is barred; that the mortgage bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity; and that under the Mithila School of law the joint family could not be bound by any debt which was not originally contracted by a common ancestor of all its members, and that in such a family a descendant is not liable for any debt for which his ancestor was liable jointly with another person.

As to the contention on behalf of the Plaintiffs that sec. 6 of the Reg. III of 1872, as amended in 1893, does not apply and that payments already made in respect of interest ought not to have been deducted from the sum of Rs. 3,50,000, their Lordships hold that in entertaining this suit the Subordinate Judge of Bhagalpur was a Court "having jurisdiction in the Sonthal Parganas," and they agree with the Board in the 1904 suit that any Court would be bound to give full force and effect to the provisions of sec. 6 of Reg. III of 1872, amended in 1893.

Sec. 6 of Reg. III of 1872 as amended by Reg. V of 1893 was very carefully considered in the High Court at Calcutta in 1905 in *Ram Chandra Marwari v. Rani Keshobati Kumari* (2), in which case Maclean, C. J., and Pargiter, J., held

(2) 1 C. L. J. 182 (1905).

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that sec. 6, Reg. III of 1872, as amended by Reg. V of 1908, does not authorise any Court to decree as interest a larger sum of money than would, together with prior payments, if any, equal the original loan or debt. In that case Ghose, J., differing, held that all that a Court has to see to when a suit is instituted, is that the interest claimed in the suit does not exceed the limit prescribed in the section.

As to the contention on behalf of the Plaintiffs that the High Court should have allowed interest from the date of the institution of the suit, under the circumstances of this case, as will presently appear, that contention must be limited to the sum of Rs. 3,88,673. That Rs. 3,88,673 was the total sum which the High Court rightly found to be allowable in respect of the principal loan. The question as to whether interest should be allowed from the institution of the suit was considered by the High Court. The Subordinate Judge, who tried the suit by his decree of the 17th June 1918, decreed interest from the institution of the suit only on the amount of the personal decree and ordered that an account should be taken of the mortgage debt due under the mortgage bond. The taking of such an account was necessary in order to complete the decree of the trial Judge for execution. The account was taken by his successor in the office of Subordinate Judge of Bhagalpur who had not tried the suit, but in making the final order as to the account which he made on the 14th May 1919, he did not confine himself to making an order for the amount which on taking the account he found to be due as the mortgage debt, which would complete the decree of 17th June 1918, of the trial Judge, but proceeded to award interest from the date of the suit on the amount of the mortgage

debt. That, as appears to their Lordships, was not within the scope of his powers. He was not a Judge sitting in review or in appeal. He had to take the decree of the 17th June 1918, as it had been drawn up. He had not power to alter it. His duty was to take the account which it directed to be taken. He had power, if necessary, to order who should be liable, and to what extent, for the costs of taking the account. The allowance of interest post the date of the institution of a suit is by sec. 34 of the Code of Civil Procedure, 1908 (Act V of 1908), within the discretion of the Court, and as a rule the Board has not interfered with the exercise of a discretion vested in a High Court. That the High Court carefully considered whether interest should or should not be allowed by the High Court post the date of the institution of this suit is apparent from the following passage in the judgment of the Chief Justice. He said :—

"It is not very clear why the learned Judge awarded interest only upon the amount of the personal decree and not on the amount of the mortgagee decree, but there is no cross-appeal on this question. I think there is much to be said for the argument that the Sonthal Parganas Regulation applies only to the interest to be decreed under the bond, and does not limit the powers of a Court under sec. 34 of the Civil Procedure Code to award interest on the decretal amount until realization. But it has been held in this Court in *Rani Kishori Bazar v. Kumar Sa Niranjani Chakraverty* 3, that interest under the Code should not be awarded upon the decretal amount in so far as it includes interest on the principal debt or loan, but only upon the amount of the principal debt itself, as to do so would contravene the provisions of the Regulation relating to compound interest. The principle underlying this decision applies equally where the amount decreed as interest already equals the sum advanced. Although I have some doubt as to the propriety of the decision mentioned, I am not prepared to differ from the conclusion there arrived at, and I think we should follow that decision."

Their Lordships have not before them a report of the decision of the Patna High

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Court to which the Chief Justice referred. But it is not necessary or advisable to consider whether the discretion of the High Court on that question of post institution of the suit interest was wisely exercised or not in respect of the amount decreed on the principal sum secured by the mortgage bond.

As to the contention on behalf of the Defendants that the claim for a personal decree is barred it is necessary to consider whether the Plaintiffs could have made a claim for a personal decree in the suit of 1904. Each of the suits was brought on the same mortgage bond. In the suit of 1904, as in this suit, a decree for sale of the mortgaged property was the principal relief claimed. In the suit of 1904 a decree under sec. 90 of the Transfer of Property Act, 1882 (Act IV of 1882), was also claimed as a relief, and "such other reliefs as may under the circumstances of the case be deemed proper may be granted," the last mentioned claim is generally known as claim for general relief. In the present suit the fifth claim for relief is: "That such other relief or reliefs as may under the circumstances of the case be deemed proper may be granted to the Plaintiffs." It was under the fifth claim for relief that the personal decree was granted by the Subordinate Judge. Although in the suit of 1904 the Subordinate Judge had no power to make a decree for sale of the mortgaged property, he could have made, and the High Court in Appeal could have made, a personal decree, and the Board could have advised His Majesty that the Plaintiffs were entitled to a personal decree, the Plaintiffs omitted to make any specific claim for a personal decree.

The contention that the claim for a personal relief is barred arises under sec. 11

of the Code of Civil Procedure, 1908 (Act V of 1908), by which it is enacted that:—

"11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is the policy of the Code of Civil Procedure, 1908, as it was the policy of the Code of Civil Procedure, 1882, that parties should not have the right to split up a cause of action against Defendants and claim a decree on it in a later suit when they might have claimed the same on it in a previous suit. In their Lordships' opinion the right to the personal decree in this suit was barred by sec. 11 of Act V of 1908, and this suit must be dismissed so far as any claim for a personal decree is concerned.

As to the contention on behalf of the Defendants that the bond did not bind the joint family except for the debts which the High Court found to have been contracted for necessity, the Board may observe that in an appeal from the decree of a High Court in a suit which involved, as this did, as will presently appear from a passage which their Lordships will quote from Mr. Justice Bucknill's judgment, a prolonged examination of numerous items of advances and loans and of the evidence relating to them by a High Court, those who impugn before their Lordships the findings of fact by the High Court upon which it based its decree must draw the attention of their Lordships to the material evidence which they suggest that the

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High Court misunderstood or failed to appreciate, and on which they contend that their Lordships should come to a conclusion different from that at which the High Court arrived. This has not been done by either side in this case, owing most probably to the fact that it was not possible to do it. Neither side has drawn their Lordships' attention to any material evidence from which the High Court drew a conclusion of fact which their Lordships would not have drawn.

These consolidated appeals are appeals from a decree of the High Court which examined laboriously the many advances for the aggregate of which that Court made its decree. These advances were made over a series of years beginning in 1883, and extending down to 1896, and were made to one or other of the principal adult members of the joint family, and it has not been suggested that any one of those advances was made for immoral purposes, or were secret advances and made without the knowledge of the other members of the family, who were adults at the time. The members of the family were not sufficiently provident always to live within their means, and debts were incurred which it was necessary in the interests of the joint family should be discharged. Their Lordships may quote a paragraph from the judgment of Mr. Justice Bucknill in this suit which illustrates the difficulty of the enquiry as to the loans which are included in the aggregate sum. Mr. Justice Bucknill said :—

"(4) A question as to the non-existence of legal necessity or family benefit for a large portion of the loan in question. This contention involved before the Subordinate Judge a very careful consideration of the elements of which the loan was in fact composed; and it has also been the subject of laborious enquiry and research before this Court. In cases such as these, where, in order to find the actual origin of portions, very often small and very often numerous, of what is a large aggregate sum of money one has

to try to trace it back for a great many years, it is frequently almost impossible to deal with each individual item in any very satisfactory manner, and, indeed, it is probably doubtful if it is right or necessary so to do. The Subordinate Judge took the broad view that, in the main, old loans contracted for the purpose of paying off earlier debts of a composite character should be regarded as carrying their own burden of proof that they fell, roughly speaking, within the confines of what may properly be regarded as legal necessity or family benefit."

From an examination of such of the evidence as has been brought to their Lordships' attention their Lordships accept the conclusion of the High Court that these advances were for the necessary purposes of the joint family.

As to the remaining contention on behalf of the Defendants based on what is said to be the law of the Mithila School that no member of a Hindu joint family subject to the law of the Mithila School is bound to pay the debt of an ancestor which was contracted jointly by the ancestor with another member of the joint family. That proposition thus broadly stated is a wide one, and would apply in the case of a son or a grandson of the ancestor who was under a pious duty to pay the debt of his father or his grandfather whether he was or was not in possession of assets which had come down to him from his father or his grandfather. That is a startling proposition. The law of the Mithila School is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila School has departed from the law of the Mitakshara. Assuming that it was a debt which, if contracted by the father or grandfather alone, it was the pious duty of the son or of the grandson to pay, it is difficult to understand on what principle of the law of the Mithila School it was not a debt which it was the pious duty of the son or grandson to pay if it were contracted jointly with

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another who was a member of the joint family.

Assuming that the Chief Justice was correct in stating in his judgment that Vivada Chintamani is an authority which is binding upon those who are governed by the Mithila School of Hindu law, the passages which have been cited as from it to their Lordships as appearing in the Tagore Translation at pages 31 and 35 seem to relate only to debts contracted by the ancestor with a stranger. From the judgment of the Chief Justice it appears, as was the fact, that the debt which was challenged in his Court on the authority of the Vivada Chintamani was a debt which was charged by the bond on the joint property of the family by each of the heads of the then four branches of the joint family, and all the other Defendants, who were members of the joint family, were their sons or grandsons, and he observed that there was under the circumstances no reason why the charges should not be held as binding upon the property in suit. With that observation of the Chief Justice, which, in their opinion, was consistent not only with common sense, but with the law which the High Court in the appeal was administering in the suit, their Lordships agree. The Chief Justice referred to *Bhagput Pershad Singh v. Girja Koor* (4), which may have come from the Mithila country.

Their Lordships will therefore humbly advise His Majesty—(1) that the appeal of the Plaintiffs ought to be dismissed and the appeal of the Defendants allowed in part and the decree of the High Court of Judicature at Patna, dated the 12th April 1922, set aside so far as it was a personal decree against the Defendants and in other respects except as to costs affirmed; (2) that the decree of the Court of the Sub-

(A. L. B. 15 Cal. 717 (1888).

ordinate Judge at Bhagalpur, dated the 17th June 1918, for the sale of the mortgaged property and for costs, ought to stand except that so far as it was a personal decree against the Defendants it should be set aside; (3) that neither side ought to be allowed any costs of the appeals in the said High Court and that any costs paid under the decree of that Court ought to be returned; (4) that the time within which the Defendants ought to pay into Court the sum of Rs. 3,88,673 in respect of the mortgage debt and interest ought to be extended until the expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council herein; and (5) that there ought to be paid by the Plaintiffs to the Defendants their costs of these appeals.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Plaintiffs.

Solicitors: *Messrs. Watkins & Hunter* for the Defendants.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1340 OF 1923.

GREAVES, J.

PANTON, J.

1925,

23, November.

BAMAPATA SARKAR,
Defendant No. 1,
Appellant,

v.

SM. SAKUNTALA DAS
and ors., Plaintiffs,
Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 148A—Suit for rent by co-sharer landlord—Purchaser of portion of holding who was recognised by other co-sharers, not made Defendant—Decree against recorded tenants of holding, if rent or money decree.

Where subsequently to the recognition by the 14 as. co-sharer landlords of a purchase of a moiety of a non-transferable occupancy holding, the remaining 2 as. landlords instituted a suit for rent under

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sec. 148A of the Bengal Tenancy Act, making parties Defendants to the suit the original owners of the holding and the 14 as. co-sharer landlords but not the purchaser :

Held--That the decree obtained in the suit was a rent decree, and the entire holding passed to the purchaser at the sale in execution of the decree and not merely the right, title and interest of the tenant Defendants.

To obtain a rent decree the Plaintiff landlord is not required to bring on the record a purchaser of an interest in the holding whom he has not recognised as a tenant.

This was an appeal against the decree of Babu Nagendra Nath Ghose, Subordinate Judge, 1st Court of Zillah Hooghly, dated the 8th of February 1923, modifying the decree of Babu Gonendra Kanta Nag, Munsif, 1st Court at Serampore, dated the 18th of November 1921.

The facts of the case will appear from the judgment.

Babu Nagendra Nath Ghose for the Appellant submitted that the Appellant who had refused to recognise the purchaser as tenant, as he was entitled to do, was not bound to make him a party to the suit. To make him a party would be to recognise him as tenant. Recognition must be by entire body of landlords. Plaintiff who was recognised by the 14 as. landlords only did not thereby become tenants. Referred to *Haro Chandra v. Umesh Chandra* (1), *Sukharuddin v. Hemangini* (2) and *Rajabali v. Dina Nath* (3).

Babu Manmatha Nath Roy for the Respondents submitted that the cases cited

were not in point. There was direct authority for the view that a purchaser who has been recognised by co-sharer landlords is a necessary Defendant if the decree is to be a rent decree. Referred to *Narab Habibullah v. Shekh Baser* (4) and the decision in Civil Revision Case No. 1284 of 1923 noted in Mr. S. C. Sen's Commentary on the Bengal Tenancy Act, at p. 689. [Their Lordships sent for the judgment and read it.]

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by Defendant No. 1 against a decision of the Subordinate Judge of the first Court of Hooghly which modified a decision of the Munsif at Serampore. The suit relates to a non-transferable occupancy holding and was brought by the Plaintiffs under circumstances which I shall presently state for confirmation of their possession and for other reliefs. The Plaintiffs purchased a moiety of the holding and obtained recognition from the co-sharer landlords who owned 14 annas interest in the property. Subsequent to the Plaintiffs' purchase Defendant No. 1 in the present suit who was a co-sharer landlord of the remaining 2 annas and who had never recognised the transfer to the Plaintiffs in this suit commenced a suit for rent under the provisions of sec. 148A of the Bengal Tenancy Act. The parties to that suit were as Plaintiffs the 2 annas co-sharer landlords who had never recognised the transfer and as Defendants the 14 annas co-sharer landlords who had recognised the transfer to the Plaintiffs. There were also on the record of the suit the recorded tenants, but the Plaintiffs in the present suit were never made a party in the sec. 148A proceedings and the question that

(1) 14 C. W. N. 71: s. c. 11 C. L. J. 929 (1909).

(2) 16 C. W. N. 420 (1911).

(3) 19 C. W. N. 1205 (1915).

(4) 24 C. W. N. ciii (1920).

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arises for our decision in this appeal is whether by reason of the absence of the Plaintiffs from those proceedings Defendant No. 1 in this appeal obtained a rent decree in the sec. 118A proceedings in respect of the land or merely a money decree. The first Court held that Defendant No. 1 by virtue of his suit obtained a rent decree in respect of the property in suit and he accordingly dismissed the Plaintiffs' suit. The learned Subordinate Judge, however, held that in the absence of the present Plaintiffs from the sec. 118A proceedings Defendant No. 1 did not obtain a rent decree but merely a money decree. There does not seem to be any direct authority on the point though we have been referred to one or two authorities which I must presently notice. But I should have certainly thought that the decree obtained was a rent decree provided, as in the present case, the recorded tenants were brought on the record and that it was not necessary that Defendant No. 1 in this suit in order to obtain a rent decree should bring on the record a tenant such as the Plaintiffs whose transfer he had never recognised at all. The only authority against this view is one referred to in the last edition of Mr. Sen's book on the Bengal Tenancy Act, at p. 689. The case is not a reported case but it is a decision of a Judge of this Court sitting singly. The decision was given in Civil Revision Case No. 1284 of 1923. We have read that judgment and there are passages or a passage which might possibly support the contentions now urged before us on behalf of the Respondents in this appeal, but taking the judgment as a whole we do not think that it can be taken to have dealt with the point we have got to decide or that it is an authority against the view which we have already expressed. We were referred on behalf of the Appellant

to passages in *Haró Chandra v. Umesh Chandra* (1), *Sakharuddin v. Hemangini* (2) and *Rajabali v. Dina Nath* (3). But we do not think that the question raised in those cases are really identical with the matter which we have to decide. The only other decision which was relied on on behalf of the Respondents in this appeal was the decision in *Nawab Habibullah v. Sheikh Baser* (4). In that decision the proceedings under sec. 118A were commenced by a co-sharer landlord who had never recognised the transfer, the Defendants in the suit were the remaining co-sharers and the recorded tenants and subsequently the co-sharers who were Defendants and who had previously recognised the transfer of a portion of the non-transferable holding were placed in the category of Plaintiffs and the suit proceeded with all the co-sharer landlords as Plaintiffs. A decree was obtained and the question arose whether it was a rent decree in the absence of the transferees of a portion of a non-transferable holding whose transfer had been recognised by some only of the co-sharer landlords. It was there held that the decree was not a rent decree but merely a money decree. But in that case the decree was obtained by all the co-sharer landlords some of whom had previously recognised the transfer and clearly it would have been inequitable to treat the decree obtained in that way as a rent decree which could be enforced as such to the detriment of the person whose transfer had already been recognised by some of those who obtained the decree. In the case before us no such difficulty arises. The only Plaintiff in the rent suit

(1) 14 C. W. N. 71: s. c. 11 C. L. J. 929 (1909).

(2) 10 C. W. N. 420 (1911).

(3) 19 C. W. N. 1208 (1915).

(4) 24 C. W. N. 614 (1920).

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was Defendant No. 1 in the present proceedings, the co-sharer landlord who had never recognised the transfer and in my opinion that distinguishes the present case from the decision in *Nawab Habibullah v. Sheikh Baser* (4). We think, therefore, that Defendant No. 1 in the rent suit obtained in the sec. 148A proceedings to which all the recorded tenants were parties and the other co-sharer landlords a rent decree which he could enforce as such. For the reasons we have indicated we think that the decision of the Munsif was right and that of the Subordinate Judge wrong, and the appeal is accordingly allowed and the Plaintiffs' suit dismissed with costs in all Courts.

PANTON, J.—I agree.

N. G.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE**

No. 1978 of 1922.

GRAVES, J. CUMING, J. 1925, Heard, 5, March. Judgment, 11, March.	}	PANCHANAN SARKAR and ors, Defendants, Appellants, v. RANI BASANTA KUMARI DAS and ors, Plain- tiffs, Respondents.
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Limitation Act (IX of 1908), Sch. I, Art. 142—Suit to recover diluviated land which has reformed—Onus on Plaintiff to prove possession within 12 years, actual or constructive—Possession, when will be presumed in Plaintiff's favour.

Cases of diluviated land or jungle or waste lands are no exception to the general rule that a Plaintiff who is dispossessed and brings a suit for recovery of possession must show that he was in possession within 12 years of the date of the suit. To do this he may rely on a variety of evidence. For instance, he could show that he was in possession up to the time of diluvion and that the land remained

under water or incapable of being possessed up to a point of time within the statutory period, or even though out of possession he might show that he had a subsisting title, in which case possession would be considered to go back to him when the trespasser was evicted by vis major when the lands were washed away.

This was an appeal preferred on the 1st of August 1922 against a decree of the District Judge of Zillah Jessore (Mr. M. C. Ghosh), dated the 18th April 1922, modifying a decree of the Subordinate Judge of that District (Babu Jagadish Chandra Sen), dated the 20th April 1921,

The facts of the case will appear from the judgment.

Babu Surendra Nath Guha and Mr. Nuruddin Ahmed for the Appellants,

Babus Joges Chandra Ray and Ramoni Mohan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

CUMING, J.—The facts of this appeal are as follows:—

The Plaintiff in the suit sued for recovery of possession of certain *chur* lands. His case was that the land in dispute formed part of his zamindari Mouzah Arara. The land had been washed away some time after the Revenue Survey and from the year 1310 (October 1903) began to reform and the Plaintiffs took possession and remained in possession through a tenant. This tenant's holding was sold in execution of a decree for rent and purchased by the Plaintiff. When he went to take possession in 1318 (1911) he was resisted by the Defendant. Hence the suit which was instituted on the 6th October 1915. The defence was that the land in suit appertained to the Defendant's Mouzah Chur Lankan, that the Plaintiffs never possessed these lands, the land

(4) 24 C. W. N. 611 (1920).

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had reformed 30 years before the date of suit and the Defendant had acquired a title by adverse possession.

The trial Court found that the suit was barred by limitation; the Plaintiff had failed to prove that the land had reformed in 1910; on the contrary they had reformed 30 years ago and Defendant had been in possession all the time; the Plaintiff had failed to prove that he had been in possession within 12 years of the date of suit; and hence he dismissed the suit.

On appeal to the District Court the learned District Judge held that the Plaintiffs had established their right and title to 18 bighas of the disputed land which were a reformation *in situ* of their estate Mouzah Arara. He held that the lands were reformed in 1903 and that it was not established by the evidence that the 18 bighas were reformed over 12 years before the date of suit. It was for the Defendants to produce what evidence they could to show that they had been in possession for 12 years.

Further that in a case like this where the Plaintiffs prove right and title by reference to ancient document and the Defendants are in possession, it is the duty of both parties to produce all the relevant evidence which is in their power and it is the duty of the Court to balance the evidence finally and to give the award to the parties on whose side there is a fair preponderance of evidence. He finally allowed the appeal to the extent of 18 bighas.

The Defendant has appealed to this Court. On his behalf Mr. Guha has contended shortly that the Plaintiff sues in ejectment; the case is governed by Art. 142 of Sch. I of the Limitation Act and it is for the Plaintiff first to prove that he was in possession within the statutory period; the learned Judge in the Court

below had not approached the case from this point of view, but had wrongly placed the onus on the Defendant; the Plaintiff had failed to prove his possession within the statutory period and his suit should have been dismissed as barred by limitation. The Respondent argues that if the land came above water less than 12 years before the date of suit he had discharged the onus. All he had then got to show is that he had at some period before the date of the suit a title to the land.

Now the Plaintiff sues in ejectment. His case in his plaint is one of possession and dispossession and Art. 142 clearly applies and to succeed he must first of all prove that he had possession within the statutory period. [See *Rakhal Chandra Ghose v. Durgadas Samanta* (1).] In this case all the decisions on this point have been discussed and dealt with and it is unnecessary for me to go over the same ground. The learned Judges remarked that cases of diluviated land or jungle or waste lands are no exception to the general rule that a Plaintiff who is dispossessed and brings a suit for recovery of possession must show he was in possession within twelve years of the date of suit. Their Lordships of the Privy Council affirm the same principle in the case of *Rani Hemanta Kumari v. Jagadindra Nath* (2). This was also a case of diluvion and alluvion. The point is now so well-settled that any further discussion of it would be idle.

The Respondent then contends that it has been found that the land emerged within 12 years of the date of suit. He has title to the land and the title must be considered to be subsisting during the time that the land was under water and

(1) 26 C. W. N. 725 (1922).

(2) 10 C. W. N. 630, 633 (P. C.) (1906).

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possession follows title. So his possession must be considered to have continued whilst the land was under water up to the time it emerged which was a point of time within the statutory period. Now no doubt if the Plaintiff had possession at the time of submergence or had then a subsisting title he would be in constructive possession during the period of submergence. This is the principle which underlies the decision in *Secretary of State for India v. Krishnamoni Gupta* (3), where it was pointed out (p. 535) that if a person enter upon the land of another and hold possession for a time and then without having acquired a title under the statute abandon possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place and further that on dispossession of the trespasser by the flood the constructive possession was with the true owner. [See also *Basanta Kumar Ray v. Secretary of State for India* (4).] But the true owner does not mean a person who at some more or less remote period had a title to the land. It means the person who has a subsisting title even though he be out of possession. The Respondent argues that it is sufficient that he can show that some time or other he had a title to throw the burden of proof on the other party to prove he lost that title and would rely on *Basanta Kumar Ray v. Secretary of State for India* (4). But in that case no question of the burden of proof arose or was decided. Respondent further argues that there is a presumption that possession went with the title [*Runjeet Ram Pandey v. Gobardhan Ram*

Pandey (5)]. But this principle has not been so broadly stated as the Respondent would now put it. It would probably be more correct to say that where the evidence as to possession is conflicting the Courts may rely on the presumption that possession follows title. See the case of *Thakur Singh v. Bhogeraj Singh* (6), where it was pointed out that in cases where the evidence on both sides was equally balanced preference should be given to the side with whom title was found.

I have found nothing in the numerous cases that I have considered which could lead me to any other conclusion but that in the case of alluvion and diluvion there is no departure from the ordinary rule that a Plaintiff suing in ejectment must prove possession within 12 years. To do this he may rely on a variety of evidence. For instance, he could show that he was in possession up to the time of diluvion and that the land remained under water or incapable of being possessed up to a point of time within the statutory period or even though out of possession he might show that he had a subsisting title, in which case possession would be considered to go back to him when the trespasser was evicted by *vis major* when the lands were washed away.

But this after all is only the manner in which he could prove his possession. The rule remains the same. He must prove possession within 12 years from the date of suit and it is from this standpoint that the case must be approached and from which unfortunately the learned District Judge has not approached it. The case must therefore be sent back to him for a determination of the following point.

He will consider if the Plaintiff has

(3) L. R. 29 I. A. 104; s. c. I. L. R. 29 Cal. 518 at p. 535; 6 O. W. N. 617 (1902).

(4) L. R. 44 I. A. 104; s. c. I. L. R. 44 Cal. 858; 21 C. W. N. 642 (1917).

(5) 20 W. R. 25 (P. C.) (1873).

(6) I. L. R. 27 Cal. 25 (1899).

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proved his possession within 12 years of the date of suit. If he decides this point against the Plaintiff, he must dismiss the Plaintiff's suit. If he decides it in favour of the Plaintiff, he will make a decree which he made before and which is now on appeal before us. He will decide the appeal on the evidence now on the record. The Appellant is entitled to his costs in this Court. With regard to costs in the trial Court and Court of first appeal, they will abide the final result.

GREAVES, J.—I agree.

N. G.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1176 OF 1925.

PANTON, J. B. B. GHOSE, J. 1926, 29, January.	}	BENODE BHUARY SAHA, Petitioner, Opposite Party in the trial Court, v. RAI SUNDARI DASSYA, Opposite Party, Petitioner in the trial Court.
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Succession of Property Protection Act (XIX of 1841)—Shebait of idol, if competent to make application under the Act—Act not limited in application to intestate succession—Sec. 14—Application made within six months of the death of widow who intervened as holder of life interest, if within time.

One P by his Will, gave a life interest in his properties to his wife and also authorised her to adopt a son, failing which event the properties were to vest in two idols. After P's death his widow was in possession for a long time and on her death one B took possession of the properties alleging that the widow had adopted his son. On the application of the mother of P representing herself as a shebait of the idols the District Judge made an order directing that the curator appointed under the Act should make over the properties to the applicant before him:

Held—That it is competent for a shebait to present an application under the Act.

The expression "succession" in the Act is not confined to intestate succession and applies also to testamentary succession.

It is not necessary to bring the operation of the Act into play that the succession should be claimed from the last deceased proprietor and the application having been made within six months of the death of the widow of the testator was properly made within the meaning of sec. 14 of the Act.

This was a Rule granted on the 4th September 1925 against an order of the District Judge of Rungpur (Babu Rajendra Lal Sadhu), dated the 26th August 1925.

The facts of the case will appear from the judgment.

Sir B. C. Mitter and Mr. Atul Chandra Gupta (with Babu Jitendra Kumar Sen Gupta) for the Petitioner.

Messrs. H. D. Bose, Girijaprasanna Sanyal and Babus Mritunjoy Chattopadhyay and Provat Kumar Sen for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule was obtained on an application for revision of an order passed by the District Judge of Rungpur under sec. 115 of the Civil Procedure Code. The order was passed by the Judge under the provisions of the Succession of Property Protection Act No. XIX of 1841 directing that the curator appointed under that Act should make over certain properties to one Rai Sundari Dassya.

The facts are these : One Purna Chandra Saha died in 1899. He left a Will, under the provisions of which amongst other things it was directed that his

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widow should remain in possession of the properties for her life. Certain annuities were given to his mother, the Opposite Party before us, and his grandmother. The widow Sarada Sundari was given authority to adopt a son and it was provided that if she died without making any adoption all the properties left by the testator should vest in two idols and that by the income of the properties the *deb-sheba* of the idols should be performed and if there was any surplus left that would be spent for certain charitable and educational purposes. The lady Sarada Sundari died on the 23rd November 1921, and after her death the present Petitioner Benode Behary Saha took possession of the properties, moveable and immoveable, left by Sarada Sundari on the allegation that Sarada Sundari had adopted his son Sudhir according to the authority given in the Will of Purna Chandra Saha. Thereupon, the Opposite Party, the mother of Purna Chandra Saha, Rai Sundari, made an application under Act XIX of 1841 on which the order complained of was made by the District Judge.

The contentions on behalf of the Petitioner may be shortly summarised in this way. The Opposite Party* and Purna Chandra belonged to the same family and were agnatic relations. There are two other persons, Bhabani and Banku, who are also descendants from the common ancestor. The idols to whom the property has been left by the testator were established by an ancestor of all these persons. Therefore, all the persons, Purna, the Opposite Party* and the others mentioned above were *shebait*s of the two idols. Purna used to perform the *sheba* for nineteen days in the month and the other three persons performed the *sheba*

for the remaining eleven days. On this fact, the contention raised is that the mother Rai Sundari who presented the petition describing herself as *shebait* of the two idols and as such entitled to possession of the properties was not the sole *shebait* and as the question involved relates to the conflicting claims of *shebait*s to the custody of the property belonging to the idols the matter does not come within the purview of the Curators Act.

Secondly, the *shebait* is not one of the persons who are authorised to present an application under that Act.

The third argument is that the dispute does not arise on a question of succession because the title of the idols arises for the first time by virtue of the Will and the mother, therefore, cannot claim the properties by succession.

Fourthly, it is urged that there is no finding in the judgment that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit.

Lastly, it is argued that under sec. 14 of the Act, this application of Rai Sundari was incompetent as it was not made within six months of the death of Purna Chandra Saha from whom the succession can only be claimed.

With regard to the first point, it may be pointed out that there was no conflicting claim as to the right of *shebaitship* in the Court below. The question that was raised and which was decided was whether the Opposite Party* was entitled to hold the properties on behalf of his son Sudhir Kumar who was alleged to have been adopted by Sarada Sundari, the widow of Purna Chandra. No claim was preferred by Benode Behary, the Opposite Party,* that he was entitled to remain in

* in the trial Court. - REF.

* in the trial Court. - REF.

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possession of the properties as one of the joint *shebait*s and this question has not at all been discussed by the lower Court. This point we cannot allow to be raised for the first time in revision.

The second point may be answered thus : that the properties were claimed by the idols and that the idols are juridical persons can hardly be disputed. The idols were certainly entitled, therefore, to make the present application under the Curators Act and as is well-known the idols must act through some human agency. The lady Rai Sundari presented the application as *shebait* of the idols to be put into possession of the properties. There cannot, therefore, be any question of the *shebait* being the proprietor of the properties; the properties have been ordered to be made over to Rai Sundari only as *shebait* of the two idols as she describes herself to be.

The third point seems to be somewhat obscure. Although the title of the idols arises from the testamentary provisions of the Will and it is a case of testamentary succession, there is nothing to show that the expression "succession" in the Curators Act must be confined to intestate succession and not apply to testamentary succession. This point also fails.

The next question is with regard to sec. 14 of the Act, which lays down : "That this Act shall not be put in force, unless the aforesaid application to the Judge be made within six months of the decease of the proprietor, whose property is claimed by right in succession." Here, the proprietor is said to be, by the Opposite Party,* Sarada Sundari and she died within six months of the application. The contention on behalf of the Petitioner* is that succession is not claimed from her as

succession is claimed from Purna Chandra who died in 1899. Under the provisions of this section, the application is not maintainable. But as has been observed with regard to a similar contention in the case of *Bhimappa v. Khanappa* (1), it is not necessary to bring the operation of this Act into play that the succession should be claimed from the last deceased proprietor. The learned Chief Justice in delivering the judgment of the Court in that case observed : "It is, however, admitted that the application was within six months of the death of Basawa, and it is contended on behalf of the opponents that the decease of the proprietor whose property is claimed by right 'in succession' referred to in sec. 14, would include the decease of Basawa in the present case, because Basawa was, between the death of her husband and her own decease, the proprietor of the property which is claimed, and it is claimed 'in succession' to her, that is to say, the claimant claims to succeed her in the possession of the property. This view of the section is, we think, correct. The words of the Act appear to have been very carefully chosen. Thus in the beginning of the preamble we find a reference to 'pretended claims of rights by gift or succession.' Here the expression is 'by succession' and is used to express the point of view of the claimant. Then in the second paragraph of the preamble we have 'the circumstance of actual possession when taken upon a succession,' that is, regarding the succession from the point of view of the Judge and not from the point of view of an interested party." The learned Chief Justice further observed :—"All that the Judge has to decide is who should be put into possession of the property in succession to the last deceased holder. An ap-

* in the Trial Court.—R&P.

(1) 1. L. R. 34 Bom. 115 (1909).

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plication was made to him to come to a decision upon that point within six months of the death of Basawa and we, therefore, think that he acted with jurisdiction in coming to his decision." We agree with this view of the reading of sec. 14 of the Curators Act.

With regard to the contention that the District Judge did not come to a finding that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit, we have to observe that although there is no actual finding in those words, the facts found by the learned Judge sufficiently show that this question was present in his mind, and he expressly refers to the provision of sec. 3 of the Act with regard to this application. He has found that the Opposite Party* has taken away all the valuable moveable properties left by the deceased and he claims the properties on behalf of his son. That finding is sufficient to maintain an application under sec. 3.

It is unnecessary for us to express any opinion on the question whether Benode Behary would be entitled to the possession of the properties as *shebail* of the idols or what the rights of parties are under the Will. It is sufficient to say that we do not find that the order of the Judge of the Court below is without jurisdiction or has been made by any irregular exercise of jurisdiction.

The Rule is, therefore, discharged with costs. Hearing-fee, five gold mohurs.

S. C. M.

* in the trial Court. - Rkr.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 530 OF 1924.

NEWBOULD, J.

B. B. GHOSE, J. ' GAHUK HOWLDER and
1925, anr., Appellants,

Heard, 10 and

11, February.

Judgment,

11, February.

THE KING-EMPEROR,
Respondent.

Criminal Procedure Code (Act V of 1898), sec. 162—Statement to police in course of investigation under Chap. XIV, legitimate use of—Jury not properly warned as to the inadmissibility of such statement—Verdict set aside.

Under sec. 162 as now amended, statements made by any person to a police officer in the course of an investigation under Chap. XIV shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the second paragraph of the section.

Where a witness for the prosecution made statements to the police supporting the case for the prosecution but resiled from them in the Magistrate's Court as also in the Sessions Court, and the Judge, although he did not positively draw the attention of the jury to these statements as evidence against the accused, refrained from warning them that these statements made by this witness to the police were not evidence at all:

Held—That under the present law it was the duty of the Judge to withhold from the jury's knowledge the statements made by this witness to the police unless they were proved in the manner provided by law at the request of the accused.

This was an appeal preferred on the 19th September 1924 against an order of the Sessions Judge of Dacca (Mr. S. N. Guha), dated the 4th July 1924, in a trial by a jury who unanimously pronounced a verdict of guilty.

GAHUR HOWLDAR v. THE KING-EMPEROR.

The facts of the case will appear from the judgment.

Mr. K. N. Chaudhuri and *Babu Jati Mohan Bose* for the Appellants.

Mr. Khundkar for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The two Appellants before us have been convicted of constructive murder on a charge framed that they committed an offence punishable under sec. 302 read with sec. 149, I. P. C. On that conviction they have been sentenced to transportation for life. They were also convicted of rioting but no separate sentence was passed under sec. 147, I. P. C.

It is unnecessary to state the facts of the case. It is conceded by the learned Deputy Legal Remembrancer that he cannot resist one point urged on behalf of the Appellants that evidence was admitted that was not admissible under the law. One of the witnesses for the prosecution was a man named Kokari. It is in evidence that this witness before the police made statements supporting the case for the prosecution. Before the committing Magistrate he resiled from those statements and his evidence before the Sessions Judge was substantially to the same effect as that given in the committing Court.

If anything, it was even less favourable to the prosecution. The learned Sessions Judge appears to have overlooked the alteration in the law effected by the recent amendment of sec. 162, Cr. P. C. Under that section, as it now stands, statements made by any person to a police officer in the course of an investigation under Chap. XIV shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the second paragraph of the section. The

admission of this evidence as to the statements made by Kokari to the police was likely to seriously prejudice the Appellants, for we find further that though the learned Sessions Judge did not positively draw attention to these statements as evidence against the Appellants, he did not, as he should have done, warn the jury that the statements made by this witness to the police were no evidence at all in support of the case for the prosecution. Under the present law it was the duty of the Judge to withhold from the jury's knowledge the statements made by this witness to the police unless they were proved in the manner provided by law at the request of the accused.

We must accordingly allow this appeal. We set aside the conviction and sentence passed on the Appellants and direct that they be re-tried according to law.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 852 OF 1925.

C. C. GHOSE, J.

DUVAL, J.

1925,

Heard,

11, December.

Judgment,

18, December.

[TARAKESWAR MUKHO-
PADBYAY, Petitioner,
v.

THE KING-EMPEROR,
Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 203, 476—Complaint, transfer of, after cognisance taken—Dismissal by trying Court under sec. 203—Court to make complaint under sec. 476—Jurisdiction.

Where on a complaint having been transferred to another Court and dismissed under sec. 203, Cr. P. C., the Magistrate before whom the petition of complaint was filed took proceedings under sec. 211, I. P. C., by making a complaint under sec. 476, Cr. P. C., and transferred the same for action to another Magistrate;

TARAKESWAR MUKHOPADHYAY v. THE KING-EMPEROR.

Held—That the Court before which complaint was filed had no jurisdiction to take proceedings under sec. 476, Cr. P. C.

If a complaint under sec. 476 is to be made in cases such as the present, it should be made by the Court which tried the case and not by the Court before which the complaint was filed.

This was a Rule granted on the 4th November 1925 against an order of the Sessions Judge of Backergunge, dated the 3rd August 1925, summarily dismissing an appeal preferred to his Court against an order of the Assistant Sessions Judge of Backergunge, dated the 23rd July 1925, convicting the accused of an offence under sec. 211, I. P. C., and sentencing him to one and a half years' rigorous imprisonment.

The facts of the case will appear from the judgment.

Babus Suresh Ch. Talukdar and Ramendra Chandra Roy for the Petitioner.

Mr. Ashrafali for the Crown.

THE JUDGMENT OF THE COURT was as follows:—

In this case the Petitioner filed a petition of complaint on the 14th June 1924 in the court of Mr. Suresh Chandra Sen, Deputy Magistrate, 1st class, under secs. 395, 380 and 147, I. P. C. Mr. Sen examined the Petitioner on oath and thereafter the case was transferred to the file of Mr. L. C. Guha, Deputy Magistrate, 1st class, for disposal. Mr. L. C. Guha held a local enquiry and then dismissed the Petitioner's complaint under sec. 203, Cr. P. C. He stated, however, that there was no occasion for proceedings against the Petitioner under sec. 211, I. P. C. Mr. Sen before whom the petition of complaint had been filed thereafter made a complaint under sec. 476, Cr. P. C., against the Petitioner

and sent the complaint to Mr. Das, Deputy Magistrate, for necessary action. After a preliminary enquiry the Petitioner was committed to the Court of Session to take his trial under sec. 211, I. P. C. He was convicted by the Assistant Sessions Judge and sentenced to undergo rigorous imprisonment for a period of one year and a half. An appeal against the said conviction and sentence was summarily dismissed by Mr. Carter, Sessions Judge, on the 3rd August 1925.

It is now contended before us that the Petitioner's case having been transferred from the file of Mr. Sen to that of Mr. Guha, Deputy Magistrate, who tried the case on the merits, the former had no jurisdiction to make the complaint under sec. 476, Cr. P. C. The matter really depends upon the meaning of the words "which appears to have been committed in or in relation to a proceeding in that Court" occurring in sec. 476, Cr. P. C. It will be noticed that the same words occurred in cl. (b) of sub-sec. (1) of sec. 195, Cr. P. C. Now, it has been held in cases under the old sec. 195, Cr. P. C., that it is the Court trying the case which is the proper authority to grant sanction and not the Court before which proceedings are instituted and by which process is issued [see the cases of *Jeebun Krista Shaw v. Benoy Krista Shaw* (1) and *Putiram Ruidas v. Mahomed Kasem* (2)]. No doubt under the present Code, sanction to prosecute under sec. 195 has been done away with and in its place a complaint has to be made in writing under sec. 476, Cr. P. C. We think, however, that the ratio of the decisions referred to above applies and that if a complaint had to be made in this case it should have been made by Mr. Guha and not by Mr. Sen. In this

(1) 6 C. W. N. 25 (1901).

(2) 3 C. W. N. 33 (1895).

TARAKESWAR MUKHOPADHYAY v. THE KING-EMPEROR.

view of the matter the contention urged before us succeeds and we make the Rule absolute. The result is that the conviction and sentence are set aside and the Petitioner will be discharged from his bail bonds.

H. C.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

VISCOUNT FINLAY.

SIR JOHN EDGE.

MR. AMEER ALI.

MR. JUSTICE DUFF.

1925,

Heard, 2 and

4, July.

Judgment,

28, July.]

AHMAD KHAN and
ors., Appellants,
v.

MUST. CHANNI BIBI,
Respondent.

Indian Evidence Act (1 of 1872), sec. 49—Special custom of succession in family or tribe—General evidence by members, without proof of specific instances, if sufficient to establish custom.

Where the Plaintiff, as sister, claimed to inherit the self-acquired properties of her brother under a special custom:

Held—That a custom of the kind alleged may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy, and the trial Court was in error in putting aside a large body of such evidence adduced by the Plaintiff and wholly un rebutted by the Defendants, merely on the ground that specific instances had not been proved.

This was an appeal (No. 74 of 1924) from a decree of the High Court at Lahore, reversing a decree, dated the 6th June 1917, of the Court of the Senior Subordinate Judge of Attock.

The suit was brought by Musammat Channi Bibi, the daughter of Muhammad Khan who had died in 1902 leaving considerable property in the Attock District.

The deceased left two widows surviving him and a posthumous son named Ali Waris Khan was born shortly after. The latter died in 1904 and the widows in 1912 and 1915. In the following year the Plaintiff brought her suit claiming the entire property as sister of her deceased brother.

The parties are Khattar agriculturists and before the Judicial Committee it was admitted that they were governed by the customary law of their tribe. The Plaintiff, however, contended that that law which operated in excluding a sister or daughter from succeeding in preference to collaterals, did not apply to self-acquired property.

The suit was dismissed by the Subordinate Judge, but the High Court (Abdul Raoof and Abdul Qadir, JJ.) held that the Plaintiff's contention was correct and decreed the suit with regard to that portion of the property which they decided was self-acquired.

The present appeal is by the Defendants, the collaterals, who claimed a preferential right of succession.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellants.

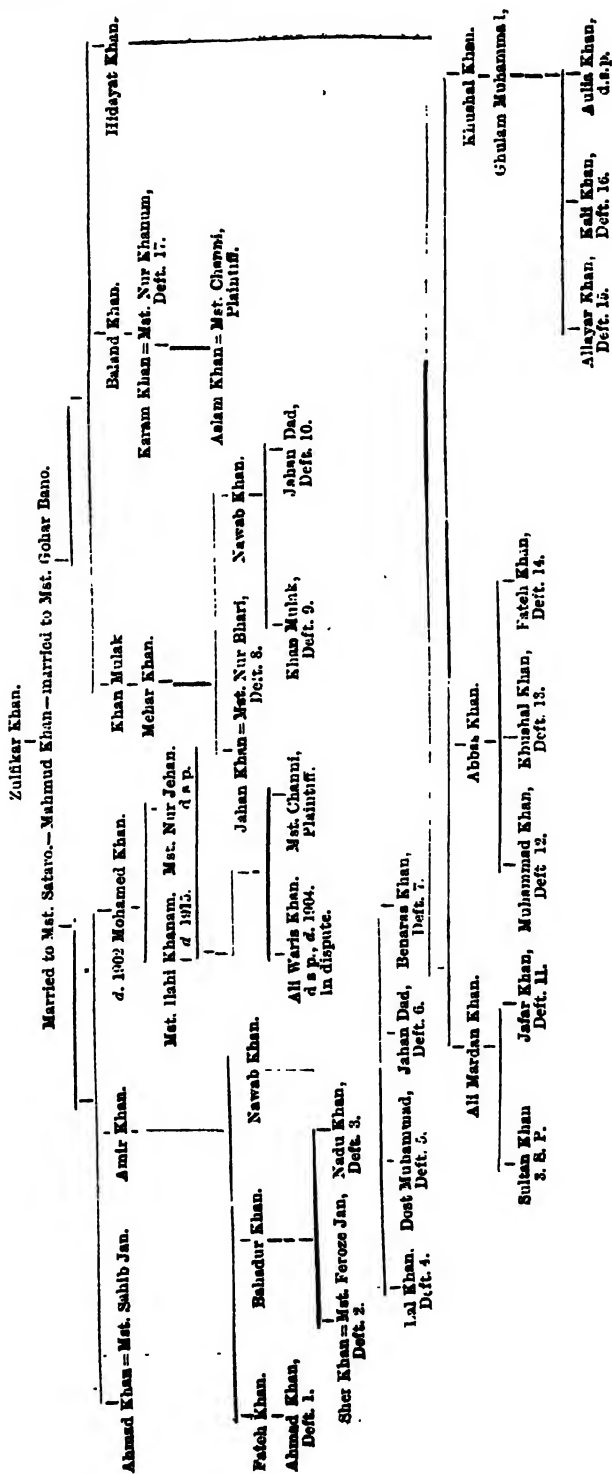
Mr. A. Majid for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This appeal arises out of a suit brought by the Respondent Musammat Channi Bibi in the Court of the District Judge at Attock, for the establishment of her title in respect of certain lands which she claimed by right of succession to her deceased brother Ali Waris Khan.

The following table will show the relationship of the parties in these proceedings.

AHMAD KHAN v. MUST. CHANNI BIBI.



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Both trace their descent from one Zulfikar Khan through his son Mahmud Khan. Mahmud had two wives, named respectively Sataro and Gohar Bano. By Sataro he had three sons, respectively named Ahmad Khan, Amir Khan and Mohamed Khan. By Gohar Bano he had also three sons named Khan Mulak, Baland Khan and Hidayat Khan.

It is in evidence that Mohamed Khan died in 1902, leaving him surviving two widows Musammat Ilahi Khanam and Musammat Nur Jehan. The latter died in 1905. By Ilahi Khanam, who lived until 1915, Mohamed Khan had a son, Ali Waris and a daughter, the Plaintiff in this case. Ali Waris died in 1904; and the litigation relates to his inheritance.

The Defendants are the descendants of the brothers and half-brothers of Mohamed Khan.

The parties belong to one of the agricultural tribes of the Punjab, called the Khattar.

The Plaintiff whilst admitting the existence in her tribe of a custom under which a daughter or a sister is excluded in favour of collaterals from inheritance in respect of "ancestral" property, denies its application to "self-acquired property."

She states that there is no special or general custom prevailing in the Khattar tribe under which collaterals like the Defendants deprive a daughter or a sister of the right of succession to property acquired by the father or brother.

The Defendants plead that by the custom prevailing in the tribe or in the family, females are excluded from succession irrespective of the character of the property whether it was ancestral or self-acquired. The parties went to trial on that issue.

There are two properties in dispute, one called Surag Salar, the other Kharala.

The Senior Sub-Judge of Attock before whom the case came for trial, found as a fact that Surag Salar was "self-acquired property" within the meaning of the custom alleged by the Plaintiff, and that Kharala, save and except 416 Kanals of land, was "ancestral." But as regards the Plaintiff's claim he held that she had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance. He accordingly dismissed her suit in respect of both the properties.

The High Court of Lahore, on the Plaintiff's appeal, have given her a decree in respect of Surag Salar and the 416 Kanals of Kharala which appears to have been admittedly purchased by Mohamed Khan, and dismissed her suit regarding the ancestral village of Kharala.

The appeal to this Board is by the Defendants, the collaterals, who claimed the succession of Ali Waris in preference to Channi Bibi, the sister.

The two points that have been raised before their Lordships really form the kernel of the case.

The first is: Does Surag Salar, as has been found by the Courts in India, constitute in fact "self-acquired property" within the meaning of the custom alleged?

The question whether Surag Salar was the "self-acquired" property of the Plaintiff's father turns upon the construction of the revenue settlement which began in 1852 and was completed in the year 1863. The settlement was in fact made with Amir Khan and Baland Khan representing the two branches of Mahmud Khan's family.

The settlement papers make it perfectly clear that prior to the settlement of 1863, the family of Mahmud Khan had no right in Surag Salar. That about the close of the Sikh rule his sons had forcibly ousted

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another family that had been settled at Surag Salar for over 40 years. As already stated they had no title in the property; they had installed themselves there by force and on the establishment of British rule in the Punjab, when settlement proceedings were begun they applied for settlement with them on the strength of certain advances or payments they had made to the Sikh Government. The settlement proceedings lasted several years and concluded only in 1863.

In the course of the proceedings a thorough inquiry was made as to title and possession. In the Punjab the Settlement Officer in the early days of British rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. There can hardly be any dispute that whilst the settlement proceedings were proceeding Mahmud Khan had died, for the settlement was made with his sons.

Before the Settlement Officer there were two parties arrayed against each other as claimants to the property of Surag Salar. Ghazan Khan represented the family which had been in possession of Surag Salar for over 40 years. They were placed in the category of Plaintiffs; whilst Amir Khan and Baland Khan representing the family of Mahmud Khan were the Defendants. Both belonged to the tribe of Khattar.

It is not necessary in this judgment to refer in detail to the proceedings which culminated in the settlement; it is enough to state the result of the enquiry embodied in Robakar Ex. F. 7. It runs thus :—

"There is no doubt that the village originally belonged to the Plaintiffs. The Defendants' possession is of 22 years' standing. The Defendants suffered a loss of thousands of rupees. If they had not made the village abad, it would have been totally ruined. Now the point for determination is whether the Plaintiff's suit is entertainable or not owing to their ejectment which took place 22 years ago. So it is clear that the Plaintiff's suit has been pending since 1852, i. e., for the last 11 years. In other words, the Defendants' possession is considered to have existed since 11 years before the institution of the suit. The period is a period during which such a suit is cognizable. It is less than 12 years. Under these circumstances the Plaintiff's suit is cognizable. The Plaintiffs are original proprietors of the village. As a matter of fact, the Defendants have no concern with the inheritance. The plea of the Defendants that they purchased the village is worthless. They produce a sale-deed which is also worthless because they previously made no mention of the sale, nor is there any proof in respect thereof nor yet as to their possession before Sambat, 1894. The Plaintiffs were continuously in proprietary possession before the said Sambat. The opinion of Munshi Lukam Chand, Extra Assistant Commissioner, is that either Rs. 10 per cent. should be fixed for the Plaintiffs as taluquadari dues or the village held the parties' property in equal half shares."

"It is therefore ordered that the cultivated land of one-half of the village be considered as the property of Plaintiff No. 1 and that of the other half as the property of the Defendants. The objection raised by Plaintiff No. 2 as to two wills that they were separately sunk by the Plaintiffs and that they should be given to them or to Plaintiff No. 1 is worthless, because if the Defendants had not made them abad, while they were in possession (of the village) they would have totally been ruined and useless. They are in working order. They should, therefore, remain the property of Plaintiff No. 1 and the Defendants in equal half shares."

Again, the proceedings before the Court of the Settlement Officer (Ex. P.-8) are instructive :—

"The Plaintiff's ancestors again made the village abad after it had become desolate. They are, therefore, considered owners. On the Defendants' possession, which is of 20 years' standing, is to be taken into consideration. But it is not worth consideration, because the Plaintiff's suit has been pending since the beginning of the British rule. An Appeal was filed therein in the Commissioner's Court which remanded the case to the District Court for further

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enquiry which was made in this case. Under these circumstances the ejectment for 12 years during the British rule is not worth consideration, because if a complete enquiry had been made at that time, the Plaintiffs would have got their right. The Defendants' possession is considered to have existed since 8 years before the British rule. The Extra Assistant Commissioner has two proposals to me. One of them is that the Plaintiffs should get Rs. 10 per cent. as taluquadari dues. Under the above circumstances I consider the Plaintiff's right to be superior thinking that the Defendants had been in actual possession since 8 years before the British rule. The other proposal of the Extra Assistant Commissioner is that in view of the fact that the Defendants shared profit and loss, the village should be given to both the parties in equal half shares."

The final decision of the Settlement Officer concerning the half share settled with Mahmud's family is contained in Ex. D. 39, as follows:—

"The proprietors descended from Zulfikar Khan and Fateh Khan will collect the produce of the entire land, cultivated by them and by the tenants distribute it among themselves according to the shares shown in the Khewat papers, and pay the Government revenue according to ancestral shares in addition to Rs. 17 per cent. on account of cesses as under."

In their Lordships' judgment, the Settlement Officer having regard to the conflicting claims of the Plaintiffs on one side and of the Defendants on the other, made an equitable division of the property between the two sets of claimants. The Plaintiffs (Ghazan's people) had the original title by long occupation; the Defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half of the lands with the descendants of Ghazan Khan who were the Plaintiffs in the proceedings, and give the other half to the descendants of Zulfikar Khan. Surag Salar was thus in no sense ancestral property—it had not been acquired by their ancestors Zulfikar or Mahmud Khan and

handed down to their successors. The settlement was effected in fact with Amir Khan and Baland Khan as representing the family of Zulfikar Khan and the title of proprietors was declared to be with them for the family. The direction contained in Document D. 39, page 180, shows the character of the settlement with the Defendants' family.

Their Lordships are clearly of opinion that the judgment of the Subordinate Judge and of the learned Judges of the High Court with regard to Surag Salar is right.

As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the Plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

There is a large body of oral evidence establishing the custom, wholly un rebutted by the Defendants who have relied exclusively on the *Riwaj-i-Aam*. The Judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them.

The Judges of the High Court have referred to the evidence of Sirdar Mohammed Hyat Khan, a distinguished officer of the Government, which if admissible would be conclusive in the case; but it is urged by the Appellants' counsel that it cannot be put in evidence as it is not in compliance with the requirements of the Indian Evidence Act, I of 1872. Their

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Lordships are not prepared to say that in the circumstances of the case it was erroneously admitted but assuming it is inadmissible it forms only one item in the mass of evidence on which the Plaintiff relied and which has been thoroughly examined by the High Court.

On the whole their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The Appellants will pay to the Respondent the costs.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Appellants.

Solicitors: *Messrs. Francis & Harker* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

Full Bench Reference

No. 2 OF 1925

IN

APPEAL FROM APPELLATE DECREE

No. 2242 OF 1922.

CHATTERJEE, A. C. J.

WALMSLEY, J.

CUMING, J.

PAGE, J.

CHAKRAVARTI, J.

1926,

Heard, 27, January.

Judgment, 23, February.]

NIRANJAN

MUKHERJEE,

Appellant,

v.

SM. SOUDAMINI

DASI and ors.,

Respondents.

Partition by Civil Court—Grant of permanent lease by co-sharers before partition—Other co-sharer, to whom land allotted, if takes it subject to lease.

A person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers.

The Reference arose in S. A. No. 2242 of 1922, which was preferred against the decree of Babu Nalini Kanta Basu, Sub-

ordinate Judge, 1st Court, 24-Parganas, dated the 19th June 1922, reversing that of Babu Rasick Mohan Bhattacharjee, Munsif, 2nd Court, Sealdah, dated the 31st day of July 1920.

The facts of the case will appear sufficiently from the ORDER OF REFERENCE which was as follows:—

CUMING and B. B. GHOSE, JJ.—The suit out of which this appeal arises was brought for *khas* possession of a piece of homestead land on ejection of Defendant No. 1 after service of notice to quit. The facts on which the question of law which arises for decision in this appeal may be shortly stated thus: The land in dispute along with other properties belonged to one Kshetra Mohan Mukherji and his co-sharers, Kshetra Mohan being entitled to 1/5th share of the whole. He died leaving his childless widow Tripura Sundari as his heir. During her life-time her co-sharers who had a 4/5th share in the property granted a *mokarari mourashi* lease of the land in suit to one Dina Nath Mukherji by accepting a *kabuliyat* executed by the tenant, dated 30th September 1891. Tripura Sundari died sometime in 1901. Plaintiff inherited the properties as the reversionary heir of her husband. Defendant No. 1 obtained by assignment the interest of Dina Nath in the land in dispute. Under a decree for partition by a Civil Court in a partition suit between the Plaintiff and his co-sharers the disputed land along with other lands was allotted to the Plaintiff. It has been found by the Court of Appeal below that neither Tripura Sundari nor the Plaintiff had granted or acknowledged the *mokarari mourashi* right of the tenant in the land. The question then arises as to whether the Plaintiff obtained the land in dispute on its being allotted to him by the decree in the partition suit subject to the

NIRANJAN MUKHERJEE v. SM. SOUDAMINI DAS.

permanent lease granted by his former co-sharers or not. The trial Court decided in favour of the Plaintiff relying on an unreported decision of the High Court. On appeal by the Defendant the Subordinate Judge has held that the Plaintiff is bound by the lease and has dismissed the suit. The Plaintiff appealed to this Court, and he being dead his representatives were substituted on the record.

It is contended on behalf of the Appellants that they are entitled to the land allotted to their predecessor free from the *mokarari* interest created on the land by the former co-sharers of their predecessor. Reliance has been placed on the general principle of equity which was given effect to by the Privy Council in the case of *Baijnath Lal v. Ramooddeen* (1), which was a case of a mortgage by a co-owner of joint property. Their Lordships say:—
“It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share in the whole into a defined portion held in severalty.” Their Lordships were further of opinion that the mortgagee had not only the right to accept what had been allotted to his mortgagor but that was, in the circumstances of the case, his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-owners. This principle of equity was applied to the case of a lease by a co-owner in *Joy Sankari Gupta v. Bharat Chandra* (2) and in

Tarini Kanto v. Iswar Chandra (3). In those cases the partitions were by the Collector under the Estates Partition Acts, but it is contended that the decisions turned upon the principle of equity recognised in *Baijnath's* case (1) and not on any special provisions of the different Partition Acts. Lastly, the unreported decision in Appeal from Appellate Decree No. 284 of 1913 is relied on in support of the Appellants' contention. That case related to another piece of land appertaining to the same estate as the land in the present case and depended upon the effect of the same partition decree as in this. There is absolutely no distinction between that case and the present case. On the other hand, the principle in *Baijnath's* case (1) was not applied to the case of a lease in *Shaik Khan Ali v. Pestonji Edulji* (4). This case was distinguished in the case of *Joy Sankari Gupta v. Bharat Chandra* (2) on the ground that the partition in *Shaik Khan Ali's* case (4) was by the Civil Court. There does not, however, seem to be any distinction on principle where the special provisions of the Estates Partition Act do not come into play. *Shaik Khan Ali's* case (4) was followed in *Bainaddi v. Kailash* (5), in which also a distinction is made between the case of a lease and a mortgage. It may be pointed out that the principle in *Baijnath's* case (1) has been applied, where there has been a partition under a decree of the Civil Court, in the case of a mortgage by a co-owner. See *Hem Chandra v. Thako Mani* (6).

It would thus appear that there is a

(1) L. R. 1 I. A. 106: s. 23 W. R. 233 (1871).

(2) L. R. 26 Cal. 434 (1899).

(1) L. R. 1 I. A. 106: s. c. 23 W. R. 233 (1871).

(2) L. R. 26 Cal. 431, 439 (1899).

(3) 21 C. L. J. 1028 (1912).

(4) 1 C. W. N. 12 (1896).

(5) 35 C. L. J. 106 (1921).

(6) L. R. 20 Cal. 533 (1893).

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clear conflict of decisions in this Court as to the application of the rule of equity in *Bajinath's* case (1) to the case of a lease granted by a co-owner, particularly between the unreported case mentioned above and the cases of *Shaikh Khan Ali v. Pestonji Edulji* (4) and *Bainaddi v. Kailash* (5), which question requires decision by a Full Bench.

Another small point argued by the Appellant is that the Subordinate Judge is wrong in dismissing the whole suit. The Plaintiff became the owner of the entire land by the partition decree. If the *mokarari* lease is held binding on him to the extent of 4/5th share he is entitled to joint possession with the Defendant No. 1 to the 1/5th share to which the Defendant had no permanent right. This proposition is not contested by the learned Advocate who appeared for the Respondent.

The question referred to the Full Bench is—

“Whether a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court takes it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers.”

If it is answered in the negative Plaintiff will be entitled to a decree for ejectment for the entire land. If answered in the affirmative the question whether he is entitled to joint possession of 1/5th share will arise. The appeal being from an Appellate decree is referred for final decision to the Full Bench.

Dr. Dwarka Nath Mitter (with *Babu Narayan Ch. Kar*) for the Appellant refers to sec. 199, *Freeman on Co-tenancy Parti-*

tion, 2nd Ed., p. 273, and to *Bajinath's* case (1).

[CHAKRAVARTI, J.—The whole thing depends on what footing the partition was made.]

Refers to *Sharat Chunder Burman v. Hurgovind* (9), where *Bajinath's* case (1) was followed. Also to *Hem Chandra v. Thako Mani* (6), *Joy Sankari v. Bharat* (2), *Tarini Kanta v. Iswar Chandra* (3), *Hakim Lal v. Ram Lal* (7), *Bhup Singh v. Chedda Singh* (8) and *Midnapur Zemindary Co. v. Naresch Narain Roy* (10) and the unreported decision* of Fletcher and Smither, JJ. These cases are in my favour.

The following cases are against me, *Shaikh Khan Ali v. Pestonji Edulji Guddar* (4) where the co-sharers held the land separately but the title was joint. In *Bainaddi Mondul v. Kailash Chundra* (5), a distinction between mortgage and lease has been drawn. It was a case of lease and the partition was by the Civil Court.

[CHATTERJEA, A. C. J.—The distinction between lease and mortgage is pointed out. Lessee's title is perfected but mortgagee's is not. *Bajinath's* case (1) was decided on that footing.]

But *Bhup Singh's* case (8) makes no distinction between mortgage and lease. Reads p. 603. Also refers to sec. 44,

(1) L. R. 1 I. A. 106: s. c. 23 W. R. 233 (1874).

(2) I. L. R. 26 Cal. 434, 439 (1899).

(3) 21 C. L. J. 603, 604 (1912).

(4) 1 C. W. N. 62 (1896).

(5) 35 C. L. J. 166 (1921).

(6) I. L. R. 20 Cal. 533 (1893).

(7) 6 C. L. J. 46, 48-49 (1907).

(8) I. L. R. 42 All. 543, 594 (1920).

(9) I. L. R. 4 Cal. 510, 513 (1878).

(10) L. R. 51 I. A. 293, 303: s. c. 29 C. W. N. 21 (1924).

* S. A. No. 302 of 1913, decided 30th March 1917. Unreported.

(1) L. R. 1 I. A. 106: s. c. 23 W. R. 233 (1874).

(4) 1 C. W. N. 62 (1896).

(5) 35 C. L. J. 166 (1921).

NIRANJAN MUKHERJEE v. SM. SOUDAMINI DAS.

Transfer of Property Act and sec. 111, cl. (c).

Mr. K. C. Chakravarti (with Babu Panchanan Ghoshal) for the Respondents.—The Plaintiff ought to show that he was inequitably affected by the partition. The *mourashi patta* of 30th September 1891 is a confirmatory *patta*. Places the facts of the case. The present case is distinguishable from *Baijnath's* case (1). There before the mortgage, the partition proceeding had commenced.

Referring to the passage of Freeman quoted, submits prejudice must be shown. *Joy Sankari Gupta v. Bharat Chandra* (2) was decided by reference to sec. 128 of the Estates Partition Act. Principle of *Baijnath's* case (1) was an *obiter dicta*. In *Hem Chandra v. Thako Mani* (6) the mortgagee was not affected at all. *Sharat Chunder Burman v. Hargovind Burman* (9) was under Reg. XIX of 1814. Refers to *Shaikh Khan Ali v. Pestonji Edulji* (4) and *Bainaddi v. Kailash* (5).

The unreported judgment* of Fletcher and Smither, JJ., is against me. Refers to Macpherson's Law of Mortgage, p. 120.

Dr. Mitter in reply.—*Baijnath's* case (1) clearly enumerates the general principle and sec. 99 of the Estates Partition Act extends that principle. There is no distinction between mortgage and lease.

Babu Biraj Mohan Majumdar appeared for the Deputy Registrar.

The JUDGMENT OF THE COURT was as follows :—

N. R. CHATTERJEA, A. C. J.—The question referred to the Full Bench is :—

“Whether a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court takes it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers.”

The Plaintiff's predecessor-in-title had 1/5th share in the land in dispute along with other properties. His co-sharers who owned the remaining 4/5th share granted a permanent lease in respect of their shares to the Defendant's predecessor-in-title. The Plaintiff brought a suit for partition in the Civil Court, and the disputed land was allotted to him in his share on partition. He then brought a suit for ejecting the Defendant after service of notice to quit. The defence was that the Plaintiff's predecessor-in-title also had granted the lease, but the finding is against the Defendant. It is not disputed that the Plaintiff is entitled to joint possession in respect of 1/5th share and the question for consideration as stated above is, whether the land is subject to the permanent lease granted by the co-sharers owning the 4/5th share before the partition.

The general principle is that a co-sharer in joint property cannot by dealing with such property affect the interest of the other sharers therein. In the case of *Baijnath Lal v. Ramodeen* (1), there was a mortgage of an undivided moiety in some villages forming a joint and undivided estate. Their Lordships observed : “It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that

(1) L. R. 1 L. A. 106 : s. c. 23 W. R. 233 (1874)

(2) I. L. R. 26 Cal. 434 (1899).

(4) 1 O. W. N. 62 (1896).

(5) 35 C. L. J. 106 (1921)

(6) I. L. R. 20 Cal. 533 (1893).

(9) I. L. R. 4 Cal. 510 (1878).

* S. A. No. 384 of 1912, decided 30th March 1917. Unreported.

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he could not by so doing affect the interest of the other sharers in them, and that the person who took the security took it subject to the right of those sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty." It is true that in that case it was the mortgagee who was seeking to enforce his remedy not against the property mortgaged to him, but against property which had been allotted to the mortgagor on partition in substitution of the mortgaged property. But their Lordships held not only "that he has a right to do so, but that in the circumstances of the case it was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of the former co-sharers."

The principle of *Bajinath's* case (1) has been applied to a number of cases relating to mortgage. The partition in *Bajinath's* case (1) was under Reg. XIX of 1814, but the equitable principle enunciated has been applied to a case in which the partition was made by a Civil Court. See *Hem Chandra Ghose v. Thako Mani* (6). The learned Judges in that case observed: "In the absence therefore of any fraud in effecting the partition the Plaintiff has no right to proceed against that portion of the undivided mortgaged property which on partition was allotted to the Appellants, but he can proceed against that portion of the undivided property which was allotted to the mortgagor Defendants in substitution of their undivided share in the portion mortgaged." A similar view was taken by Mookerjee and Holmwood, JJ., in *Hakim*

Lal v. Ram Lal (7). The partition in that case was under the Estates Partition Act, but the learned Judges observed: "It is well-settled, as was laid down by their Lordships of the Judicial Committee in *Bajinath v. Ramoodeen* (1), that the mortgagee of an undivided share in joint property is entitled only to property allotted on partition to the mortgagor if the partition was fair and equal and is not vitiated by fraud."

In *Bhup Singh v. Chedda Singh* (8) the learned Judges referring to *Bajinath's* case (1) observed: "It is immaterial whether the partition was made by the revenue authorities, or by the Civil Court, or by arbitration or by private arrangement, and it is not necessary that the mortgagee should have been a party to the partition. It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. Of course, if the partition is tainted with fraud or if in making the partition the encumbrance was taken into account and the partition was made subject to the encumbrance, the result will be different; but in the absence of fraud or the circumstance mentioned above the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition."

It is unnecessary to consider the effect of a private partition, but it appears to be well-settled that the principle of *Bajinath's* case (1) applies to cases of mortgages whether the partition is under the Partition Act, or by a decree of the Civil Court. There is, however, a divergence

(1) L. R. 1 I. A. 106; s. c. 23 W. R. 233 (1874).

(6) I. L. R. 20 Cal. 533 (1899).

(1) L. R. 1 I. A. 106; s. c. 23 W. R. 233 (1874).

(7) 6 O. L. J. 46, 48-49 (1907).

(8) I. L. R. 42 All. 596, 599 (1920).

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of opinion as to whether the principle applies to a case of lease

In *Sharat Chunder Burman v. Har-govind Burman* (9), the Court had to consider the case of a lease (*mokurari* lease) granted by a co-sharer before partition. The partition was under the Partition Act, but the learned Judges (Mitter and Maclean, JJ.) observed that the principle [in *Bajinath's* case (1)] "is applicable to all assignees of any interest whatever." In *Joy Sankari Gupta v. Bharat Chandra Bardhan* (2) the partition was effected under the Estates Partition Act but Maclean, C. J. and Banerji, J., said (at page 439): "But even if sec. 128 of Bengal Act of 1876 be not applicable to the case, still we think that, according to the general principles of equity, the *miras* tenure in question, if it was created by Defendant No. 7 alone, could not affect the lands allotted to the share of any other co-sharer upon a partition by the Collector, but could hold good only in respect of lands allotted to the lessor's share." See also *Tarini Kanto v. Iswar Chandra* (3).

A contrary view, however, was taken in the case of *Shaikh Khan Ali v. Pestonji Edulji* (4). There, a lease was granted in respect of one-third share of certain property pending a suit for partition. Pethe-ram, C. J. and Rampini, J., observed: "At the time when this lease was granted by undivided co-sharers, they had a perfect right to grant the lease which would cover their undivided shares, and these shares were their shares in the piece of land included in the lease. I quite fail to see how any subsequent dealing with the

property by partition, subsequent to the creation of the estate by a lease and by a person who had a perfect right to create it could have affected the right of the lessee."

With great respect for the opinion of the learned Judges I think that a co-sharer has not a "perfect right" in dealing with joint property in so far as it affects the rights of the other co-sharers. The opinion of the learned Judges is opposed to the principle laid down by the Judicial Committee in *Bajinath's* case (1), viz., that a co-sharer cannot by pledging his share affect the interest of the other sharers in them.

The case of *Shaikh Khan Ali v. Pestonji Edulji* (1) was followed in *Bainaddi v. Kailash* (5), where the learned Judges (Richardson and Cuming, JJ.) observed that "the difference between the lease and the mortgage is this, that in the case of a lease followed by possession of the property demised the title of the lessee is complete, while in the case of a mortgage, the land is merely hypothecated and no title thereto is perfected until the security is enforced. See *Bajinath Lal v. Ramooden* (1)." There is no doubt a difference between the interest of a mortgagee and a lessee as pointed out by the learned Judges, but we are unable to hold that there is any difference between a mortgage and a lease so far as rights of the co-sharers are concerned.

In Freeman on Co-tenancy and Partition, 2nd Edition, sec. 199, the principle is stated as follows:—"A lease or deed by one tenant in common to a stranger of a portion of the joint estate, although voidable by the co-tenants who do not join

(1) L. R. 1 I. A. 106; s. c. 23 W. R. 233 (1874).

(2) I. L. R. 26 Cal. 424 at p. 439 (1899).

(3) 21 C. L. J. 603 (1912).

(4) 1 C. W. N. 63 (1896).

(5) I. L. R. 4 Cal. 510 (1878).

(1) L. R. 1 I. A. 106; s. c. 23 W. R. 233 (1874).

(4) 1 C. W. N. 63 (1896).

(5) 35 C. L. J. 166 (1921).

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therein, is valid between the parties and against all persons unless so avoided. If the title of the co-tenant entitled to disaffirm the conveyance becomes vested in the one by whom it was executed, the newly acquired title of this lessor or grantor will enure by estoppel to the benefit of the lessee or grantee. Such a conveyance is undoubtedly void so far as it undertakes to impair any of the rights of the other co-tenants. It will not justify the grantee in taking exclusive possession of the part described in his deed. It will not deprive the other co-tenants of the right to enjoy every part and parcel of the real estate; nor can it, to any extent, prejudice or vary their right to a partition of the common property. The grantee is liable to lose all his interest in the parcel conveyed to him, by its being set off to some other of the co-tenants upon partition. But although the deed does not impair the rights of the other co-tenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor, by transferring it to the grantee."

The principle laid down by the author is similar to that enunciated by *Bajinath's* case (1).

I may refer to the decision of Fletcher and Smither, JJ., in the unreported case.* That case arose out of the very same partition with which we are dealing in the present case, and the question to be considered was to what extent, if at all, the Plaintiff was bound by the lease granted by the other four co-sharers. The learned Judges following

Bajinath's case (1) held that "a person taking an interest from persons who have an undivided interest in the property takes subject to the rights of the other co-sharers who are not bound by the transaction, namely, that if the property comes to be partitioned, the rights of the other co-sharers not bound by the lease, as it is in the present case, would not be affected by the grant of the lease."

It is contended on behalf of the Respondents that it was for the Plaintiff (Appellant) to show that his interest had been affected, in other words, that the lease had not been taken into account in making the allotments on partition. But the Plaintiff was allotted the disputed land on partition: he had not granted any lease. It was therefore for the Defendant to show any equitable circumstances which would render the lease binding upon the Plaintiff.

I would accordingly answer the question referred to the Full Bench in the negative.

WALMSLEY, J.—I agree.

CUMING, J.—I also agree.

PAGE, J.—I have had the advantage of reading the judgment of the learned Acting Chief Justice, and I agree that a negative answer should be given to the question referred to the Full Bench.

CHAKRAVARTI, J.—The question referred to the Full Bench runs as follows:—

"Whether a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court takes it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers."

The principle that the interest of a co-sharer in a joint property is not affected by a mortgage created by another co-sharer and the charge so created on parti-

(1) L. R. 1 I. A. 106: s. c. 23 W. R. 283 (1874).

* S. A. No. 284 of 1913, decided 30th March 1917. Unreported.

(1) L. R. 1 I. A. 106: s. c. 23 W. R. 283 (1874).

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tion falls upon the land exclusively allotted to the share of the co-sharer who created such charge has been laid down by the Judicial Committee in the case of *Baijnath v. Ramooddeen* (1) and the question here is, does the same principle apply to other encumbrances created by a co-sharer, namely, a grant of a permanent tenure by him. On principle there seems to be no distinction. The principle laid down in the case above cited has been recognised by the Legislature in sec. 99 of the Estates Partition Act, so far as undertenures are concerned. The incumbrance so created is transferred to the lands which fall on a partition to the grantor of such tenures.

In my opinion whether the partition is effected by the Collector or the Civil Court, the same equitable principles are applicable.

The co-sharer who granted no permanent tenure parts with his unencumbered rights in the lands which fall into the exclusive allotment of his co-sharer who granted the lease and it is only just that the lands which fall to him in entirety should be lands unencumbered as was his share when the lands were joint. The grantee of such a tenure cannot justly complain of such transfer because he took the tenure subject to the right of the other co-sharer to a just and equitable partition. I have no hesitation therefore in following the case of *Joy Sankari v. Bharat* (2) and I therefore answer the question referred to the Full Bench in the negative.

CHATTERJEA, A. C. J.—The result is that the appeal is allowed and the decree of the Court of first instance restored.

N. G.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM INSOLVENCY JURISDICTION

No. 17 OF 1925.

SANDERSON, C. J.

G. C. MOSES

RANKIN, J.

v.

1925,

A. C. OAKESHOTT.

16, December.

Presidency Towns Insolvency Act (III of 1909) sec. 39 (2) (), insolvent, if guilty of fraud under—Jurisdiction of Court to make an order of conditional discharge.

One B was adjudicated an insolvent under the Presidency Towns Insolvency Act (III of 1909). Prior to his insolvency he transferred certain goods of his to one M. The transfer was set aside on the ground that it was made with a view to use it as a shield against his creditors:

Held—That the case came within sec. 39, sub-sec. (2), cl. (j) of the Presidency Towns Insolvency Act, 1909, and the insolvent was guilty of fraud within the meaning of the sub-section.

Held further—That the jurisdiction of the Court to discharge the insolvent was limited by sec. 39, so that it could make only one of the orders contemplated by cls. (a), (b), (c) or (d) of sec. 39, sub-sec. (1).

This was an appeal against an order of Mr. Justice Buckland sitting in insolvency.

The facts of the case will appear from the judgment.

Messrs. A. N. Chaudhuri and F. Surita for the Appellant.

No one appeared for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by Mr. G. C. Moses against an order of the learned Judge on the Original Side sitting in insolvency whereby he granted the insolvent, who is the Respondent in this appeal, but who has not appeared,

(1) L. R. 11 A. 106; 4 C. 23 W. R. 233 (1874).

(2) I. L. R. 26 Cal. 434 (1899)

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his discharge subject to his paying Rs. 140 for six months to the Official Assignee, the first of such payments to be on the 10th of March and the subsequent payments to be made on the 10th of every subsequent month.

It appears that the Respondent was adjudicated insolvent on his own petition on the 27th of January 1923, his liabilities being about Rs. 40,000 and the assets at about Rs. 3,600.

The Official Assignee stated in his report: "A point to notice in this insolvency is the transfer of insolvent's furniture to one of his creditors. This transfer was subsequently set aside by the Court and sold for the benefit of the general body of creditors." That transfer is alleged to have been made on the 7th of February 1922 in favour of one Mr. MacMillan. The learned Judge who was then sitting in insolvency set it aside, holding that the insolvent and MacMillan put their heads together and hit upon the device of an assignment of the said property, furniture and household effects for the purpose of using the same as a shield against Mr. Moses who was the landlord of the house in Behala and to whom the insolvent owed arrears of rent, and against other creditors.

In view of that finding, it seems to me that this case comes within sec. 39, sub-sec. (2), cl. (j) of the Presidency Towns Insolvency Act, 1909; and I am of opinion that the Respondent concealed his property or part thereof, and was guilty of fraud within the meaning of the sub-section.

Consequently, the jurisdiction of the learned Judge sitting in insolvency was limited because sec. 39 provides as follows:—"The Court shall refuse the discharge in all cases where the insolvent has committed any offence under this Act or

under secs. 421 to 424 of the Indian Penal Code and shall, on proof of any of the facts hereinafter mentioned,"—of which (j) to which I have just referred is one—"refuse the discharge or suspend the discharge for a specified time or suspend the discharge until a dividend of not less than four annas in the rupee has been paid to the creditor or require the insolvent as a condition of his discharge to consent to a decree being passed against him in favour of the Official Assignee for any balance or part of any balance of the debts proveable under the insolvency which is not satisfied at the date of his discharge."

The learned Judge made an order which is not covered by any one of the clauses which I have just read. The word used in this section is "shall." Therefore, the learned Judge was bound to make one of the orders specified in (a), (b), (c) or (d) of the first sub-section of sec. 39 of the Act.

The result in my judgment is that the learned Judge's order must be set aside.

The only question is what order should be substituted in place thereof.

Having regard to all the facts of this case in my opinion the proper order to make is to suspend the discharge for four years.

We make no order as to costs.

RANKIN, J.—I agree.

The learned Judge has found that the fact mentioned in cl. (a) of sub-sec. (2) of sec. 39 of the Presidency Towns Insolvency Act has been established, namely, that the insolvent's assets are not of a value equal to four annas in the rupee so that even in his own view the form of his order was not in conformity with that finding. Owing, I think, to the form of the Official Assignee's report and of the affidavit in opposition, the facts mentioned in cl. (a) are the only ones read into the

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order, and, in my opinion, it should also be read into the order that the insolvent has been guilty of fraud in connection with the alleged transfer of his goods. The case is not serious enough to justify the Court in refusing the discharge altogether : on the other hand, the liabilities and the position of his assets might make it unjust in this case to refuse the discharge until a dividend of four annas in the rupee could be paid. I think, therefore, that the best course is to make the order proposed by the Chief Justice. It is entirely wrong, upon a condition as to payment, to give the insolvent his discharge either immediately or after the payment is made. Any order of the kind mentioned in cl. (1) (d) must be made exactly within the terms of the clause.

Mr. C. C. Ghosh, Solicitor for the Appellant.

Mr. R. C. Mitter, Solicitor for the Respondent.

S. N. B.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

NOS. 22 AND 510 OF 1923.

WALMSLEY, J.	GULAM HOSSAIN PRA-
MUKERJI, J.	DHANIA, Defendant,
1925,	Appellant,
Heard,	v.
16, June.	K. S. BONNERJEE,
Judgment,	Plaintiff, Respondent.
17, June.	

Bengal Tenancy Act (VIII of 1885), sec. 50, sub-sec. (2), presumption under—Nature of proof required, to be entitled to presumption—Rent receipts for each of the twenty years, if must be produced—Finding arrived at without considering other evidence relating to the wanting years, if can be set aside in second appeal—High Court, if competent to deal upon admitted facts and decide case in second appeal.

For the purpose of the presumption arising

under sec. 50 (2) of the Bengal Tenancy Act, in order to prove that a tenant has been holding at a uniform rate of rent for twenty years it is not necessary that he should prove payment of rent for all those years and produce dakhilas for every one of those twenty years. Uniform payment for the wanting years may be proved otherwise, by other proof and from surrounding circumstances.

Where the Special Judge arrived at a finding against the tenant merely relying on the dakhilas produced and not considering the oral evidence adduced :

Held—That the finding having been arrived at on a misunderstanding of the principle laid down in judicial decisions was liable to be set aside and it was open to the High Court to deal with the case upon the admitted facts and to hold that in view of the circumstances proved in the case the tenants were entitled to the presumption contained in sec. 50, sub-sec. (2) of the Bengal Tenancy Act.

These were appeals preferred against a decree of J. Bartley, Esq. Special Judge of Tipperah, dated the 28th June 1922, modifying a decree of the Assistant Settlement Officer at Chandpur (Mr. S. N. Sen Gupta), dated the 15th April 1920.

The facts of the case will appear from the judgment.

Babu Srish Chandra Sen Gupta for the Appellant.

Babu Monmohun Banerji for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—These two appeals arise out of two applications made by the Plaintiff landlord for settling fair and equitable rent under the provisions of sec. 105 of the Bengal Tenancy Act. The Defendants

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have been recorded in the record-of-rights as occupancy raiyats. Appeal No. 22 relates to Khatian Nos. 196, 201 and 288 of Mouza Pathair and Appeal No. 510 relates to Khatians Nos. 29, 43, 55, 59 and 120 of Mouza Bardeil. The Assistant Settlement Officer held that the tenants had succeeded in proving that they were holding the *jamas* at a uniform rate of rent for twenty years prior to the institution of the proceedings and that, therefore, the *jamas* were not liable to enhancement having regard to sec. 50, sub-sec. (2) of the Bengal Tenancy Act. On appeals being preferred by the Plaintiff against the decision of the Settlement Officer, the Special Judge set aside the decision of the primary Court holding that the *jamas* were liable to enhancement and ordered enhancement at the rate of 2 annas 6 pies in the rupee. Against this decision of the Special Judge, the present appeals have been preferred by the tenants.

It will be convenient to deal with the two appeals separately; and I propose, first of all, to take up appeal No. 22. This appeal, as I have said, relates to three Khatians Nos. 196, 201 and 288. So far as Khatians Nos. 196 and 201 are concerned, the learned Special Judge observes that, with regard to Khatian No. 196, it is shown that the rent from 1293 to 1305 was what it is now and the tenant states that it has not been changed but that no evidence apart from the statement of the tenant is to be found with regard to the rate of rent for the last twenty-two years; and, as to Khatian No. 201, he observes that there is one *dakhila* of 1300, but there is no evidence except the verbal statement of the tenant with regard to the rate of rent for the subsequent 27 years. On those facts, the learned Special Judge was not inclined to give the tenants the benefit of the presumption which arises under

sec. 50 (2) of the Bengal Tenancy Act. In arriving at this conclusion, the learned Judge, in my opinion, erred on a point of law. It has been held in a series of cases in this Court that, in order to prove that a tenant has been holding at a uniform rate of rent for twenty years, it is not necessary that he should prove payment of rent for all those years and produce *dakhilas* for every one of those twenty years. A presumption similar to that contained in sec. 50 (2) of the Bengal Tenancy Act will be found embodied in sec. 16 of Act X of 1859. In the case of *Kattyani Debi v. Soondurce Debi* (1), the learned Judges observed as follows: "It is not absolutely necessary that *dakhilas* should be for twenty consecutive years before the date of suit; for, it might frequently happen that parties with every right to the presumption might lose one or two *dakhilas* here and there during such a long period; and it would be manifestly unjust to deprive them of the benefit allowed by law when no suspicion could arise of misfeasance, merely because one or two of these receipts had been mislaid or lost. In the present case, the missing *dakhilas* are for years about the middle of the period and we do not think that their non-appearance should defeat the special Appellant's claim to the presumption." In the case of *Elahibuksh Chaudhury v. Roopum Teli* (2), the learned Judges observed: "In order to take the benefit of the presumption which the law allows to be raised from proof of the fact that rents have not varied for twenty years previous to the suit, raiyats can give what is the best proof of non-variation, namely, that they have paid uniformly for the twenty years preceding the suit. When receipts are filed not for the entire period of twenty

(1) 2 W. R. (Act X Rulings) 80 (1863).

(2) 7 W. R. 284 (1867).

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years preceding the suit but some are wanting here and some there in that interval, still uniform payment may be proved otherwise for the wanting years by other proof and from surrounding circumstances." The same view was taken in a number of other cases in this Court—notably in the case of *Catherine Foschola v. Huro Chunder Bose* (3), in which it was said that "it is sufficient if the whole space of that time is included between limits upon which the evidence bears provided that that evidence is such as to lead to the belief that the rent was uniform throughout the intervening period." In a recent case of this Court, namely, the case of *Satish Chunder Biswas v. Nil Madhub Saha* (4), it was laid down that "for a presumption to arise under sec. 50, sub-sec. (2) of the Bengal Tenancy Act, what a tenant has got to establish is not that rent has been actually paid at a uniform rate during twenty years but that the tenant has held at a rent or rate of rent which has not been changed during twenty years. Such holding may be established even if it is not proved that rent has actually been paid during a portion of the twenty years." The learned Judges further observed that "in order to establish uniform payment of rent for twenty years, it is not necessary to produce rent receipts for the entire period of twenty years preceding the suit. Uniform payment for the wanting years may be proved otherwise by other proof and from surrounding circumstances." In another case of this Court, namely, the case of *Poran Chandra Sow v. Kanta Mohun Mullick* (5), there were two intervals of twelve years each between the dates of the *dakhilas* that had been produced in support of the Defend-

ant's case and this Bench, as at present constituted, observed that, in the absence of anything to show that there was any change in the tenancy or that during these intervening periods there was any alteration in the rent, it should not have been held that the Appellant, the tenant, was not entitled to the presumption which arose under sec. 50, cl. (2) of the Bengal Tenancy Act. In the present case, the learned Special Judge does not in his judgment refer at all to the oral evidence that he says is on the record in support of the case put forward on behalf of the tenants. He merely relies upon the *dakhilas* in order to find whether payment of rent at a uniform rate has been proved for a period of twenty years. In dealing with the matter in this way, the learned Judge evidently has misunderstood the principles laid down in the cases to which I have referred and his finding to the effect that the tenants have failed to prove payment of rent at a uniform rate for twenty years arrived at in the way in which it has been arrived at, namely, by ignoring the oral evidence as if it does not count at all and insisting on production of *dakhilas* in proof of payment of rent cannot be supported. It has been contended on behalf of the Plaintiff-Respondent that this finding of the lower Appellate Court is a finding of fact and that it is not open to us to interfere with it in second appeal; and, in support of this contention, reliance has been placed upon the judgment of this Court in the case of *Alimuiddin Mollah v. K. S. Bonnerjee* (6). That case, however, is no authority for the proposition that a finding of fact to the effect that uniform rate of rent has not been proved cannot be interfered with in a second appeal under any circumstances; for, it appears that, with regard to one of the *Khatians* dealt in

(3) 8 W. R. 284 (1907).

(4) 87 C. L. J. 898 (1922).

(5) 29 C. L. J. 487 (1924).

(6) 29 C. W. N. 800 (1924).

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the judgment of that case, namely, Khatian No. 75, the finding of the Special Judge on appeal was set aside by this Court on the ground that it had been arrived at without a proper consideration of the principles which are applicable to a case of this nature. I am, therefore, of opinion that the finding of the Special Judge on this question so far as Khatians Nos. 196 and 201 are concerned must be set aside.

The question then remains as to whether the case should be sent back for a further consideration by the learned Special Judge with regard to these two Khatians. In view of the fact that the evidence which is on the record and which was believed by the Court of first instance has not been disbelieved by the learned Special Judge and in view also of the fact that there are no circumstances from which it may be inferred that there was a change in the tenancies or that there was a variation in the rents between those that are evidenced by the *dakhilas* which have been produced and the rents that are being paid at the present time, I think, it would be a mere waste of time to send the case back for a further consideration by the Court of Appeal below so far as these two Khatians are concerned. I am of opinion notwithstanding the observations of one of the learned Judges in the case to which I have last referred and with all deference to those remarks that it is open to us, having regard to the fact that this finding of the learned Judge is no longer in our way, to deal with the case upon the admitted facts and to hold that, in view of the circumstances proved in the case, the tenants are entitled to the presumption contained in sec. 50, sub-sec. (2) of the Bengal Tenancy Act. I am, therefore, of opinion that, so far as these two Khatians are concerned, the decision

of the Special Judge should be set aside and that of the Assistant Settlement Officer restored.

As regards Khatian No. 288, the position seems to be this : The learned Special Judge says that these are no *dakhilas* produced so far as this Khatian is concerned. It appears, however, that certain *dakhilas* were produced relating to this Khatian. They were before the Assistant Settlement Officer when he dealt with the case. After the disposal of the case by the first Court, these *dakhilas* were taken away by persons other than the tenants who produced them before the Court ; and, after the appeal had been disposed of by the learned Special Judge, an application was made to him by the tenants praying for an opportunity of getting these *dakhilas* admitted in the record of the case. That application was, however, refused. From the application that was filed before the Special Judge, it appears that the *dakhilas* were taken away by some third party and, after search, the tenants were able to get hold of those *dakhilas*. The case, so far as Khatian No. 288 is concerned, must, therefore, be sent back to the learned Special Judge in order that he may admit these *dakhilas* into the record, take them into consideration and then come to a proper finding and dispose of the case.

The result, therefore, is that appeal No. 22 is allowed in this way : So far as Khatians Nos. 196 and 201 are concerned, the decree of the lower Appellate Court is set aside and that of the Court of first instance is restored with costs to the tenant both in this Court and in the Court of Appeal below : so far as Khatian No. 288 is concerned, the decree of the lower Appellate Court is set aside and the case is remitted to the learned Special Judge to be dealt with in accordance with the obser-

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vation made above. Costs of the parties with reference to this Khatian will abide the result. We assess the hearing-fee in this Court at eight rupees per Khatian.

Appeal No. 510, as I have stated, relates to 5 Khatians, namely, Khatians Nos. 29, 43, 55, 59 and 120. The learned Special Judge dealt with all these Khatians in a lump and his judgment, so far as these Khatians are concerned, is this: "In some, there are variations which it is sought to explain by saying that portions of the *jama* were sold. Where this is the case, although there is a rough proportion between the various areas and the various rents paid, there remains no proof that the rent or rate of rent remained unchanged particularly as it is not the case of either party that any fixed rate was in force." I am not satisfied that this is a proper way of dealing with these Khatians. If there was a proportion between the different areas and the different rents that were paid, the question that had to be considered was whether from the materials disclosed it could be held that there was no variation of rent; and in this respect the materials relating to the different Khatians could not possibly have been of exactly the same nature. It is desirable, therefore, that the learned Judge should deal with each of these Khatians separately, come to a proper finding of fact with regard to each of them and then decide whether the tenant is entitled to the benefit of the presumption contained in sec. 50, sub-sec. (2) of the Bengal Tenancy Act. This appeal, therefore, is allowed. The decision of the Special Judge is set aside and the case is sent back to him so that he may deal with it in accordance with the observations made above. Costs will abide the result. The hearing-fee in this Court is assessed at eight rupees per Khatian.

WALMSLEY, J.—I agree.
S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

REF. No. 5 of 1925.

CUMING, J.

PAGE, J.

1926,

KING-EMPEROR

Heard,

v.

8, February. INDU BHUFAN SARKAR.

Judgment,

11, February.

Income-tax—Fisheries within permanently settled estates—Profits from fisheries assessed at time of settlement, if liable to income-tax—Income Tax Act (XI of 1922), sec. 6—"Other sources" in sec. 6, if includes income from fisheries—Bengal Permanent Settlement Regulation (I of 1793), Arts. III, IV and VI.

Where income from fisheries lying within an estate was included in the assets upon which land revenue was assessed under the Permanent Settlement Regulation (I of 1793), incomes from such fisheries are not further liable to assessment under the Income Tax Act.

An intention to take away the right conferred by the Regulation on persons paying land revenue cannot be gathered from the use of the general words "other sources" in the last item of heads of income, profits and gains, made chargeable to income-tax by sec. 6 of the Income Tax Act.

This was a Reference under sec. 66 (2) of the Income Tax Act made by the Commissioner of Income Tax, Calcutta (Mr. W. Prentice).

The REFERENCE was as follows:—

"At the request of the assessee I have the honour to submit herewith under sec. 66 (2) of Income Tax Act, the following questions of law for the decision of the Hon'ble High Court:—

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Is the income from the *jalkars*, which were included in the assets upon which the *jamas* of the Estates T. Ns. 106 and 107 of the Dacca Collectorate and T. N. 6301 of the Faridpur Collectorate were assessed under Regulation I of 1793 at the time of the Permanent Settlement, liable to assessment to income-tax under Act XI of 1922.

2. The facts are as follows:—Babu Indu Bhusan Sarkar, an assessee of Faridpur District, declared in his return filed under sec. 22 (2), Income Tax Act, an income of Rs. 6,574 from *jalkars* and was assessed under sec. 23 (3) on this and other sources of income. He appealed against the assessment to the Assistant Commissioner of Income Tax, Faridpur, on the ground that this income from *jalkars* arose from assets which were included in the assets taken into consideration in settling the *jama* of the three estates T. Ns. 106 and 107 of the Dacca Collectorate and T. N. 6301 of the Faridpur Collectorate at the time of the Permanent Settlement under Regulation I of 1793 and that any further imposition on the same source in the shape of income-tax would be contrary to Art. VI of the said regulation. There was no claim that income from *jalkar* was agricultural income as defined in sec. 2 (1), Income Tax Act (XI of 1922) and exempt as such under sec. 4 (3) (viii) of the same Act. The assessee supported his claim by a reference to the decision of Dawson-Miller, C. J., in the case of *Maharajadhiraj of Darbhanga v. Commissioner of Income Tax* (5). The Assistant Commissioner rejected the appeal relying on the judgment of Rankin, J., in the case of *Emperor v. Raja Probhat Chandra Barua* (6).

3. The assessee has now applied for a Reference of this question of law to the Hon'ble High Court under sec. 66 (2), Income Tax Act (XI of 1922). I have ascertained from the Collectors of Dacca and Faridpur that the income from the *jalkars* were included in the assets upon which the *jamas* of the said estates were fixed under Reg. I of 1793. Accordingly I refer the question as stated at the commencement of this letter.

4. Under sec. 66 (2) I am required to express my opinion on the question which is referred and I would answer the question in the affirmative, adopting the reasons given by Rankin, J., in his judgment in the case of *Emperor v. Raja Probhat Chandra Barua* (6).

5. In that judgment of Rankin, J., the remark was made that the High Court was without any assistance in regard to the practice of the revenue authorities since 1886 as regards fisheries in permanently settled estates. A reference to the previous assessment records of this assessee shows that he has for years declared and has been assessed on income from fisheries; and so far as my personal experience goes (and the enquiries I have made uniformly confirm my experience) income from fisheries has all along been assessed to income-tax in Bengal without objection. The claim now made that income from fisheries and from similar items of non-agricultural income in permanently settled estates are exempt from income-tax is a new one which so far as I can discover has only been raised in the last two or three years and whatever the legal position may be (and the judgment of Rankin, J., appear to me to be conclusive on the subject) there can be no doubt that the general practice all along has been to assess income from such sources to

(5) I. L. R. 3 Pat. 470; [1925] Pat. 49, 53 (1924).

(6) I. L. R. 51 Cal. 504—547 (1924).

(6) I. L. R. 51 Cal. 504—547 (1924).

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income-tax—*vide* Rulings 9, 10, 12 of the Bengal Board of Revenue in Appendix IV, page 75, Bengal Income Tax Manual, 1907, which were given in 1886 and have been followed uniformly ever since in Bengal."

Babus Rupendra Kumar Mitter and *Dharma Das Sett* for the Applicant Assessee.

Mr. B. L. Mitter (Advocate-General), *Babus Surendra Nath Guha* and *Satindra Nath Mukerji* for the Government.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This is a Reference under sec. 66 (2) of the Income Tax Act by the Commissioner of Income Tax and the question of law referred for decision is—

Is the income from the *jalkars*, which were included in the assets upon which the *jamias* of the Estate Touzi Nos. 106 and 107, Dacca Collectorate and Touzi No. 6301 of the Faridpur Collectorate were assessed under Reg. I of 1793 at the time of the Permanent Settlement, liable to assessment to income-tax under Act XI of 1922? I am of opinion that the answer must be in the negative. The sections of the Income Tax Act on which the Commissioner relies are— :

Sec. 4 which provides that save as hereinafter provided this Act shall apply to all incomes, profits or gains as described or comprised in sec. 6 from whatever source derived, accruing, or arising or received in British India or deemed under the provision of this Act to accrue or arise or be received in British India.

Sec. 6 provides : " Save as otherwise provided by the Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely,

(i) Salaries

(ii) Interest on securities.

(iii) Property.

(iv) Business.

(v) Professional earnings.

(vi) Other sources."

The contention of the Commissioner of Income Tax is that the profits from fisheries fall under " other sources " and that there is nothing in the Act which exempts such profits from the operation of the Act.

The assessee relies on Reg. I of 1793 (the Bengal Permanent Settlement Regulation) with special reference to Arts. III, IV, VI.

He argues that by this Regulation the amount of revenue payable by his estate is fixed in perpetuity; that the income from these fisheries was taken into account in assessing the amount of revenue to be paid, and hence he is paying revenue for these fisheries, and that now to assess these fisheries to income-tax is in reality to increase the amount of revenue payable by him.

He does not contend that the legislature has not the power to do so, but he argues that the Act which takes away a right conferred on the subject by a previous enactment must do so in clear and unequivocal language.

The Commissioner of Income Tax contends that the language of the Income Tax Act is sufficiently clear, and that by the words " other sources " so much of Reg. I of 1793 as covers the income derived from fisheries is repealed.

To discover what is the rule which should guide the Courts in determining whether the provisions of one Act are repealed or modified by a subsequent enactment it will be sufficient if I refer to the observation of three very learned Judges.

Lord Selbourne, Lord Chancellor in the case of *Mary Seward v. The Owners of the*

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Vera Cruz (1) remarks—"If anything be certain, it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from, merely by force of such general words without any indication of a particular intention."

Let us apply the rule to the present case.

We have in the Regulation of 1793 an Act which deals specially with the fixing of the revenue to be paid by permanently settled estates. The words used in the Income Tax Act are very general, *viz.*, "other sources." The provision is obviously capable of a reasonable and sensible application without extending it to incomes derived from fisheries. They are obviously not the only income which might fall under other sources.

There is, to my mind, nothing in the words "other sources" to indicate that by these words the legislature had the particular intention of repealing so much of Reg. I of 1793 as dealt with the fixity of revenue so far as fisheries were concerned.

Lord Justice Bowen re-stated the same rule in the case of *Re : Curo Mansfield v. Mansfield* (2). In the case of *Garnett v. Brady* (3), Lord Blackburn remarked: "But where there is the case, where the particular enactment is particular in the sense that it protects the right, the property, the privileges of particular person or a class of persons the reason for the rule which has been acted upon is exceedingly plain and strong. It would be very unjust or I would rather say unfair (I do

not go further than that) to pass an enactment taking away from a particular person or class of persons his or their rights without hearing what he or they have got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class, which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it and it is not to be imputed to the legislature or to be supposed that the legislature would do what was unfair." Let us apply these observations also to the present case.

Reg. I of 1793 does certainly confer certain rights and privileges on a particular class of persons with whom these estates were settled at the time of the Permanent Settlement, enacting that the revenue which they should pay for their estates then settled with them was fixed for ever. If these rights are to be taken away by the general words "other sources of income," clearly their rights would be taken away without their having any knowledge or opportunity of resisting it.

As Lord Blackburn puts it, it is an intelligible principle that the legislature shall not be presumed to have done anything unfair and to have taken away a privilege not having openly stated that they meant to take it away or in such open or clear language that the persons affected might come and resist and use arguments to shew why it should not be taken away but having simply used general words quite consistent with their never having thought of the privilege at all.

It must be remembered that the Income Tax Act was passed by the Central Assembly. There are many parts of India where the Permanent Settlement and all that it implies are entirely unknown, and there is nothing to show that the legislature when enacting the particular

(1) 10 App. Cas. 59, 64 (1884).

(2) L. R. 48 Ch. Div. 12, 17 (1888).

(3) 9 App. Cas. 914, 967 (1878).

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Act had in mind the Permanent Settlement and deliberately took away one of the privileges conferred by the Regulation. As Lord Blackburn puts it the general words are quite consistent with the legislature having never thought of the Permanent Settlement at all. It is difficult for me to think that the legislature would by an indirect route alter the important and long-cherished privileges conferred by the Permanent Settlement.

I am not in any way impressed by the argument of the Commissioner of Income Tax that hitherto incomes from fisheries have been assessed to income-tax without objection. It may have been but that does not make it any more legal. Neither is there anything to shew that the incomes of these fisheries he referred to were taken into account in fixing what revenue had to be paid.

The view which I now take is the view which has commended itself to the Madras High Court [see *Chief Commissioner of Income Tax v. Zemindar of Singampatti* (4)] and also to the Patna High Court [see *Maharajadhiraj of Darbhanga v. Commissioner of Income Tax* (5)]. The answer I would give to the Reference of the Commissioner of Income Tax is that the incomes of such *julkars* as are referred to in his letter of reference are not liable to be assessed to income-tax.

PAGE, J.—I agree. In the case of *Emperor v. Probbhat Chandra Barua* (6) I had occasion to state my views on this matter and I need not repeat them. In that case I had the misfortune to differ from my brother Rankin, but before that case was decided the Madras High Court in *Chief Commissioner of Income Tax v. Zemindar of Singampatti* (4), and since it was

decided, the Patna High Court in *Maharajadhiraj of Darbhanga v. Commissioner of Income Tax* (5), arrived at the same conclusion as that which I expressed in *Emperor v. Probbhat Chandra Barua* (6). It is highly important that questions affecting the liability of the subject to taxation should not remain in doubt, and notwithstanding the dissentient views of Rankin and Mullick, J.J., it is satisfactory that a Full Bench of the Madras High Court, and a Division Bench of the High Courts at Calcutta and Patna which have been invited to express an opinion on this important matter have each now answered the question propounded in the same sense, and are of opinion that income derived from sources such as that which is the subject-matter of this Reference is not assessable to income-tax.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 280 OF 1924.

NEWBOLD, J.	}	RAKHAL CHANDRA
MUKERJI, J.		BISWAS, Petitioner,
1924,		v.
25, November.	}	THE KING-EMPEROR.

Appeal—Conviction of rioting, if can be altered to one of simple hurt in the absence of charge under sec. 323, Indian Penal Code (Act XLV of 1860).

In the absence of a charge under sec. 323, I. P. C., framed during the trial, a conviction under sec. 147, I. P. C., cannot be altered in appeal to one under sec. 323, I. P. C.

This was a Rule granted on the 29th September 1924 against an order of the Honorary Magistrate of Barisal (Mr. B. B. Gupta), dated the 10th July 1924, convicting the Petitioner under sec. 147, I. P. C., and sentencing him to pay a fine of Rs. 25, modified on appeal by the Addi-

(4) I. L. R. 45 Mad. 518 (1922).

(5) I. L. R. 3 Pat. 470; [1925] Pat. 49 (1924).

(6) I. L. R. 51 Cal. 504 (1924).

(5) I. L. R. 3 Pat. 470; [1925] Pat. 49 (1924).

(6) I. L. R. 51 Cal. 504 (1924).

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tional District Magistrate of Backerganj (Mr. H. Graham), on the 7th August 1924.

The facts of the case will appear from the judgment.

Babu Radhikaranjan Guha for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

Three persons of whom the Petitioner is one were sent up for trial for an offence under sec. 147, I. P. C. The Petitioner and one of the other persons were tried and convicted under that section and sentenced to pay a fine of Rs. 25 each. On an appeal preferred by the Petitioner and the co-accused who had been convicted the learned District Magistrate acquitted the co-accused of the Petitioner and altered the conviction of the Petitioner from that under sec. 147, I. P. C., to one under sec. 323, I. P. C., maintaining the sentence passed upon him.

The Petitioner has obtained a Rule to show cause why his conviction and sentence should not be set aside on the ground amongst others that such an alteration of the conviction is not permissible as the Petitioner had not been tried on a charge under sec. 323, I. P. C. The contention seems to be supported by the decision of this Court in the case of *Genu Majhi v. The King-Emperor* (1), where following the decision in the case of *Yakub Ali v. Lethu Thakur* (2), it was held by this Court that in the absence of a charge under sec. 323, I. P. C., framed during trial, the conviction under sec. 147, I. P. C., cannot be altered to one under sec. 323, I. P. C.

The Rule is accordingly made absolute. The conviction and sentence passed on the

Petitioner are set aside and the fine if paid will be refunded.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD ATKINEON.

LORD CARSON.

SIR JOHN EDGE.

1925,

Heard, 21, 26, 27,

30 & 31, March.

Judgment,

5, May.

KIRKWOOD *alias* MA

THEIN and anr.,

Appellants,

v.

MAUNG SIN and anr.,

Respondents.

Civil Procedure Code (Act V of 1908), Sch. II, secs. 20, 21—Application to have award filed—Award found not binding on minor parties—Refusal to file award on that ground only—Effect—Suit to set aside award—Specific Relief Act (I of 1877), sec. 39 or 42, whether applicable to such suit—Limitation Act (IX of 1908), Sch. I, Art. 91.

Where upon an application under Sch. II, secs. 20 and 21, of the Civil Procedure Code, to have an award filed, the District Judge found that three of the alleged parties to the reference were not bound by the award, because they were minors and the reference purported to be made on their behalf by persons who had no legal authority to represent them, and passed order to the effect that though he was not prepared to hold that the award was not binding on the adult parties the award in his opinion was not one which should be filed, and dismissed the application :

Held—That the dismissal might have per se deprived the adult parties to the award of the power of enforcing it by certain effective statutory methods, but it did not render the award void or otherwise unenforceable as against those parties.

That a suit to set aside the award by parties thereto fell within sec. 39 and not sec. 42 of the Specific Relief Act and was governed by Art. 91 of the Limitation Act.

(1) 18 C. W. N. 1276 (1914).

(2) 1 L. R. 80 Cal. 288 (1902).

KIRKWOOD *alias* MA THEIN v. MAUNG SIN.

This was an appeal (No. 87 of 1924) by special leave from two decrees of the Chief Court of Lower Burma, dated the 18th April 1921, reversing a decree of the District Court of Hanthawaddy, dated the 22nd October 1917.

The suit was instituted by the Appellants and others for a declaration that a reference and award were void and not binding on the Plaintiffs.

The District Judge of Hanthawaddy passed a decree declaring the references and award void and not binding on the parties thereto. In his judgment he held that, under Art. 91 of the Schedule of the Limitation Act, the suit was barred as against the 4th Plaintiff (the second Appellant) as she had been an adult at the time of the references, and as against the second Plaintiff (the first Appellant) inasmuch as she had not proved that her minority had ceased within three years of the institution of the suit, but as it was admitted that the bar of limitation did not affect the other Plaintiffs and as he found that they were not properly made parties to the reference, he held the award was void against them. He also held on the construction of the award that the arbitrator had failed to decide two important matters referred to him, *i.e.*, the division of the property in dispute and the ownership of mortgages held by the estates, and that this failure made the award void. As to the second Plaintiff and first Appellant, Ma Thein, he was of opinion that as a minor at the time of the reference and award and not properly represented, she was not a party thereto, but that this did not prevent her right of suit in regard thereto being barred. He, however, held that the rights of the parties were so confused that as the award was not binding on the first and third

Plaintiffs, it was void as against all the Plaintiffs.

Each of the Respondents appealed, and the Chief Court confirmed the finding of the District Court that the first Appellant did not sue within three years of attaining her majority, and without going into the merits of the case decided that the suit must be dismissed so far as concerned her claim and that of the second Appellant as barred by limitation.

The facts are set out at length in the judgment of the Judicial Committee.

Mr. DeGruyther, K. C. and the *Hon. Geoffrey Lawrence, K. C.* for the Appellants.—In considering the validity of the award Ma Thein is on a different basis to Ma Shwe U. The former was a minor, she was not a party to the reference and was not represented at the time of the award. The award therefore is a nullity as regards her. The validity of the award must be raised in this suit because the award was set up as a defence in the partition suit.

The award was a nullity so far as the minors were concerned so that they need not and did not sue to have it set aside.

Rashid-un-nesa v. Ismail Khan (4), *Petherpermal Chetty v. Muniandi Seroat* (5), *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (6), *Sajid Ali v. Ibad Ali* (7) and *Banku Behari Shaha v. Kristo Go-bindo Joardar* (8).

If the award is void as to certain persons it is void as to the others also because the various parts are inseparable.

(4) L. R. 36 I. A. 168: s. c. 13 C. W. N. 1182 (1909).

(5) L. R. 35 I. A. 88: s. c. I. L. R. 35 Cal. 551; 12 C. W. N. 562 (1908).

(6) L. R. 34 I. A. 87: s. c. I. L. R. 34 Cal. 329; 11 C. W. N. 424 (1907).

(7) L. R. 22 I. A. 171: s. c. I. L. R. 23 Cal. 1 (1895).

(8) I. L. R. 30 Cal. 433 (1902).

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Russell on Arbitration, 7th Ed., Part II, sec. 4, pp. 261-263, 325, 331, 334.

Art. 91 of the Limitation Act is not applicable because the award is not an instrument within the meaning of the article.

Moreover the suit was for a declaratory decree under sec. 42 of the Specific Relief Act and not for setting aside the award.

The Respondents had applied to have the award filed, that application was refused in December 1910 so that there was no necessity to bring a suit to "set aside" the award. The meaning of "set aside" is to "cancel" or "destroy."

If Art. 91 were applicable even so the suit would not be barred, inasmuch as time would begin to run only after the refusal to file the award, because then only the facts entitling the Plaintiff to have the award set aside became known to him.

[Reference was made to *Dinabandu Jana v. Durga Prasad Jana* (9) and *Mitra on Limitation*.]

The article which would be applicable here would be Art. 120 inasmuch as this is a suit for a declaration, and no other article is specifically applicable.

The right to sue could not have accrued previous to the award and being within 6 years of the award it is not time-barred.

Mahomed Riasat Ali v. Hasin Banu (10) and *Kodoth Ambu Nair v. Secretary of State for India* (11).

Messrs. Dunne, K. C. and E. B. Raikes for the Respondents.—The suit is barred by Art. 91 of the Limitation Act and must be dismissed.

The meaning of the expression "set aside" is wider than the meaning "can-

cel" as is apparent from a comparison with Art. 95.

Jugadamba v. Dakina Mohun (12).

The present suit is not a suit in which a bare declaration can be asked for under sec. 42 of the Specific Relief Act, there is a prayer for the further substantive relief that the document may be set aside.

Similarly this is not a suit brought under sec. 39 of the Act, and apart from those two sections there is no right to bring a suit for a bare declaration. It is a type of suit which is specifically dealt with by Art. 91 of the Limitation Act. The Appellants contend that the award is a nullity and that there is no need to bring a suit to set it aside. It might similarly be contended that a decree obtained by fraud is a nullity but Art. 95 specifically deals with such a case. Yet on the Appellants' argument you could avoid Art. 95 by bringing a suit for a declaration and claiming to come under Art. 120. Art. 120 is not applicable because there is a specific article applicable to this type of suit.

Malkarjun v. Narhari (13) and *Jafra Begam v. Ali Raza* (14).

The cases cited from Russell on Arbitration are not in point. The rights there were inter-dependent, here the rights of the parties are severable.

They also referred to *Kathama Nachiar v. Dorasinga Tever* (15), *Deokali Koer v. Kedar Nath* (16) and *Sheoparsan Singh v. Ramnandan Singh* (17).

Mr. DeGruyther, K. C. replied.

(12) L. R. 13 I. A. 84; s. c. I. L. R. 13 O. L. 308 (1886).

(13) L. R. 27 I. A. 216, 228; s. c. I. L. R. 25 Bom. 337; 5 O. W. N. 10 (1900).

(14) L. R. 28 I. A. 111, 117, 118; s. c. I. L. R. 23 All. 383; 5 O. W. N. 785 (1901).

(15) L. R. 2 I. A. 169 (1875).

(16) I. L. R. 39 Cal. 704, 706 (1912).

(17) L. R. 43 I. A. 91; s. c. I. L. R. 43 Cal. 694; 20 O. W. N. 738 (1916).

(9) I. L. R. 46 Cal. 1041, 1050; s. c. 23 O. W. N. 716 (1919).

(10) L. R. 20 I. A. 155, 159; s. c. I. L. R. 21 Cal. 157 (1893).

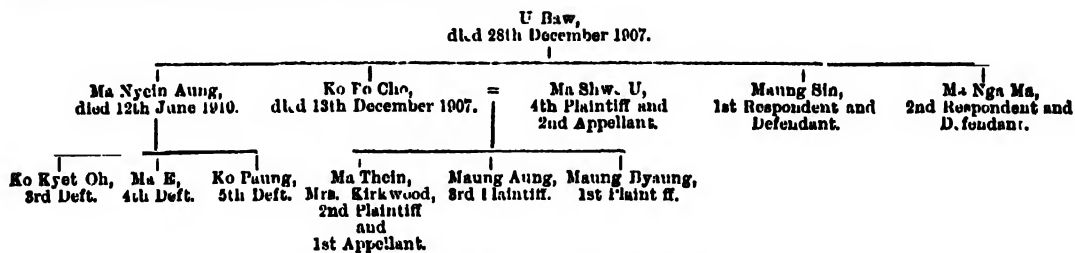
(11) I. L. R. 51 I. A. 257; s. c. 29 O. W. N. 365 (1924).

KIRKWOOD *alias* MA THEIN v. MAUNG SIN.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—The facts of this case are complicated and involved. This is due to the circumstance that several of the parties concerned have on many occasions embarked somewhat recklessly on needless litigation, the different branches of which were not always consistent with each other. It is nevertheless essential to unravel these complicated facts in order to apprehend clearly what are the questions which must be dealt with on this appeal, and to appreciate the true nature

and reach of the decisions upon them. The subject-matter from which the litigation sprung was the administration and distribution of the assets of two Burmese Buddhists, father and son, named respectively U Baw and Ko Po Cho, the latter of whom died on the 13th of December 1907, and the former of whom, the father, died fifteen days later, namely, the 28th of December 1907. To make the proceedings which have taken place intelligible it is necessary as a preliminary to examine the following pedigree :—



The words "Plaintiff" and "Defendant" and "Appellant" and "Respondent" printed underneath the names of the members of this family indicate the positions they respectively assumed, and the action they respectively took, in the legal proceedings subsequently instituted to assert their claims to certain shares in the assets of U Baw and Ko Po Cho, deceased. At the date of the latter's death it is admitted that his three children were minors; that none of them had come of age before the 20th of February 1910, when the submission to arbitration hereinafter dealt with was entered into; that two of them, namely, Maung Aung and Maung Byaung, were still minors on the 13th of March 1914, when the suit was instituted in which the order appealed from was made, and that the girl Ma Thein, the eldest of the three children, had failed to establish that she was a minor within three years of the 13th of

March 1914. Letters of administration of the estate of U Baw, deceased, were in the year 1910 granted to his son Maung Sin. Ma Shwe U, the widow of Ko Po Cho, deceased, married again in the year 1910 a man named Maung Po Yeik, and Ma Thein, the daughter, married Colonel Kirkwood on the 1st of July 1913. Disputes having arisen between the descendants of U Baw and the members of the family of Ko Po Cho, a submission of these disputes to the arbitration of one Lugyi U Hla Baw was on the 20th of February 1910, drawn up. It purported to have been executed by Ma Nyein Aung, Maung Sin and Ma Nga Ma, descendants of U Baw, and Ma Shwe U. These executing parties were all adults. The submission further purported to have been executed in addition by the three children of Ko Po Cho, then minors, by two guardians, one Maung Tundu, acting on behalf of Ma Thein and Maung Aung,

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and the second, Maung Po Yeik, on behalf of Maung Byaung. It was not disputed on this appeal that these two persons so purporting to sign this submission as guardians for the three minors, the children of Ko Po Cho, were never appointed guardians of the children on whose behalf they purported to sign and had no right or authority whatever so to do. The consequence of this is that the three minor children are no parties to the submission and are not bound by the award made in pursuance of it. On the 12th of April 1910, a further question, touching the ownership and disposition of certain property, was by the agreement of the pleaders representing the parties to the first submission, referred to the arbitration of the same arbitrator. The submission is very obscurely worded, and its provisions are to a great extent immaterial in the present appeal. They are in addition rather peculiar in character. The first begins by reciting that the parties to it have a dispute amongst themselves, that they bind themselves to abide by the decision of the arbitrator, that he may decide this dispute finally in the manner hereinafter indicated, that is, first by partitioning in the manner set out certain properties which are stated to be the subject of the dispute. These properties are divided in five classes or categories, marked by five letters of the alphabet. The first class (a) comprises land and rent belonging to U Baw, Ko Po Cho, and Ko Sin. The second class (b) comprises similar lands and rents belonging to Ko Po Cho and Ko Sin. The third class (c) comprises certain paddy lands 216'11 acres in extent, belonging to Daw Hmo. The fourth class (d) comprises moveable and immoveable property, debts, rents, etc., belonging to Ko Po Cho and his wife Ma Shwe U. The fifth class (e) com-

prises debts due and to be paid to, and debts to be recovered by Ko Po Cho, his wife, and his three children. As to the first class (a) the direction is that U Baw's share is to be left out of it and the remainder of the property comprised in it is to be divided into four shares, one of which is to be given to Ma Shwe U and her three children, and the three remaining shares to be given to the persons named. The property comprised in class (b) is to be similarly dealt with. The paddy lands, 216'11 acres in extent, are to be divided into three shares, one to be taken by the widow Ma Shwe U and her children, the two remaining shares to go to the persons named. The fourth class (d) is to be divided into two shares, M Shwe U taking one of them and the remaining share to go to the same three children. Further minute directions are given as to the manner in which the indicated partitions are to be effected. They are not material, however, to the matter now in hand. If the law as to the limitation of property existing amongst Burmese Buddhists were the same as the English law dealing with such matters, it might be plausibly contended that under the limitation directed and carried out, Ma Shwe U and her three children would become joint tenants of the lands to be allotted to them, with rights of survivorship amongst them.

The authorities examined and criticised in the judgment of the Board in the case of *Kirkwood v. Maung Sin* (1) seem to lead one to the conclusion that no such rights of survivorship would exist amongst these four beneficiaries if the award were made according or conformed to Burmese Buddhist law. That was a suit instituted in the year 1918 for the administration of the estate of U Baw, a Burmese Buddhist,

(1) L. R. 51 I. A. 334: s. c. 29 C. W. N. 653 (1924).

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governed by Burmese Buddhist law. The Plaintiffs-Appellants were the children of Po Cho, who was himself the eldest son, but second born child, of his father U Baw. The Defendants-Respondents were the two surviving children of U Baw and Daw Hmo, and the representatives of their eldest born child, a daughter, Ma Nyein Aung, who had attained majority and survived both her parents, but died before the institution of the administration suit. By the decision of the Board affirming that of the Chief Court it was held that Po Cho, not being the eldest born, was not the *orasa* son, and that his children were therefore only entitled to a one-sixteenth share of the estate of U Baw.

As far as the Board have been able to ascertain, the proceedings in that suit have not since the year 1924, when the decision of the Board was delivered, proceeded further. On the 20th December 1912, nearly 13 years ago, Ma Shwe U filed a suit against her three children and Maung Sin, alleged to be in possession of part of her deceased husband's estate, for apparently the partition and administration of that estate. For nearly six years this litigation was carried on, and ultimately on the 15th of August 1918, a preliminary decree was made directing that accounts of the properties belonging to Po Cho, of the liabilities thereon, and of mesne profits payable by Maung Sin in respect thereof, should be taken by a Commissioner. The accounts are apparently still being taken, and no final decree has as yet been made. It was during the hearing of this appeal much pressed by Mr. Dunne on behalf of the Respondents, either that the present suit was unnecessary, or that the claim of all the parties concerned to interests in the assets of U Baw or Po Cho could be adjusted and

satisfied in one or other or both of these administration suits. It is quite obvious, however, that the information before the Board is not full enough or precise enough to enable it to express any definite opinion on the soundness of Mr. Dunne's contention on this point.

The arbitrator in the present case made his award on the 10th of June 1910. He found that by the terms of the submission he had power to direct the division among the co-heirs of the properties described in it under the heads (a), (b), (c), (d) and (e) already mentioned, following the rules of division set out therein, and to declare the rights of each and every of the co-heirs thereto. He further states that as to all property not included in those five categories, he will be guided by the ordinary Buddhist law of inheritance. He then proceeds to determine the ownership of the property he was directed to divide. It is difficult to see how he could identify it otherwise, and he then determines in which of the five categories it is included. He finds that most of the debts have been time-barred, sets out in a schedule (No. 6) those he considered good, and directs that they are to be divided on the same principle as the properties in a list he indicates. He further holds that the estate of U Baw is indebted to the extent of Rs. 33,004-9-0, which ought to be deducted from U Baw's estate before division, and that the latter's co-heirs are liable for this debt according to the value of the properties they receive. He then appoints Ko Sin guardian of the persons of Ma Thein and Maung Aung, and Ma Shwe U guardian of the person of Maung Byaung. He further appoints the last-named lady, Ma Shwe U, guardian of the properties of her three above-named children, "until Ma Thein attains the age of majority," on "her (*i.e.*, Ma

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Shwe U) furnishing security to the amount of Rs. 8,000." On the 9th of December 1910, Maung Sin filed an application in the District Court of Hanthawaddy to have the award filed in Court under secs. 20 and 21 of the Second Schedule of the Code of Civil Procedure. This application was opposed by Ma Shwe U, both personally and on behalf of her minor child, Maung Byaung; her other children, Maung Aung and Ma Thein, were made Defendants on the application, and a document was filed by Ma Shwe U, on behalf of herself and as guardian of the minors, stating in detail numerous objections to the aforesaid award. Amongst these are to be found the following:— (1) That the persons who purported to sign the submission as guardians of her three children were not at the time of so signing, or at any subsequent time, guardians of the persons or property of these three minors. (2) That the arbitrator erroneously appointed a guardian to the aforesaid minors, which he had no authority to do. (3) That the arbitrator, in declaring certain properties admittedly in the joint names of Ko Cho, deceased, and Ko Sin, to belong to the estate of U Baw, deceased, exceeded his authority to the detriment of the minors. (4) That the arbitrator failed to decide what debts were left by U Baw and Ko Cho, and what debts were due to the estates of U Baw and Ko Cho. Issues were joined upon these objections. On the 9th of September 1912, the District Judge of Hanthawaddy (Casson, J.) made a preliminary order dealing with these issues. He held that the arbitrator had no power to appoint guardians *ad litem* or other of the minor children of Ma Shwe U, and that therefore the arbitration proceedings were not binding on these minors; that the question of the validity of the award as

regards them did not arise; that the consequence was that they should be dismissed from the suit. In the formal order drawn up, dated the 4th of October 1912, the learned Judge, in the final passage of the order, states as follows: "I am not prepared to say the award is invalid, or that no suit can be filed to enforce it, on the major parties thereto, but it certainly appears to me that the award is not one which should be filed, and the application is dismissed with costs." This dismissal may have *per se* deprived the adult parties to the award of the power of enforcing it by certain effective statutory methods, but it did not in their Lordships' view render the award void or otherwise unenforceable as against those parties. Ma Thein was named as one of the Defendants in an application, dated the 17th of January 1911, by Maung Sin to have guardians *ad litem* appointed for Maung Byaung and Maung Aung, sons of Ma Shwe U. In the third paragraph of the application it is stated that the Plaintiff had ascertained that Ma Thein was an adult and could conduct her own case. In the objections filed on behalf of Ma Shwe U and Maung Byaung on the 28th of March 1911, it is stated she was then still a minor. The District Judge, in delivering judgment on the 22nd of October 1917, in the main suit hereinafter dealt with, held that Ma Thein claimed that she did not attain her majority till the 19th of April 1912, while the Defendants pleaded that she attained it on the 21st of April 1910. After dealing exhaustively with all the evidence given on this point, he held that it had not been proved that Ma Thein was a minor within three years ending with the institution of that suit, *i.e.*, within the three years ending on the 13th of March 1914; so that she must have attained her majority before the 13th of

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March 1911, but how long before is not found. Having regard to the amount of evidence taken by the arbitrator during the course of the arbitration, their Lordships think that there can be little, if any, doubt that at the date of the award both Ma Thein and her mother must have become perfectly well aware of all the facts entitling them to have the award set aside.

No appeal was taken by Maung Sin or any other party against the District Judge's refusal to file the award. On the 20th of December 1912, Ma Shwe U instituted a suit in the District Court of Hanthawaddy for a partition of her share of the estate of Po Cho, citing as Defendants her three children and Maung Sin and Ma Nga Ma, but whether by mistake or otherwise she omitted to pray expressly to have the award set aside. The Court ultimately held that the award barred these proceedings as to all properties included within it, and that the Court could only deal with properties not included in it. The proceedings are still pending. On the 13th of March 1914, Maung Byaung, still a minor, by his next friend Maung Ba San, instituted a suit against his mother Ma Shwe U, his sister, Mrs. Kirkwood, his brother Maung Aung, his uncle Maung Sin and aunt Ma Nga Ma, brother and sister of his father, and the representatives of Ma Nyein Aung, another aunt, deceased, praying first for a declaration that the two submissions to arbitration, dated respectively the 20th February 1910, and the 11th of April in the same year, and the award dated the 10th of June 1910, made in pursuance thereof, were not binding on him; and, second, that they were absolutely void and might be set aside. He based his claim on this allegation, amongst others, that he was a minor at the times the submissions bore date, and that therefore the

agreements of reference were not binding on him and they and the award were void together. His brother and then his mother and sister were subsequently joined with Maung Byaung as Plaintiffs in the suit. As more than three years had then elapsed from the date of the award, Maung Byaung claimed exemption from limitation on the ground of minority; Ma Thein on the ground that she was a minor till the 19th April 1912, and Maung Aung that he was a minor till the 6th October 1913. Ma Thein and Ma Shwe U also claimed to exclude the time occupied by the other proceedings already mentioned. Ma Shwe U also based her claim on the averment contained in the 10th paragraph of the amended plaint, which runs as follows:—

"10. That the Plaintiffs submit that the said agreement of reference and the award are not binding on the 1st, 2nd and 3rd Plaintiffs as they were minors at the time and the said agreement and the award being void in part are void altogether, having regard also to the decision of this Honourable Court in Civil Regular No. 107 of 1910 and having regard to the fact that the Arbitrator failed to adjudicate on all the matters referred to him by the agreement and proceeded to deal with certain matters which were not referred and having regard to the fact that this Honourable Court dismissed the application to file the award in Suit No. 107 of 1910."

The principal Defendant, Maung Sin, filed two written statements. The first on the 7th of June 1915, and the second, an amended one, on the 22nd of July 1915. In these statements he practically admits that the various events already detailed had happened in the course of this long litigation. He relies, however, on the following special defences: First, that the award was binding on the three minor children of Po Cho because they were properly represented in the making of the agreements to refer to arbitration, and were also represented in the arbitration proceedings. Second, that this

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question was in issue in suit No. 54 of 1912, and that though no order was actually made by the Court upon this issue, the learned presiding Judge stated such an order was ready and could be delivered when necessary, that this suit is still pending, and that the matter is therefore *res judicata*, or in the alternative, that as this formed an issue in suit No. 54, 1912, when the present suit, filed on the 13th of March 1914, was instituted it could not be maintained till that issue had been disposed of. He further submitted that this latter suit is not maintainable having regard to the 42nd section of the Specific Relief Act. In this amended statement the Defendant, in addition, averred that the plaint disclosed no cause of action in favour of the fourth Plaintiff Ma Shwe U, that any alleged cause of action in her favour is barred by Art. 91 of the Indian Limitation Act, and that as to the fourth Plaintiff, he averred that the suit was not maintainable having regard to the provisions of the 42nd section of the Specific Relief Act. He further avers that the second Plaintiff, Mrs. Kirkwood, attained her majority on the 21st of April 1910, and that as against her the suit was barred by Art. 91, Indian Limitation Act; he then denies all the averments contained in the statement filed by the Plaintiffs, which were not specially admitted. The averments contained in the written statement filed by Defendant Ma Nga Ma on the 7th of June 1915, are substantially to the same effect as those contained in the written statement filed by Maung Sin.

Their Lordships think they had better deal at once with the point raised that sec. 42 of the Specific Relief Act applies to this suit and renders it unmaintainable. In their view the section of that Act which applies to and covers this suit is the 89th section and not the 42nd section, and it

has no such effect as it is claimed would result if it were covered by the latter section.

It was held both by the District Court and the Chief Court of Burma that Ma Thein, having failed to prove she had attained majority during the three years terminating on the 13th of March 1914, the present suit was, as regards her and her mother, barred under the 91st Article of the Indian Limitation Act of 1908. Their Lordships concur in, and approve of, that decision, notwithstanding the ingenious contention of Mr. Geoffrey Lawrence to the effect that the time which bars began to run, not from the date of the award, but from the date of the refusal of the learned Judge to file it. It was found by the District Judge and stated in the Court of Appeal that the three minors, Ma Thein, Maung Byaung, and Maung Aung had not been properly represented when the agreement to refer to arbitration was entered into, and that they were not bound by the submission or by the award made in pursuance of it. Their Lordships also concur in and approve of that conclusion. In accordance therewith the Chief Court by its decree, dated the 18th of April 1921, declared that as against the minors, Maung Byaung and Maung Aung, the award should be set aside and they should be remitted to their original rights. As regards Mrs. Kirkwood, the Chief Court held that, though she was not and could not be bound by the award, yet as her present suit for a declaration to that effect was time-barred, it was immaterial to her whether or not she got a declaration to effect what she desired. The point that the matter in controversy as to whether the minors were properly represented in the entering into the reference to arbitration, and were therefore bound by the award, was in

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issue in the suit No. 54, 1912, which is still pending, and that, therefore, the controversy in the present suit was *res judicata*, was not mentioned in the memorandum of appeal and apparently was abandoned. There remains, however, the important question whether the award of the 10th of June 1910, having been set aside as regards the two minors, Maung Byaung and Maung Aung, it should, in addition, be set aside in its entirety. That is a question which must be decided according to Burmese Buddhist law. Well, one has only to refer to the judgment of the Board in *Kirkwood v. Maung Sin* (1), to see how unascertainable that law is. It is stated to be contained in a series of books entitled *Dhamathats*, which have been composed from time to time by the expounders of that law ever since the thirteenth century, if not before. A distinguished Burmese jurist of the name of U Gaung has, at the expense of the British Government, compiled a digest of these books, and says it is a collection of rules which are in accordance with the custom and usage of the Burmese people. It may possibly be that in Burma these rules have in the course of ages crystallised, as it were, into rules of positive law. It was by an analogous process that the Common Law of England was built up and formed. The District Judge held the view, apparently strongly, that the award should in this instance be set aside in its entirety. He says: "Looked on as a matter of contract, the terms of the contract become so uncertain in their application that the contract becomes well-nigh impossible of enforcement. As regards the authorities on the point the case of *Ma Gyi v. Maung Po Hmyin* (2) has been cited to me on behalf

of the Plaintiffs. In that case there had been a reference to arbitrators as to the partition of the estate of a Burman Buddhist and an award thereon. Certain of the children of Po Ko were not parties to the award, and for this reason, and for this reason only, it was found that the award was not binding on the parties, and it was ordered that the estate be administered by the Court." After dealing with several authorities which had been cited to him, he returns to this Burma case, and says: "*The Burma Law Times* case, cited on behalf of the Plaintiffs, is distinct authority for the view that in such an event the award becomes invalid in its entirety and the estate becomes open to the administration by the Court. The reasons for this finding are not given, but it seems to me that the test in such cases must be whether the different parts of the award are so severable that it is possible to carry out the intentions of the remaining parties thereto whilst allowing one party to claim entirely independently of the award."

It would appear to their Lordships that in modelling this test the learned Judge has relied upon the principles of the English law bearing on such matters rather than on the Burmese Buddhist law, which has not been proved to resemble to any extent the English law on this subject. He then proceeds to say: "The difficulties in the way of such a course in the present case seem well-nigh insuperable. If Maung Aung be allowed to claim independently of the award, then the whole basis of the award is upset." And he winds up with the uncompromising statement: "I find on the second issue that if the reference and award are found to be void as regards some, or any of the Plaintiffs, then it must be found void as regards all the parties and be set

(1) L. R. 51 L. A. 334-339; F. C. 29 C. W. N. 653 (1924).

(2) Bur. L. T. 45.

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aside in its entirety." The learned Judges of the Chief Court, however, take a wholly different view on this point. The Chief Judge, S. M. Robinson, in giving judgment, refers to many authorities and particularly to the case of *Davuluru Vijaya Ramayya v. Davuluru Venkatasubba Rao* (3). He says, at page 207 of the record, that several of the authorities to which he had been referred were cited in it, and that he does not think it is an authority for more than this, that there may be cases in which the necessary result will be that the proceedings may have to be set aside entirely, and that at page 485 of the report it is said that :—

"Avoidance by the minor of a decree against him may in some cases *ipso facto* be tantamount to an adjudication of the suit, in others it might be possible and proper for the Court merely to avoid such part of the decree as would affect the minor and that part may be separable from the rest.' This case was concerned in the setting aside of a decree. In the case before us, however, we are concerned with setting aside an award which has not apparently been executed or carried into effect by any active action."

The learned Judge then proceeds to deal at length with this point in the following passage of his judgment :—

"As regards Plaintiffs Nos. 1 and 3 therefore who were minors and not properly represented before the arbitrator there must be a decree declaring that the award is not binding on them. As to whether the decree should go further and declare that the award is not binding on any of the parties to it I am of opinion that in this case there is no ground for passing such a decree. The major parties to the reference in the award acted with their eyes open and with full knowledge of what they were doing. Whatever may have been the immediate object they had in view and whether they were acting under the idea that they were protecting the interests of the minors against their mother after her second marriage or were seeking to protect themselves as well as the minors, there is no ground for holding that they should be relieved of the result of their considered action and their binding agreement to refer. It is no argument to say that the result of remitting the minors to their original rights will have the effect of creating great complications."

(3) 30 Mad. L. J. Rep. 465, 485 (1915).

Mr. Justice Heald practically concurs in the conclusion reached by his colleague. In the course of the argument of the appeal several additional grounds were mentioned upon which it was contended that the award of the 10th of June 1910 was void, such as that the arbitrator did not deal with several matters which had been referred to him, and did deal with several matters which had not been referred to him. These objections, however, were not dealt with judicially by the Chief Court. Owing to the course the proceedings took it could not well be otherwise. Their Lordships are clearly of opinion that the several conclusions hereinbefore indicated at which both the District Court and the Chief Court have arrived, and with which their Lordships entirely concur, afford ample and trustworthy materials for the satisfactory and just decision of this appeal. Under these circumstances it appears to them that the more desirable, and indeed the more satisfactory, course for them to pursue is to abstain from expressing any opinion whatever upon the question on which the two tribunals are in conflict, namely, whether this award should be set aside *in toto* or only set aside as it has been against the two minors named in the decree of the Chief Court, dated the 18th of April 1921, and to decide the case upon the findings in which both the Courts concur and of which, as has been already pointed out, their Lordships entirely approve. The opinion which their Lordships have formed on these reliable materials is that this appeal fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors : *Messrs. Light & Fulton* for the Appellants.

Solicitor : *Mr. Douglas Grant* for the Respondents.

G. D. M.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 1892 OF 1924.

BUCKLAND, J.	}	NATIONAL COAL CO.,
1926,		LTD., Plaintiff,
22, January.		v.
		KSHITISH BOSE & Co.,
		Defendant.

Surety for judgment debtor—Consent decree without the knowledge of the surety, if discharges the surety—Payment of decretal amount by instalments.

Where a consent decree is made without the knowledge and consent of the surety, the surety is discharged.

TATUM v. EVANS (1) followed.

This was an application by the Plaintiff Company for the execution of a consent decree against Jotindra Nath Ghose who stood surety for the Defendant firm in pursuance to an order of the Court. The order was made on the 26th August 1924 to the effect that the Defendant firm do furnish security for Rs. 6,000 to the satisfaction of the Registrar and that on furnishing such security the Defendant firm should be at liberty to defend the suit under Or. 37 of the Civil Procedure Code. Jotindra Nath Ghose stood surety by executing a bond in favour of the Registrar for the Defendant firm for any amount which might be decreed against the Defendant firm. On 5th May 1925 a decree by consent was made by the parties without the knowledge and consent of the surety whereby it was *inter alia* agreed that the Defendant firm should pay Rs. 4,700 with cost and interest Rs. 1,500 by 7th May 1925 and balance by monthly instalments of Rs. 500 until realization, and that the surety was to continue as guarantee for the performance of the condition of that decree. It transpired that the Defendant firm paid Rs. 2,500 in terms of the decree. The Plaintiff Company wanted to realise the

portion of the decretal amount by attachment and sale of the properties of the surety.

Mr. H. R. Panckridge (with him Mr. D. N. Mitter) argued on behalf of surety that as the consent decree, dated 5th May 1925, was made between the parties in the suit without the knowledge and concurrence of the surety and as time was granted by the Plaintiff Company to the Defendant firm to pay the amount by instalment, the surety was discharged. [Cited *Tatum v. Evans* (1), *Bowsfield v. Tower* (2), *Croft v. Johnson* (3) and *Halsbury*, Vol. 15, p. 551.]

Mr. B. C. Ghose on behalf of the Plaintiff Company argued that the surety caused payment of two instalments to be made to the decree-holder on 26th August and 2nd September 1925. Hence the surety was liable.

Mr. Panckridge in reply argued that his client Jotindra Nath denied that he caused any such payment of the decretal amount to be made.

The JUDGMENT OF THE COURT was as follows :—

BUCKLAND, J.—This is an application for execution against a surety who executed a bond in favour of the Registrar in pursuance of an order giving leave to the Defendant to defend a suit under Or. 37 of the Civil Procedure Code upon furnishing security.

When the suit came to trial a consent decree was made and the terms of the consent decree provided for the payment of the amount decreed by instalments. The surety now claims to have been thereby discharged. So far as I am aware this point has never so far come before this Court but in addition to earlier cases I

(1) 54 L. T. 336 (1885).

(2) 4 Taunton's Rep. 456 (1812).

(3) 3 Taunton's Rep. 319 (1814).

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have been referred to *Tatum v. Evans* (1). This case is very much to the point and it seems to me that the applicant must fail unless he can show that the surety either consented to the order or that he satisfied it or waived any rights that he might have. As to this there is a statement in the affidavit of Satya Charan Srimani that the surety caused payment of two instalments to be made to the decree-holder on the 26th August and 2nd September last. That is denied, though it may be questionable whether the affidavit so denying it is one that should be admitted, but I cannot act on a bare statement of that nature. If it was desired to rely upon such payments something more tangible, such as, a cheque, counterfoil, receipt or other similar document should have been exhibited or at least referred to. In the circumstances I am not prepared to act upon this statement. As however it was made in the affidavit and as the point as far as I am aware is new I enquired of learned Counsel whether his instructions would justify him in saying that it could be supported by any tangible evidence of that nature; but having regard to what he has informed me his instructions on the subject are, I do not think it would serve any useful purpose, to give the applicant an opportunity of amplifying the statement.

In these circumstances the application must be dismissed with costs. Certified for Counsel.

Mr. Satish Chandra Bose, Solicitor for the Surety.

Mr. P. Basak, Solicitor for the Plaintiff Company.

P. D.

(1) 54 L. T. 330 (1885).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
Nos. 2319 OF 1923 AND 362 OF 1924.

SUBHAWARDY, J. MUKERJI, J. 1925, Heard, 9 and 10, December. Judgment, 16, December.	}	ABINASH CH. CHOWDHURY , Defendant, Appellant, v. TARINI CHARAN CHOWDHURY and ors., Plaintiffs, Respondents.
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Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Attachment of property under sub-sec. (4), sec. 145, Criminal Procedure Code (Act V of 1898), in proceeding under—Possession, whose, in law pending attachment—Possession with person in whose favour order made.

For the purpose of limitation, possession during the period during which a disputed property is kept under attachment under sub-sec. (4) of sec. 145, Cr. P. C., is in law the possession of the party whom the Magistrate as a result of the proceeding finally declares to be entitled to retain possession as the party who was in possession at the date of the proceeding.

This was an appeal preferred on the 5th September and 6th December 1923, respectively, against the decree of the District Judge of Zillah Pabna and Bogra (Mr. G. C. Sen), dated the 27th July 1923, modifying the decree of the Subordinate Judge of Pabna (Babu Amrita Lal Banerjee), dated the 25th November 1918.

The facts of the case will appear from the judgment.

Mr. Sarat Chandra Ray Chaudhuri, *Babus Jatindra Nath Lahiri* and *Bireswar Bagchi* for the Appellant in No. 2319 and for the Respondent in No. 362.

Mr. Atul Chandra Gupta, *Babus Dinesh Chandra Ray* and *Jatish Chandra Guha* for the Respondent in No. 2319 and for the Appellant in No. 362.

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The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—The events which have led up to the suit out of which these appeals arise have been narrated in detail in the judgment of the District Judge. The facts, so far as they are necessary to be stated for the purpose of these appeals and are undisputed, are these : one Nur Mohamed *alias* Nur Meah claiming to be a *mutwali* in respect of a *wakf* created by his father Dost Mahammad, granted an *istemrari* lease of an entire village called Bamangao to one Abdul Aziz in the year 1891. In the same year and some two months later Abdul Aziz granted a lease of an 8 annas share of the village in *kayem maurasi jote* right to the predecessors of the Plaintiffs. In 1898 litigation arose for declaration of title, administration of the estate, and accounts, etc., in the shape of suits which are instituted by some of the heirs of Dost Mahammad against the said Nur Meah and others. In these suits Abdul Aziz was a party, but the predecessors of the Plaintiffs were not. The relief claimed as against Abdul Aziz was the setting aside of the lease granted by Nur Meah in his favour. The trial Court dismissed the suits as against Abdul Aziz holding that the Plaintiffs should, if so advised, institute separate suits for setting aside the lease; and as regards the other Defendants the suits were decreed, the *wakf* created by Dost Mahammad being declared invalid. The decrees of the trial Court were affirmed on appeal to this Court in 1902. When the appeals to this Court were pending, one Alamgir, son of Nur Meah, as the then *mutwali* of the *wakf*, dispossessed the Plaintiffs' predecessors. In 1904 a common manager was appointed in respect of the estate. In 1915 proceedings under sec. 145, Cr. P. C., were started between some of the

Plaintiffs' predecessors and the common manager. Those proceedings ended in a declaration in favour of the latter on the 21st May 1916. Thereafter on the 18th January 1917 the Plaintiffs instituted the present suit for declaration of their *kayem maurasi jote* right to the 8 annas share of the village and for recovery of possession thereof.

The trial Court decreed the suit to the extent of a 4 annas 17 g. 8 d. share being the share of Nur Meah in the village as one of the heirs of Dost Mahammad with possession thereof and mesne profits. This decree has been modified by the lower Appellate Court which has reduced the Plaintiffs' share to 3 as. 2 g. 8 d. From the decree of the lower Appellate Court two appeals have been preferred, the appeal of the common manager being No. 2319 of 1923 and that of the Plaintiffs No. 362 of 1924.

In appeal No. 2319 of 1923 the substantial question in controversy is that of limitation. It is urged on behalf of the Appellant, the common manager, that the Plaintiffs' suit is barred upon the facts found by the Courts below and which are not now in dispute. This bar is sought to be established in this way : It is said that the Plaintiffs must prove that they were in possession within twelve years of the suit, but that they have failed to do so as they were out of possession since 1305, it having been found by the learned Judge that the Plaintiffs' predecessors were dispossessed in 1305 by Alamgir claiming as *mutwali* of Dost Mahammad's *wakf*, and Alamgir remained in possession till 1311 when the common manager took possession on his appointment as such. The Plaintiffs answer this contention by stating that after the institution of the proceedings under sec. 145, Cr. P. C., there was an attachment under the pro-

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viso to cl. (4) of that section on the 23rd September 1915 which lasted till the 21st May 1916 on which date the final order in those proceedings was passed, and that during this period Plaintiffs' predecessors as the rightful owners of their 8 annas share must be deemed in law to have been in possession thereof. The Appellants challenge the correctness of this proposition and they further assert that even if its correctness be assumed, the Plaintiffs were not the rightful owners who may be entitled to the benefit of it as their right had been extinguished in consequence of their having refrained from instituting a suit for regaining the possession which they had lost when they were dispossessed by Alamgir and having remained continuously out of possession for more than twelve years, that is to say, till the date of the attachment. To this the Plaintiffs rejoin that when Alamgir's possession ceased and that of the common manager began in 1311, the law would presume a discontinuity and that there was an interval, however momentary, during which the Plaintiffs, who at that date had admittedly not lost their right and were rightful owners, must be taken to have been in constructive possession. These contentions have been developed in great detail on both sides, and various interesting questions have been discussed in the course of the arguments.

The first question which arises for consideration upon these arguments is with whom did possession lie during the attachment under the proviso to cl. (4) of sec. 145 of the Code of Criminal Procedure, that is to say, did it lie with the rightful owners whoever they were or with the common manager who was found to have been in possession at the date of the institution of the proceedings.

In the case of *Joyanti Kumar Mookerjee*

v. *Middleton* (1) an order under sec. 144, Cr. P. C., was interpreted as an attachment suspending the previous possession, whatever it might be, and was regarded as an intervention by the Magistrate by reason of which no evidence could be adduced as to the possession of any of the parties during the period that the order was in force and it was observed that "at the same time the former possession continued, and although the lawful exercise of its rights had been forbidden for a time, the possession had never ceased to exist." In the case of *Ismail Ghani Ammal v. Katima Rowther* (2) the Madras High Court, in dealing with a case in which a Receiver had been appointed prior to the institution of proceedings under sec. 145, Cr. P. C., held that the possession of the Receiver may, for the purpose of sec. 145, Cr. P. C., be properly regarded as possession on behalf of the party who should be ultimately found by the Magistrate to be in possession immediately before the date of his appointment, as, for the purpose of limitation, the possession of the Receiver is held to be the possession of the party entitled to possession. In the case of *Palany Chetty v. Rathina Chetty* (3), the power of a Magistrate to appoint a Receiver in proceedings under sec. 144, Cr. P. C., was doubted, and where a person had been appointed with the consent of parties to take charge of the property in dispute, he was not considered to be a Receiver, and it was doubted whether the possession of such a person could be treated as that of a Receiver whose possession is that of the party who may be found entitled to possession under sec. 145, Cr. P. C. In the case of *Rajah of Venkatagiri*

(1) I. L. R. 27 Cal. 785 (1900).

(2) 18 Cr. L. J. 28.

(3) 15 Cr. L. J. 809.

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v. *Isakapalli Subbiah* (4), it was held that an attachment under sec. 146, Cr. P. C., operated in law for purposes of limitation, simply as a detention of custody, pending the decision by a Civil Court, on behalf of the party entitled, and for such purposes the seizin or legal possession was, during the attachment, in the true owner. It was observed that "such attachment operates in law for the purposes of limitation simply as detention or custody of the property by the Magistrate, who, pending the decision by a Civil Court of competent jurisdiction, holds it merely on behalf of the party entitled, whether he be one of the actual parties to the dispute before him or any other person. For the purposes of limitation the seizin or legal possession will during the attachment be in the true owner and the attachment by the Magistrate will not amount to dispossession of the owner or to his discontinuing possession." In the case of *Ramaswamy Ayyar v. Muthusamy Ayyar* (5) in the case of paddy, taken possession of by the Magistrate in the course of proceedings relating to a criminal charge of theft in respect of it, it was held that where the property is seized by the Magistrate, the property passes into legal custody and such custody is for the benefit of the rightful owner. In *Brojendra v. Abdul Razac* (6), it was held that during an attachment under sec. 146, Cr. P. C., the seizin or legal possession is in the true owner and that the attachment does not amount to either dispossession of the owner or the discontinuance of his possession. The learned Judges in that case relied for their conclusion upon the decision of the Judicial Committee in the case of *Khagendra Narain Chowdhury v. Matangini Debi*.

(7) in which the attachment under the 530th and 531st sections of the Code of 1872 was considered as placing the Government really in the position of stakeholders, the decision in the case of *Ramaswamy v. Muthusamy* (5) to which reference has already been made, the decision in the case of *Beni Prasad v. Shahojhazada* (8) in which the possession of the Magistrate after attachment under sec. 146 was held to be one on behalf of such of the rival parties as might establish a right to possession on their own account and the decision of the Judicial Committee in the case of *Karan Singh v. Bakar Ali Khan* (9) in which the possession of the Government in the Revenue Department of land which had been attached by the Collector to secure payment of revenue which had been endangered in consequence of disputes relating thereto was considered to be possession not adverse to the owner, though the Collector had subsequently paid over the surplus proceeds of the estate to a stranger. Reliance also was placed in that decision upon the principles deducible from the decisions of the Judicial Committee in the case of *Trustees and Agency Company v. Short* (10) and *Secretary of State v. Krishna Mani Gupta* (11) and the observations of Baron Parke in *Smith v. Lloyd* (12). The same view was taken of the effect of an attachment under sec. 146, Cr. P. C., in a later decision of this Court in the case of *Sarat Chandra Maiti v. Bibhabati Debi* (13), in which it

(5) I. L. R. 30 Mad. 12 (1906).

(7) L. R. 17 I. A. 62; s. c. I. L. R. 17 Cal. 814 (1890).

(8) I. L. R. 32 Cal. 856 (1905).

(9) L. R. 9 I. A. 99; s. c. I. L. R. 5 All. 1 (1882).

(10) L. R. 13 A. C. 793 (1888).

(11) L. R. 29 I. A. 104; s. c. I. L. R. 29 Cal. 518; 6 O. W. N. 617 (1902).

(12) 9 Exch. 563 (1854).

(13) 84 C. L. J. 808 (1911).

(4) I. L. R. 26 Mad. 410 (1902).

(5) I. L. R. 30 Mad. 12 (1906).

(6) 28 C. L. J. 233 (1916).

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was observed that the authority of the decision in the case of *Deonarain v. Webb* (14) in which the Plaintiff had been dispossessed from his raiyati lands and subsequent to such dispossession there was an attachment under sec. 146, Cr. P. C., and it was held that the Plaintiff was not entitled to have a fresh start of limitation from the date of the attachment as he had already been dispossessed before that date, must be considered as shaken by the decision of the Judicial Committee in the case of *Secretary of State v. Krishna Mani* (11). The intervention of public authorities for the preservation of peace was considered as operating in the same way as the vis major of floods and by analogy it was held that the constructive possession of the land after such intervention remains, if anywhere, in the true owner.

It may perhaps be doubted whether the principles applicable to the case of dispossession of a trespasser by some force major which means a discontinuance of his possession, and which renders the subject-matter of possession derelict so as to make it incapable of possession, so that the constructive possession (if anywhere) remains in the true owner is, strictly speaking, applicable in the case of an attachment under sec. 146, Cr. P. C.; but it is not necessary to discuss this question as the application of any other principle that may legitimately be applied to the case leads exactly to the same result. The true view seems to be to treat the Government, to quote the words of Lord Morris in the judgment of the Judicial Committee in the case of *Khagendra Narain Chowdhury v. Matangini Debi* (7) as

being "really in the position of stakeholders." The purposes of the two attachments, one under the proviso to cl. (4) of sec. 145 and the other under sec. 146, Cr. P. C., are different, and the stakes are not the same. In the case of the former, the attachment subsists till the decision under sec. 145, cl. (4), that is to say, till it is decided which party was in possession at the date of the proceedings; in the latter case it lasts until a competent Court has determined the rights of the parties or the person entitled to possession. It may be that an attachment under sec. 145, cl. (4) may terminate on the proceedings being dropped or an attachment under sec. 146, Cr. P. C., may be withdrawn when the Magistrate is satisfied that there is no longer any likelihood of a breach of the peace; but that does not affect the character of the attachments. The objects of the two attachments are obviously different. The possession in the case of the one enures to the benefit of the party who was in possession at the date of the proceedings and in the case of the other to the party or to any person, either a party to the proceedings or not, who may be adjudged, on the basis of his rights to be entitled to possession. Proceedings under Chap. XII of the Criminal Procedure Code are of a *quasi*-civil character and the Magistrate intervenes and attaches the property much on the same lines and with a similar purpose as when a Receiver is appointed by the Court in a civil action, in order to prevent a scramble and to preserve the property until the rights of the parties are ascertained. The possession of a Receiver appointed under such circumstances is exclusively the possession of the Court, the property being regarded as in the custody of the law in *gremio legis* for the benefit of whoever may be ultimately determined to be entitled

(7) L. R. 17 I. A. 82; s. c. I. L. R. 17 Cal. 814 (1890).

(11) L. R. 29 I. A. 104; s. c. I. L. R. 29 Cal. 518; 6 O. W. N. 817 (1902).

(14) I. L. R. 28 Cal. 86 (1900).

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thereto. The object of proceedings under sec. 145, Cr. P. C., being to determine which party was in possession at the date of the proceedings and to declare such party to be entitled to retain possession, the possession of the Court during attachment in the course of those proceedings should enure for the benefit of such party in whose favour such a declaration is made. The object of an attachment under sec. 146, Cr. P. C., is to hold the property in anticipation of an action in which the right or title to possession is to be declared by a competent Court and the possession of the Court during such attachment should enure for the benefit of party or person in whose favour a competent Court would make such a declaration.

In the case of an attachment pending the proceedings which may result in a further attachment under sec. 146, Cr. P. C., the result which will follow from an application of these principles need not be considered in the present case.

The effect of the possession of a Receiver appointed by a Court with a similar object on the statute of limitation has been considered in several cases which are referred to in Halsbury's Laws of England, Vol. XIX, p. 139, under para. 269, where the law is summarized in these words: "Where the Court during the pendency of an action is in possession of property by a Receiver, that possession enures for the benefit of the party to the action, ultimately declared to be entitled, so that during such possession time will run against, but not in favour of, a person who is a stranger to the suit." In the same Book, Vol. XXIV, p. 384, para. 723, it is thus said:—"So also the possession by the Receiver necessarily displaces the possession of the owner or occupier to some extent, for the purpose of the appointment does not interfere with the rights and

liabilities of the parties to the action in relation to strangers. It is not such an interruption of possession as prevents the statutes of limitation running in favour of the Defendant as against strangers to the action, though it does prevent their running in favour of strangers as against the party obtaining the appointment." The rightful owner may not be a party to the action, in which case time will run against him, but not in his favour.

For the foregoing reasons, in our judgment, the common manager and not the Plaintiffs must be treated as having been in possession during the attachment under sec. 145, cl. (4), Cr. P. C., and consequently the Plaintiffs' suit is barred by limitation. In view of the opinion I have formed on the aforesaid question, none of the other matters which arise upon the arguments addressed to us need be considered. The appeal must be allowed, the decrees of the Courts below set aside and the suit dismissed with costs in all the Courts.

As regards the Plaintiffs' appeal No. 362 of 1924 it was not seriously pressed and it must necessarily fail in view of the fact that the suit is barred. That appeal accordingly should be dismissed, but without costs.

SUHWARDEY, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. No. 1 OF 1926.

PAGW, J.

MUKERJI, J.

1926,

16, February.

SUBAL CHANDRA NAMADAS, Complainant,
v.
AHADULLAH SHEIKH and
ors., Accused.

Complaint—Magistrate's discretion in issuing process—Trial and acquittal of one set of accused—Complaint against another set in respect of the same occurrence before another Magistrate—Plea of suit

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is acquit, if tenable—Magistrate's duty to consider the fact of the previous trial—Omission to do so, effect of.

Under the Code of Criminal Procedure a wide discretion is given to Magistrates with respect to the grant or refusal of process and in the interest of the community generally it is essential that Magistrates should be vested with an ample discretion in this matter.

In India where the Grand Jury system does not exist as an additional shield to innocent persons against whom unfounded complaints are laid in a Criminal Court it is specially necessary that caution and discretion should be used in issuing process. An accused person ought not to be dragged off to answer a charge merely because a complaint has been lodged against him.

The Magistrate's discretion must be exercised judicially and if after carrying out the instructions contained in the Code of Criminal Procedure he is of opinion upon the materials before him that a *prima facie* case has been made out he ought to issue process and in such circumstances he is not entitled to refuse to issue process merely because he thinks that it is unlikely that the proceedings will result in a conviction.

It is settled practice that if the Magistrate, having followed the procedure laid down in the Code, has exercised a judicial discretion as to whether he ought to issue process or not, the High Court will respect his decision and will be slow to disturb the order that he has passed.

Where on a complaint one set of accused persons are tried and acquitted by a Magistrate and subsequently another complaint in respect of the same occurrence is filed before another Magistrate against other persons the plea of *autre fois acquit* would not be available to the accus-

ed in the subsequent case but the fact that other persons accused upon the same facts of having been implicated in the same offence has been acquitted may properly be taken into consideration by the Magistrate in determining whether upon the materials before him there is sufficient ground for issuing process and the Magistrate acts improperly in summoning the accused without paying any regard to what had taken place in the earlier proceedings.

This was a Reference under sec. 438, Cr. P. C., made by the Sessions Judge of Mymensingh (Mr. G. C. Sankey), dated the 23rd December 1925, recommending that the order of the Deputy Magistrate of Tangail (Babu U. M. Bose), dated the 10th September 1925, summoning the accused under sec. 426, I. P. C., may be set aside and the whole proceedings against them quashed, for the reasons set forth in the letter of Reference.

The LETTER OF REFERENCE was as follows :—

"The facts of the case are briefly as follows :—Two persons Mukram Pramanik and Ibrahim Khan were placed on their trial before the 2nd class Magistrate of Tangail under sec. 426, I. P. C. The charge against them was that they and a number of other persons who were named in the petition of complaint caused mischief to the crops of the complainant. These persons were duly tried and were acquitted by the Magistrate. The Magistrate found that the land was in possession of the accused and the crops were grown by them. A few days after the acquittal of these persons the complainant filed another petition of complaint on the same facts before another Magistrate of Tangail with 1st class powers omitting the names of the two persons who had been acquitted. The Magistrate sum-

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moned two other persons under sec. 426 and the case against them is still pending. No evidence has as yet been recorded.

I am of opinion that the order of Babu U. M. Bose summoning these two persons was an illegal order and that proceedings against them should be quashed. I do not think that the Magistrate had any jurisdiction to summon these persons while the judgment of Babu A. K. Malakar who tried the first case was still in force and when that Magistrate had clearly indicated his desire to terminate all proceedings relating to the matter in his Court. In this Court a number of decisions of the Calcutta High Court have been referred to. None of these are exactly to the point but I think that a discussion of these decisions will show that the action of Babu U. M. Bose was illegal. In *Panchanan Singh v. Umar Mahommed* (1), where one of two co-accused was acquitted and the Magistrate passed order dismissing the case and the District Magistrate set aside the order dismissing the case and directed that the case against the other accused should proceed, it was held that as the Subordinate Magistrate desired to terminate all proceedings relating to the matter in his Court the order of the District Magistrate was without jurisdiction and the proceedings against the co-accused were set aside. In *Bishnu Das v. King-Emperor* (2) certain persons were acquitted by the trying Magistrate who entered the case to be doubtful and false. The District Magistrate then directed that the other accused should be put on their trial. It was held that no proceedings could be taken against the other accused so long as the trying Magistrate's judgment declaring the case to be false was not set aside. The decision in *Kedar*

Nath Biswas v. Adhin Masi (3) is similar. In *In re : Azim Sheikh* (4) the test whether the trying Magistrate did or did not desire to terminate the proceedings in his Court was also applied. In that case it was held that the Magistrate did not intend to terminate the proceedings. Consequently it was open to him to place the other accused on their trial. In all these cases therefore it seems to have been held that where certain accused were acquitted and the trying Magistrate had found that the case as a whole was not true and his judgment indicated that he desired that the whole proceedings should terminate, it was not open either to him or any other Magistrate to institute proceedings against others of the accused until the judgment of the trying Magistrate had been set aside by competent authority. The only case that has been referred to before me in which it was argued that a different opinion had been expressed is that of *Kokai Sardar v. Meher Khan* (5). In that case it was held that the acquittal of some of the accused, accused of charges of rioting, grievous hurt and other offences, was no bar to the trial of others concerned in the same offences. In that case certain of the accused were placed on their trial before the Sessions Judge of Faridpur and acquitted. The District Magistrate then directed the prosecution of others of the accused. The Sessions Judge moved the High Court against that decision and it was held that the order of the District Magistrate was justified. It appears to me, however, that *Kokai Sardar's* case (5) is distinguishable from the present case in certain important respects. For one thing that case was a warrant case. The present case is

(3) 7 O. W. N. 711 (1908).

(4) 7 O. L. J. 249 (1907).

(5) I. L. R. 37 Cal. 680 (1910).

(1) 4 O. W. N. 346 (1899).

(2) 7 O. W. N. 493 (1902).

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a summons case. The High Court in its order on that case laid emphasis on the fact that there was nothing in the Session Judge's judgment to show that the riot did not actually take place. Moreover, one of the Assessors in the Sessions trial found the accused guilty. The High Court held that it was not a clear case and that there was nothing unreasonable in putting the other accused on their trial. It appears to me that there is nothing in this decision contrary to the view which in my opinion is justified by the other decisions referred to, to the effect that in a summons case where a trying Magistrate holds that the case as a whole is not true and indicates that in his opinion the whole proceedings should terminate, it is illegal either for him or any other Magistrate to place other persons accused of the same offence on their trial. A reference to the judgment of Babu A. K. Malakar shows clearly that in the present case this was his opinion. He found that no independent witnesses came forward to support the prosecution story and the possession of the complainant. He found that the land seemed to be in possession of the accused and the crops to be grown by them. Clearly such a finding will apply not only to the persons under trial before him but to any other persons accused of taking part in the same occurrence. For the above reasons I am of opinion that the order putting the present Petitioners on their trial is barred on the analogy of sec. 403, Criminal Procedure Code, and is an illegal order.

I would suggest that the case of the original accused having been made over to Babu A. K. Malakar for disposal it should be held that the whole case had been made over to him. In such circumstances even if it had been legal to take proceedings against others of the accused the only Court competent to do so was that of Babu

A. K. Malakar. Babu U. M. Bose had no jurisdiction to take action in the matter. For this proposition the decision already referred to in *In re : Azim Sheikh* (4) is an authority. In that case the Sub-Divisional Magistrate took cognizance of the whole case and after examining the complainant transferred it to an Honorary Magistrate. It was held that the case must be regarded as having been transferred as a whole to the Honorary Magistrate and the High Court expressed considerable doubt as to whether the case could have been transferred piece-meal.

For the above reasons I recommend that the order passed by Babu U. M. Bose summoning the Petitioners under sec. 426 should be set aside and the whole proceedings against them quashed.

No one appeared on this Reference.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—This case raises a question of importance relating to the jurisdiction of a Magistrate to issue process in a criminal case.

In the Code of Criminal Procedure (Act V of 1898 as amended) it is provided :—

Sec. 202 (1).—“ Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under sec. 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for

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the purpose of ascertaining the truth or falsehood of the complaint :

Provided that no such direction shall be made :—

(a) unless the complainant has been examined on oath under the provisions of sec. 200, or

(b) where the complaint has been made by a Court under the provisions of this Code."

Sec. 203.—" The Magistrate, before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of any investigation or inquiry under sec. 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

On the other hand, if the Magistrate is of opinion that " there is sufficient ground for proceeding " it is his duty to issue process on the person or persons against whom the complaint has been preferred : secs. 190 and 204.

The material facts are as follows :—

On the 5th March 1925, one Subal Chandra Namadas laid a complaint in writing before the Magistrate at Tangail that three named persons " and about 20 others " had allowed their cattle to graze on *kalai* growing in a field in the complainant's possession, and also had taken away some *kalai* from the field. Upon this complaint Mukram Pramanik and Ibrahim Khan, two of the three persons whose names were mentioned in the complaint, were duly tried by a 2nd class Magistrate at Tangail under sec. 426 of the Indian Penal Code, and on the 2nd of September 1925 were acquitted. Subsequently, on September 10th, 1925, the complainant preferred another complaint in writing before a first class Magistrate at Tangail against

the Petitioners Rostam, Ahadullah, Kali-muddi and " others, 23 in all," that they had let loose 48 cattle on the complainant's field and " caused a loss of Rs. 30. I filed case against two accused but they have been acquitted."

The Magistrate upon this complaint issued a summons to Ahadullah and another person to answer a charge under sec. 426, Indian Penal Code. The Sessions Judge of Mymensingh, being of opinion that the Magistrate had no jurisdiction to issue process upon the Petitioners so long as the acquittal of the persons who already had been tried upon the same charge and on the same facts stood good, has referred the matter to the High Court under sec. 438, Criminal Procedure Code. The question to be determined is whether the Magistrate was justified in law in issuing process upon the Petitioners.

Now, under the Criminal Procedure Code a wide discretion is given to Magistrates with respect to the grant or refusal of process, and in the interest of the community generally it is essential that Magistrates should be vested with an ample discretion in respect of the issue of process. Except as otherwise provided by statute anybody is entitled to prefer a complaint in a Criminal Court, and in India, where the Grand Jury system does not exist as an additional shield to innocent persons against whom unfounded complaints are laid in a Criminal Court, it is specially necessary, as is well stated in the *Oudh Criminal Digest* (p. 7) that " caution and discretion should be used in issuing summonses. An accused person ought not to be dragged off to answer a charge merely because a complaint has been lodged against him."

But in this matter a Magistrate's discretion, though wide, is not unfettered. In memorable words the late Lord Hals-

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bury laid down the course which a Magistrate ought to follow in exercising the discretion with which he is entrusted. "An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion. [*Rooke's case* (6)]; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular and it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself" [*Sharp v. Wakefield* (7)].

Thus, in determining whether process ought to issue, a Magistrate must proceed according to the provisions of the Code, and if, after carrying out the instructions therein contained, he is of opinion upon the materials before him that a *prima facie* case has been made out, he ought to issue process; and in such circumstances he is not entitled to refuse to issue process merely because he thinks that it is unlikely that the proceedings will result in a conviction. If the Magistrate were to refuse to grant a summons on that ground it would mean either that he was trying out the merits of the case at a preliminary stage in the proceedings or was following a process of guesswork and speculation; and neither of these things is he permitted to do.

If upon the facts alleged by the complainant and upon the assumption that the statement by the complainant is true no offence is disclosed, it is, of course, the duty of the Magistrate to dismiss the complaint. Again, if the Magistrate would

not be justified in issuing process unless he could place reliance upon the statement which the complainant has made under sec. 200—and this is the ordinary case—then, if he distrusts the statement made by the complainant, or if he distrusts the complainant's statement, and the distrust—though not sufficiently strong to warrant him in acting upon it without further inquiry—is confirmed as the result of an inquiry or investigation under sec. 202, in either case also it is his duty to dismiss the complaint; [*Baidya Nath Singh v. Muspratt* (8)].

On the other hand, if the Magistrate were to come to the conclusion that the facts alleged by the complainant disclose an offence, and, in his opinion, there is no ground for distrusting the complainant, could it be contended in reason or equity that the Magistrate was not justified in issuing a summons, merely because some other persons had been tried and acquitted upon the same charge and the same facts? Surely not; for *inter alia* it may be that at the previous trial the Magistrate had not correctly appraised the value of the evidence, or for some other reason the order of acquittal cannot be supported. [*Kokai Sardar v. Meher Khan* (5) and *Emperor v. Ghure* (9)].

It is unnecessary in this case to consider the interesting and difficult question as to whether, and, if so, in what circumstances, a Magistrate is entitled to take into account the *bond fides* of the complainant in considering whether there is sufficient ground for issuing process, and I refrain from doing so. It is settled practice, however, that if the Magistrate, having followed the procedure laid down in the Code, has exercised a judicial dis-

(6) 5 Rep. 100a.

(7) [1891] A. C. 179.

(5) I. T. R. 37 Cal. 690 (1910).

(8) I. T. R. 14 Cal. 141 (1898).

(9) I. L. R. 80 All. 168 (1914).

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cretion as to whether he ought to issue process or not, the High Court will respect his decision, and will be slow to disturb the order that he has passed.

The learned Sessions Judge in his report on this case has expressed the opinion that the Magistrate had no jurisdiction to issue process against the Petitioners so long as the acquittal of the persons accused of being participators in the same offence stands good. I am of opinion that this view is unsound and cannot be sustained. In support of his opinion the learned Sessions Judge cited *Panchanan Singh v. Umar Mahommed Sheikh* (1), *Bishnu Das Ghose v. King-Emperor* (2) and *In re : Azim Sheikh* (4).

The report of *Panchanan Singh's* case (1), however, is not satisfactory, and it is not clear whether process was issued against both the accused, or whether it was intended that the charge should be dismissed against both of them. *In re : Azim Sheikh's* case (4) is against the view which the learned Sessions Judge recommends to this Court. In that case one Bachauddi preferred a complaint against Maghu and Azim for having trespassed upon his land. Process was issued against Maghu, who was tried and acquitted. Subsequently a summons was issued against Azim upon the same charge, and the order directing the issue of the summons upon Azim was referred to the High Court with a recommendation that it should be set aside on the ground that the Magistrate had no jurisdiction to pass such an order.

The reference was rejected, and Mookerjee, J., distinguished *Panchanan Singh's* case (1) on the ground that "in that case the Magistrate's order was construed as

indicating a desire to terminate all proceedings relating to the matter in his Court and it was held that the District Magistrate could not interfere under sec. 437." I confess that I am unable from the report to ascertain the facts upon which *Panchanan Singh's* case (1) was decided, or the ground of the decision. I cannot, therefore, regard it as an authority. It appears to me, however, that when A has been tried and acquitted the expression of a desire by the trial Judge that further criminal proceedings should not be taken in connexion with the subject-matter of the trial cannot operate as a bar in law to the issue of process against B who was neither tried nor acquitted at A's trial.

Bishnu Das Ghose's case (2) and *Kedar Nath Biswas v. Adhin Mazi* (3) were cases in which the accused were charged with various offences, including the offence of unlawful assembly in which it was necessary that at least five persons should jointly be implicated. After the trial and acquittal of some of the accused there was obviously no "sufficient ground" in the circumstances for proceeding afterwards against the Petitioners. See *Kokai Sardar's* case (5). It is further urged that where A and B are alleged to be concerned jointly in committing an offence, and A is tried and acquitted, and in the order of acquittal the Magistrate states that in his opinion, the prosecution case is false, such an order ousts the jurisdiction of a Magistrate subsequently to issue process against B in respect of the said offence until the acquittal of A has been set aside [see *Bishnu Das's* case (2) and *Kedar Nath's* case (3)].

Those cases are distinguishable from the

(1) 4 C. W. N. 246 (1899).

(2) 7 C. W. N. 493 (1902).

(4) 7 C. L. J. 249 (1907).

(1) 4 C. W. N. 246 (1899).

(2) 7 C. W. N. 493 (1902).

(3) 7 C. W. N. 711 (1903).

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present case on the facts, for the learned Magistrate in the present case found "that the case seems to be purely a land dispute of civil nature, with a long history having equilibrium for each side." But, in my opinion, the above proposition regarded as a statement of law, with all due deference to the learned Judges who laid it down, is not only unsound in principle, but is opposed to the decisions of this Court in *Kokai Sardar's case* (5), *Manindra Chandra Ghose v. Emperor* (10) and *Emperor v. Ghure* (9).

The true view appears to be that although in such a case the plea of *autre fois acquit* would not be available to B, and the acquittal of A would not bar the issue of process against B, the fact that another person accused upon the same facts of having been implicated in the same offence has been acquitted may properly be taken into consideration by the Magistrate in determining whether upon the materials before him there is "sufficient ground for proceeding" to issue process upon the person against whom the complaint has been preferred.

In each case the Magistrate in deciding whether process should issue must exercise a judicial discretion having regard to the materials duly placed before him. In the present case the learned Magistrate, having come to the correct conclusion that the acquittal in the previous trial was not a bar to the issue of process against the Petitioners, appears straightway to have ordered that process should issue without paying any regard to what had taken place in the earlier proceedings. That, we think, he ought not to have done; and accordingly we set aside the order that pro-

cess should issue against the Petitioners, and in the circumstances we think that no further proceedings should be taken against the Petitioners.

MUKERJI, J.—I have read the judgment of my learned brother in this case, and I agree in the observations he has made, the conclusions he has arrived at, and the order he has passed.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD PHILLIMORE | RAJAH BHUPENDRA
LORD CARSON. | NARAYAN SINGH,
SIR JOHN EDGE. | Appellant,

1925,

Heard, 12, June.

Judgment, 7, July.

NARAYAN SINGH,
Respondent.

Chaukidari Chakran Act (VI, B. C., of 1870), sec. 51—Resumed Chakran lands included within putni tenure—Right of putnidar to take possession—Right of zamindar to additional rent.

Putnidars are entitled to have possession of Chaukidari Chakran lands included within their putni tenure and resumed under Act VI, B. C., of 1870, but subject to the right of the zamindar to have additional rent fixed for such land.

The decision of the trial Court holding that the putnidar should pay to the zamindar such increased putni rent over the doul jumma as might be proportionate to the increase of the present collection over what it had been when the putni mahal was created was affirmed by the Judicial Committee.

RAJA RANJIT SINGH v. KALI DAS DEBI (3) and RANJIT SINGH v. MAHARAJ BAHADUR SINGH (4) explained.

(5) I. L. R. 27 Cal. 680 (1910).

(9) I. L. R. 35 All. 188 (1914).

(10) I. L. R. 41 Cal. 754; s. v. 19. O. W. N. 580 (1914).

(3) I. L. R. 44 I. A. 117; s. v. O. I. L. R. 44 Cal. 841; 21 O. W. N. 609 (1917).

(4) I. L. R. 45 I. A. 102; s. v. O. I. L. R. 45 Cal. 179; 22 O. W. N. 128 (1918).

RAJAH BHUPENDRA NARAYAN SINGH *v.* NARIPAT SINGH.

PRYAMBADA DEBI *v.* MONAHAR MUKHOPADHYA (5) *approved*.

This was a consolidated appeal by special leave from one judgment and 18 decrees of the High Court at Calcutta, dated the 27th February 1922, which modified decrees of the District Court of Birbhum, dated the 13th September 1919, which had affirmed decrees, dated the 30th September 1910, of the Munsif's Court at Rampurhat.

The Appellant was the zamindar and the Respondent represented the *putnidar* and *dar-putnidar*. The *putni* mahal contained several plots of Chaukidari Chakran land which were resumed by the Government under the provisions of Bengal Act, VI of 1870, and conveyed to the Appellant.

The Respondents claimed to be entitled to these lands on the ground that they were included in a grant to their predecessors-in-title in 1853.

The Munsif and District Judge found that the *putni* lease in 1853 covered all the lands within the boundaries of the mahals but that the profits of the Chaukidari lands were not taken into account in determining the rent payable by the *putnidar*.

The question involved in the present appeal was whether the *putnidar* was entitled to obtain possession of the lands unconditionally or only on payment of an additional rent to the Appellant.

The High Court (Greaves and B. B. Ghose, JJ.) decided that the zamindar was not entitled to share in the rents and profits derived from the settlement of the resumed lands, being of opinion that the decisions of the Judicial Committee in *Ranjit Singh v. Kali Dasi Debi* (3) and

Ranjit Singh v. Maharaj Bahadur Singh (4) established that "the *putnidar's* interest in such lands, if, as here, they are comprised in his *putni*, is derived from the *putni* itself and from nothing else. This being so, it is difficult," say the learned Judges, "to see on what principle the zamindar can claim to vary the *putni* by enhancing the rent in respect of lands which were included in the original demise, even assuming that the profits of these lands were not taken into account in fixing the rent."

Sir G. Lowndes, K. C. and Dubé for the Appellant.

Messrs. L. DeGruyther, K. C. and Hodge for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD CARSON.—This is a consolidated appeal by special leave from one judgment and 18 decrees, dated the 27th February 1922, of the High Court of Judicature at Fort William in Bengal. Each of the 18 decrees, though relating to a distinct subject-matter, raises the same question for decision. Each suit was a suit to recover possession from the Defendant (who is the present Appellant), the zamindar of certain villages in *putni* settlement of Chaukidari Chakran lands which had been resumed by the Government under the provisions of Bengal Act, VI of 1870, and were transferred to the zamindar subject to the payment of rent assessed on the lands in accordance with sec. 51 of the Act. The Plaintiffs (Respondents) alleged that by a pottah, dated 13th November 1853, the predecessors-in-title of the Appellant zamindar granted five villages in *putni* settlement at the annual rent of Rs. 4,589, to one Krishna Chan-

(3) L. R. 44 L. A. 117; a. c. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(5) 29 C. W. N. 328 (1924).

(4) L. R. 44 L. A. 162; a. c. L. R. 46 Cal. 173; 23 C. W. N. 193 (1919).

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dra, from whom the Plaintiffs derived title. It was further alleged by the Plaintiffs and it is not now in dispute that at the time of the *putni* settlement there were certain lands in every village which were *Chaukidari Chakran* lands, and were held and enjoyed by the *Chaukidars* in lieu of their salaries, and that such lands which had been transferred as aforesaid by the Collector form part of the lands of the *putnidar* under the said pottah of 18th November 1853. The Appellant, on the other hand, denied that under the terms of the said pottah the Plaintiffs had any title to the *Chaukidari Chakran* lands released by the Government, and that in any event the Plaintiffs were not entitled to get possession thereof without paying some rent in addition to the annual rent of Rs. 4,589 fixed in the pottah.

All the suits were tried by the Munsif of Rampurhat, who by his judgment, dated 30th September 1910, held that the disputed property was included in *putni* settlement, and that the Plaintiffs were entitled to obtain *khas* or actual possession of the lands in suit, but that they could not do so without paying an additional rent to the zamindar, and he concluded his judgment in the following terms :—

"The Plaintiffs' *putni* lease appears to cover all the lands within the boundaries of the mahals, but the profits of the *Chaukidari* lands were not taken into account in determining the rent payable by the *putnidar*. The Plaintiffs must be held to pay a higher amount for the resumed lands than that which has been assessed for *Chaukidari* purposes on these lands by the Collector as by the resumption the lands were enfranchised and the *putnidars* would get the land free from the burden of the public service. The principle has been laid down in *Hari Narain v. Mukund Lal* (1), 'The *putnidar* is bound to pay to the zamindar such a rent for these lands as corresponds to the proportion between the gross collection and the *putni* rent formerly payable by him.'"

On an appeal and cross-appeal to the District Judge of Birbhum the decree and

order of the Munsif was, by a judgment of 13th September 1919, affirmed. The Plaintiff, now Respondent, appealed to the High Court of Judicature against so much of the order as adjudged that the Plaintiff should pay to the Defendant No. 1 such increased *putni* rent over the *doul jumma* as may be proportionate to the increase of the present collection over what it had been at the time at which the *putni* mahal was created. The learned Judges of the High Court allowed the appeals of the Plaintiff and made decrees setting aside that part of the decision of the District Judge which declared the zamindar entitled to obtain additional rents from the Plaintiff, and the only question to be considered on the present appeal by the Appellant zamindar against the said order is as to whether such increased rent is or is not payable. It has not been disputed, and, indeed it was so stated by the judgment of the High Court that by a long series of decisions the zamindar's right to a share of the rents and profits in addition to the amount payable to the *Chaukidari* fund under the provisions of Act VI of 1870 was established :—

"These decisions," say the learned Judges, "have recently been considered and followed in the case of *Maharaja Bijoy Chand v. Krishna* (2) which was decided in December 1920, and no useful purpose would, we think, be served by going through them again. They undoubtedly do support the contention urged before us on behalf of the zamindar Respondent and it is useless to suggest that they are in the main distinguishable from the cases before us"

The learned Judges, however, held that the series of decisions laying down this principle could no longer be supported having regard to the decisions of this Board in two cases, *viz. Raja Ranjit Singh v. Kali Dasi Debi* (3) and *Ranjit*

(2) 34 C. L. J. 275 (1920).

(3) L. R. 44 I. A. 117; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(1) 4 C. W. N. 814 (1909).

RAJAH BHUPENDRA NARAYAN SINGH v. NARAPAT SINGH.

Singh v. Maharaj Bahadur Singh (4). Their Lordships cannot agree with the Appellate Court that either of the cases referred to has the effect attributed to it by the learned Judges. In the first of these cases where it is to be observed the order was in substantially the same form as in the present case, all that this Board decided was that a *putni* grant by a zamindar of his interest in lands includes his interest in Chaukidari Chakran lands within the boundaries of the grant, and that upon their being resumed and transferred to the zamindar under Bengal Act, VI of 1870, the *putnidar* or *dar-putnidar* holding from him is entitled under sec. 51 of that Act to possession. The *putnidar* did not in that case challenge the validity of so much of the order appealed from as rendered the decrees for possession subject to the fixing of a fair and reasonable assessment. In giving the judgment of the Board Lord Parker of Waddington added: "It is a satisfaction to find that the view above expressed is that hitherto universally adopted in the Indian Courts."

In the second of the above-mentioned cases referred to by the Judges of the Appellate Court, the only point decided was that upon the transfer of Chaukidari Chakran lands situated within the villages to the zamindar an action by the *putnidars* for declarations that such lands formed parcel of the *putni* mahal, and that they were entitled to a settlement and *khas* possession was not an action for specific performance of contract within Art. 113 of Sch. II of the Indian Limitation Act, 1877, but a suit for possession of immoveable property within Art. 114. Their Lordships can find nothing in the judgment in anywise affecting the point raised upon the present appeal. The

Board has examined the record in that case, and it is to be observed that the order appealed from, as in the former case, recognised the right of the zamindar to have a rent fixed for the Chaukidari Chakran lands in question, and this part of the order was not questioned or appealed from in the case before the Board, and the judgment appealed from was in their Lordships' opinion correct.

In a case decided by the High Court of Calcutta in 1924, *Pryambada Debi v. Monahar Mukhopadhyaya* (5), the learned Judges refused to follow the decision appealed from in the present case, holding that the Appellate Court had misread or had not appreciated the two judgments of the Privy Council on which they had based their decisions. Their Lordships agree with this view, and are of opinion that the Court below was in error in holding that the cases referred to before the Privy Council made any change in the law as to the right of the zamindar to have a rent fixed under the circumstances existing in the present case. It was, however, argued in the present case before the Board that under sec. 51 of Act VI of 1870, the *putnidar* is entitled to hold the lands rent free, or without paying additional rent for them. Their Lordships cannot accept this view. The peculiar character of Chaukidari Chakran lands, and how they came to be included, without paying rent, in the various *putni* pottahs, as is found in the present case, has been frequently discussed before the Board, as in the cases referred to and others, and as Lord Buckmaster says in *Ranjit Singh v. Maharaj Bahadur Singh* (4):—

"It does not follow that because the rights original

(4) L. R. 45 I. A. 163; a. c. I. L. R. 40 Cal. 173; 23 C. W. N. 199 (1913).

(5) L. R. 45 I. A. 143; a. c. I. L. R. 40 Cal. 173; 23 C. W. N. 199 (1913).
(5) 29 C. W. N. 326 (1924).

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ly arose by virtue of a grant declared to be a contract within the meaning of sec 51 they are, therefore, rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the *putni* grants were made the resumption of the Chaukidari Chakran lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession."

Their Lordships therefore, see no reason for interfering with the long series of authorities commencing as far back as the year 1900, which have established the right of the zamindar to have an additional rent fixed for such lands, nor can their Lordships overlook the fact that in the cases already referred to before this Board no exception was taken by the *putnidar* to the fixing of such rents as a condition of being put into possession.

Their Lordships are therefore of opinion that this appeal should be allowed, that the decrees appealed from should be set aside, except so far as they confirm the decrees of the lower Appellate Court, and that such last-mentioned decrees should be restored. The Respondent should pay the costs of this appeal and of the appeals in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors: *Messrs. W. W. Box & Co.* for the Appellant.

Solicitors: *Messrs. Gush, Phillips, Walters & Williams* for the Respondent.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD DUNEDIN.

LORD SUMNER.

SIR JOHN EDGE.

1925,

Heard,

26, October.

Judgment,

5, November.

SHAFI AHMED N BI

AHMED and ors,

Petitioners,

v.

THE KING-EMPEROR,

Respondent.

Privy Council, not a Court of Criminal Appeal - Grounds on which it will interfere with criminal sentences - Penal Code (Act XLV of 1860), sec. 111, proper direction as to - Refusal of Governor-General to transfer case to another Province - Violation of natural justice.

The rule in DILLET's case (1) that the King in Council is not a Court of Criminal Appeal and will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done - was re-affirmed.

A question whether the trial Judge had properly explained sec. 111 of the Penal Code is one for a Court of Criminal Appeal and not one for consideration by the Judicial Committee.

The refusal by the Governor-General of India to transfer the case for trial to another Province on the alleged ground that there had been such copious and prejudicial newspaper comment on the crime committed that a fair trial by a local jury was impossible cannot be challenged before the Judicial Committee as a violation of the principles of natural justice.

These were two applications for special leave to appeal against convictions and sentences passed on the Petitioners in what was known as the Malabar Hill Tragedy.

SHAHI AHMED NABI AHMED &c. THE KING-EMPEROR.

The Petitioners were tried in the High Court at Bombay before Crump, J., and a special jury.

In the first application the 6 Petitioners had all been convicted of murder and were sentenced 3 to death and 3 to transportation for life.

In the second application the Petitioner Phanse had been found guilty of abetment of murder and was sentenced to transportation for life.

The case for the prosecution was that all the accused were members of a conspiracy to kidnap Mumtaz Begum who had been for some years the mistress of the Maharaja of Indore but had left him in April 1924; that in September 1924 she became the mistress of Mr. A. K. Bawla, a rich inhabitant of Bombay with whom she had since been living; that the conspiracy was organized from Indore and that in pursuance thereof Mr. Bawla was murdered, Mumtaz Begum was injured, and Lieutenant Saegert who came to their assistance was seriously wounded.

The Petitioner Phanse, who was accused No. 9, was A. D. C. to the Maharaja of Indore.

There was evidence that he had been in Bombay in September 1924, that he had been arranging for the return of Mumtaz Begum to Indore, and had provided a motor car for that purpose.

The accused was not present in Bombay at the time of the occurrence but there was evidence that he was in communication with some of the other accused.

In his summing up to the jury the learned Judge said—

“Whether as regards the last 2 charges”—

[i.e., (i) abetment of murder of Bawla, and

(ii) abetment of the attempted murder of Lieutenant Saegert]—

“against him you are inclined to go to the length of saying that the probable consequence of the conspiracy in which he entered was the murder of Bawla and the attempted murder of Lieutenant Saegert, is a separate question which I leave to you to decide.”

Sir John Simon, K. C., Sir Geo. Lowndes, K. C. and Mr. J. M. Parikh for the Petitioners.—These are two applications on somewhat different grounds but in regard to them both, special leave to appeal is sought on the ground that a fair trial was impossible in Bombay owing to the hostile atmosphere which was accentuated by newspaper comment.

Titbetts v. Windrush (2).

The evidence of identification is meagre.

[LORD SUMNER.—If there is evidence the value of it is a question for the jury to decide. The Board will not interfere unless there is misdirection and no misdirection is alleged on this point.]

The case of Anantrao Phanse is even stronger. There is no evidence that he was present at the scene of the crime. Mumtaz Begum had fled with the state jewels and there was evidence which showed that she might be willing to return. The accused Phanse provided the motor car to bring her back. The provision of a motor car might possibly be construed as evidence of complicity in an abduction but not as providing the means of committing a murder.

[LORD DUNEDIN.—He has been convicted of abetment of murder and the question was, did he come within the section.]

The summing up was not adequate to justify a conviction for murder and the jury were not properly instructed by the trial Judge. The whole tenor of the summing up was in regard to the charge of abduction, the further charges of murder

SHAM AHMED NABI AHMED v. THE KING-EMPEROR.

and abetment were dismissed in a single sentence.

Messrs. A. M. Dunn, K. C. and Kenworthy Brown for the Crown.—The evidence shows that there was a conspiracy to abduct Mumtaz Begum at all costs, and Phanse was a party to that conspiracy. That itself imports violence, and if violence ensues and death results he is responsible as it is a probable consequence of his act. That fact is clearly brought out by the learned Judge in his summing up and was a matter for the jury to decide.

Sir John Simon replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD DUNEDIN.—Their Lordships have repeatedly announced that in dealing with petitions for special leave to appeal against sentences pronounced in the Criminal Courts of the various Dominions of the King, they will not act as a Court of Criminal Appeal and will not, to use the words of Lord Watson in *Dillet's* case (1), advise His Majesty to "review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

In the present case the first point urged by the Petitioners is that there had been such copious and prejudicial newspaper comment on the crime committed that a fair trial by a jury was impossible in Bombay.

It is in the power of the Governor-General of India if he thinks that in the state of public feeling a fair trial could not be obtained in the place where the offence would ordinarily be tried, to order that the trial be held elsewhere. An application

was made to him to so order and was refused. To ask the Board to declare that such a refusal of the Governor-General, who had all the advantages of being in the country and of judging of the real state of public feeling, amounted to a violation of the principles of natural justice is nothing less than preposterous, and their Lordships cannot too strongly qualify the impropriety and uselessness of such a demand.

As regards the other grounds in the case of the first six Petitioners, they are all questions as to the sufficiency of evidence—fit for consideration by a Court of Criminal Appeal, but falling far short of the definite dictum quoted.

The case of the remaining Petitioner, which at first sight might seem different, is, when more closely looked at, just the same. He was not present at the scene of the assault and murder and consequently the offence of which he was found guilty was abetment of murder. The point that was sought to be urged by his counsel was that the charge of the learned Judge did not adequately bring home to the jury that abetment of murder could not be properly inferred from a conspiracy to kidnap unless the natural result of the attempt to kidnap was murder. The learned Judge in the course of his charge used these words after explaining sec. 111 of the Penal Code:—

"I merely emphasise once more that the crucial point as regards the applicability of that section is whether that which is done was a probable consequence of the abetment; was it a probable consequence of the conspiracy into which Accused No. 9 had entered that Bawla would be murdered on the night of January the 12th? Unless you can so find, that charge of murder cannot be established."

And he specially left it to them to say whether after finding conspiracy they "could go the length of saying that the probable consequence of the conspiracy was the murder of Bawla and the attempt-

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ed murder of Lieutenant Saegert." If this were a Court of Criminal Appeal it would be difficult indeed to say that this advice to the jury was not adequate to the situation. Still, it would be a question for a Court of Criminal Appeal. Here the moment that adequacy is raised in reference to such advice the case of the Petitioners is gone; for who could possibly say that the adequacy or otherwise could amount to a "disregard of the forms of process or violation of the principles of natural justice?" The averment fails, just as the averments in the other cases failed.

Their Lordships will humbly advise His Majesty to refuse the prayer of all the Petitioners.

Solicitors: Messrs. T. L. Wilson & Co. for the Petitioners.

Solicitor: The Solicitor, India Office, for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1306 OF 1922.

GRAVES, J.

CUMING, J.

1925,

3, March

BAIKUNTA CHANDRA

DHUPI, Defendant,

Appellant,

v.

PRANLAD CHANDRA

DHUPI and ors.,

Plaintiffs, Respondents.

Fraudulent ex parte decree, suit for setting aside, if lie, when summonses had been served and Defendant was aware of the suit—Falsity of claim and adducing of false evidence, if constitute sufficient fraud for vacating the previous decree.

B. obtained an ex parte decree against P. and others and on compromise against some others. Summonses had been duly served and as a matter of fact P. had watched the progress of the suit on behalf of the Defendants. P. subse-

quently brought a suit to set aside the ex parte decree on the ground that it was obtained by suppression of processes, and by adducing false evidence in support of a false claim. The lower Courts found that there was no suppression of processes and that P. was fully aware of the progress of the suit, but that B.'s suit was wholly false and that the decree was obtained by the production of false evidence and by the practice of fraud on the Court and therefore set aside the previous decree.

Held—That the balance of authority is that it is not open to a party to raise pleas of this nature, and no suit lies to vacate a previous decree if the suit had been decreed on contest or if the suit had been decreed ex parte and it was established that summonses had been served on the Defendants.

NALINI KANTA MUKHERJI v. HARI NIKARI (1) followed.

KEDAR NATH DAS v. HEMANTA KUMARI DEBI (2) and LAKHMI CHURN SHAHA v. NUR ALI (3) distinguished.

This was an appeal against the decree of Babu Jatindra Chandra Lahiri, Subordinate Judge, Barisal, dated the 21st February 1922, affirming that of Babu Rabindra Kumar Basu, Munsif, Pirojpur, dated the 22nd July 1920.

The facts of the case are briefly as follows:—The Appellant Baikunta Chandra Dhupi had brought Title Suit No. 3 of 1917 in the Munsif's Court at Pirojpur, Backerganj, for declaration of his howla right in certain lands, which the Defendants had falsely got recorded in the settlement record-of-rights as appertaining to their howla, and also for a declaration that the Defendants having denied

(1) 20 C. W. N. 325 (1925).

(2) 18 C. W. N. 447 (1913).

(3) 15 C. W. N. 1010 (1911).

BAIKUNTA CHANDRA DHUPL. v. PRAHLAD CHANDRA DHUPL.

their *nimi-houla* under the Appellant Baidkunta, there was a forfeiture and he was entitled to *khas* possession on eviction of the principal Defendants. Summonses were duly served and some of the Defendants appeared and some did not appear but watched the case on behalf of some of the appearing Defendants. The suit was ultimately decreed on compromise against some of the Defendants and *ex parte* against others. One of these latter subsequently brought the present suit for setting aside the *ex parte* decree and for declaration of his title in certain lands, on the ground that the decree was obtained by the practice of fraud on the Court inasmuch as summonses had been suppressed, the claim was false, and false evidence was adduced. The lower Courts found that there was no suppression of processes and that the Defendant in that suit was fully aware of the suit and had been watching the suit on behalf of some of the contesting Defendants. But they held that the decree was obtained by practising fraud on the Court inasmuch as the claim was palpably false and it was supported by adducing perjured evidence. They therefore decreed the present suit *in toto* and set aside the previous decree and declared Plaintiff's title to the suit lands. Hence the present Defendant, i.e., the Plaintiff of the previous suit, preferred the present second appeal to the High Court.

Mr. Satya Charan Sinha and Mr. Jitendra Nath Roy for the Appellant.

Babu Bhagirath Chandra Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—The facts of this appeal are as follows :—The Appellant obtained an *ex parte* decree against the Respondents

in a certain Title Suit No. 3 of 1917. The Respondents then sued the Appellant to set aside this *ex parte* decree on the ground that it was obtained by suppression of processes, by adducing false evidence and by wrongly including certain lands within his tenancy which did not belong to the tenancy. The Court of first instance found that there had been no suppression of processes and that the Respondent was fully aware of the progress of the suit. He further found that the Appellant's suit was wholly false and that the decree was obtained by the production of false evidence and by the practice of fraud on the Court and decreed the Respondent's suit. On appeal to the District Court this decision was upheld. The learned Judge there held agreeing with the Court of first instance that the Respondent was fully aware of the suit and that processes had been served upon him. He, however, found that it was fraud on the part of the Appellant to falsely allege his own *houla* right and to obtain a judgment by adducing false evidence. The Defendant has appealed to this Court. I think that the facts as found by the lower Appellate Court would justify the Court in holding that the appeal succeeds and the Plaintiff's suit should be entirely dismissed. The learned Advocate for the Appellant has referred us to the case of *Nalini Kanta Mukherji v. Hari Nikari* (1) to the decision of which one of the members of this Bench was a party. The allegations in that suit were more or less the same as have been made in the present suit. In that suit it was urged that the summonses had not been served and that the claim was fraudulent. My learned brother in dealing with the second contention remarked that the balance of authority was that it was not open to a party to raise pleas of

(1) 29 C. W. N. 325 (1925).

BAIKUNTA CHANDRA DHUPI. v. PRAHLAD CHANDRA DHUPI.

this nature if the suit had been decreed on contest or if the suit had been decreed *ex parte* and it was established that summonses had been served on the Defendants. In the present case it has been found that the Respondent who was the Defendant in the original suit of which the decree is sought to be set aside had been served with summons and was at that time watching the suit. I see no reason to differ from the principle laid down in *Nalini Kanta Mukherji v. Hari Nikari* (1) with which I am in entire agreement. We have been referred to the case of *Kedar Nath Das v. Hemanta Kumari Debi* (2). The facts of that case are, however, distinguishable, because in that case it appears that no summonses had been served on the Plaintiff and that the Plaintiff was not aware of the suit and in those circumstances an *ex parte* decree had been obtained. We are also referred to the case of *Lakhmi Churn Shaha v. Nur Ali* (3). The facts of that case are also distinguishable because in that case the Defendant, although he was duly served with notice, was unable to appear and defend the suit. In the present appeal the facts are entirely different. The Respondents were all along aware of the case and were watching the case during the course of its prosecution.

In the circumstances we think that the appeal must succeed and the decree of the lower Appellate Court be set aside and the Plaintiffs' suit entirely dismissed with costs in all Courts.

GREAVES, J.—I agree.

J. N. R. *Appeal decreed with costs.*

(1) 29 C. W. N. 325 (1925)

(2) 18 C. W. N. 447 (1913).

(3) 15 C. W. N. 1010 (1911)

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORIGIN

No. 402 OF 1923.

NAWAB NIZAM-UD-

DOWLA and ors.,

Judgment-debtors,

Appellants,

v.

BENI MADHAB and ors.,

Decree-holders,

Respondents.

WALMSLEY, J.

MUKERJI, J.

1925,

30, June.

Civil Procedure Code (Act V of 1908), Or. 21, rr. 11, 15—Execution, application for, by one of several decree-holders—Omission to specify names and interests of other decree-holders in petition, if vitiates proceedings—Other decree-holders appearing and consenting to execution, effect of.

Omission on the part of one of several decree-holders to state, in his application for execution, the names of all the persons who are interested in the decree is not such a defect as would invalidate the execution proceedings. The names of the parties required by Or. 21, r. 11, of the Civil Procedure Code, is for purposes of identification only. Upon an application for execution by one of several decree-holders under Or. 21, r. 15, it is for the Court to pass proper orders to protect the interests of the other decree-holders.

Where the other decree-holders appeared and consented to the execution proceeding, their interests were sufficiently safeguarded.

This was an appeal preferred on the 4th December 1923 against an order of the Subordinate Judge, 1st Court, 24-Per-ganas (Babu Durga Prashad Ghose), dated the 5th September 1923.

The facts of the case will appear from the judgment.

Mr. B. C. Laha and Babu Tarakeswar Nath Mitter for the Appellants.

Mr. A. N. Bose, Babu Nagendra Nath

NAWAB NUZHAT-UD-DOWLA v. BENI MADHAB

Ghose and Moulvi A. S. M. Akram for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of an order passed under sec. 47, C. P. C. The judgment-debtor is the Appellant in this appeal. The application for execution was filed by one Prince Sultan Hossain Mirza on the 11th April 1922 for execution of a decree passed in Original Suit No. 3 of 1900 of the Court of the Additional Subordinate Judge of 24-Perganas which was ultimately affirmed by the Privy Council in Appeal No. 16 of 1903. The learned Subordinate Judge has held that the application is maintainable under the provisions of sec. 47 of the Code of Civil Procedure.

The decree in question was in favour of one Prince Nanhey Mirza and others. By transfer of certain interests in the decree, the persons who have become entitled to the decree-holders' interests are these : A 10 annas share was sold to one Mehdi Hossain who in his turn sold 4 annas out of his 10 annas to one Lala Mohun Lal. The 6 annas that remained with the original decree-holders have now been inherited by three persons, namely, Sultan Hossain Mirza, Nawab Akbari Begum and Nawab Dilband Begum. The first one of these persons is the executing decree-holder. The 6 annas share which remained with Mehdi Hossain after transfer to Lala Mohun Lal of the 4 annas out of the 10 annas purchased by him has now devolved on his death on his widow Haidari Begum, his two daughters Zakia Begum and Taiba Begum and his two sons Nazir Hossain and Abid Hossain. Nazir Hossain and Abid Hossain have been declared insolvents and the $3\frac{1}{2}$ annas share which they

inherited is now in the hands of the Receiver appointed in the insolvency proceedings, namely, one Pravudayal Ras-togi. The $2\frac{1}{2}$ annas share which belonged to the widow and the two daughters of Mehdi Hossain, namely, Haidari Begum and Zakia Begum and Taiba Begum is now in the hands of the administrators to the estate left by them, namely, Beni Madhab and Basanta Roy. Beni Madhab and Basanta Roy are also the heirs of Lala Mohun Lal to whom Mehdi Hossain had sold 4 annas out of the 10 annas purchased by him.

The objections put forward on behalf of the Appellant in this appeal are mainly three. The first objection is that the application for execution is not maintainable, inasmuch as there are defects in it and because it is not complete. It is urged that the necessary particulars have not been embodied in the application and furthermore, when it is an application under Or. 21, r. 15, C. P. C., it should contain the names of all the decree-holders who are interested in the decree so that notices of the application may be served on them. It appears that, in the application for execution, besides the name of the executing decree-holder, the names of certain other persons are given, namely, those of Beni Madhab and Basanta Roy and also of Nawab Dilband Begum and Nawab Akbari Begum. The names of Beni Madhab and Basanta Roy are mentioned; but it is not stated whether they are there in their capacity as administrators to the estate of Haidari Begum, Zakia Begum and Taiba Begum or as heirs of Lala Mohun Lal. It is contended on behalf of the Appellants that this is one of the defects in the application. The other defect in the application that is complained of is that the names of Nazir Hossain and Abid Hossain are not men-

NAWAB NUZHAT-UD-DOWLA v. BENI MADHAB.

tioned nor does the name of Pravudayal Rastogi who has been appointed Receiver to their estate appear therein as one of the decree-holders. Applications have been filed subsequent to the institution of these proceedings both by the Receiver Pravudayal Rastogi as also by the administrators Beni Madhab and Basanta Roy giving their consent expressly to the execution proceedings. The question now arises as to whether the omission on the part of the applicant for execution of the decree to mention the names of these persons and the interests which they have in the decree is such a defect as would be sufficient for holding that the proceedings are incomplete and, therefore, invalid. On a reference to Or. 21, r. 11, C. P. C., it appears that, so far as the names of parties are concerned, all that is necessary to be stated in the application is, first of all, the names of the parties to the decree and then the name of the person against whom execution of the decree is sought. These particulars have to be embodied in the application so that there may not be any difficulty in the matter of identification of the decree in respect of which execution is sought for. I am not prepared to hold that the omission on the part of a decree-holder to state in the application for execution the names of all the persons who are interested in the decree is such a defect as would invalidate the execution proceedings. It is quite true that when an application is made under Or. 21, r. 15, C. P. C., by one of the decree-holders for execution of the whole decree which has been passed jointly in favour of himself and others, the Court has got to pass proper orders in order to protect the interests of all the decree-holders; but in my opinion, it is not absolutely necessary that the names of all the decree-holders should be given in the execution petition by the

executing decree-holder. As has been held in the case of *Durga Das Nandi v. Dewraj Agarwalla* (1) it is in the discretion of the Court whether or not notice should be given to the other decree-holders or to the judgment-debtor before making an order for execution under Or. 21, r. 15, C. P. C.; but it is not obligatory upon the Court to issue such notice. In the present case, the other decree-holders having subsequently come in and having given consent to the execution of the decree and there being no reason to suppose that their interests have not been properly safeguarded, I am unable to say that this defect is one which would invalidate the proceedings in any way.

The next contention that has been urged on behalf of the Appellant is that the learned Judge of the Court below was wrong in allowing the decree-holders to adduce further evidence after arguments had been heard and order has been reserved in the case. The arguments were heard on the 11th August 1923. After that date, an application was filed on behalf of the decree-holders praying for an opportunity to adduce further evidence. The application was filed on the 16th August 1923 and the learned Judge granted the same in view of the fact that, in the petition of objection that was filed on behalf of the judgment-debtor, it was not expressly stated what was the ground upon which it was sought to be contended that the decree-holder was not entitled to maintain the application. It seems to me that there is considerable substance in what has been urged before us on behalf of the decree-holder when it is stated that his client or his lawyers understood the objection of the judgment-debtor to mean that it was not proved that the executing decree-holder was the son of Prince

(1) I. L. R. 33 Cal. 306 (1905).

NAWAB NUZHAT-UD-DOWLA v. BENI MAHAJAN.

Nunhey Mirza who was one of the original decree-holders. It is said on their behalf that evidence was given on that point and that they did not understand that there was a further objection which the judgment-debtor put forward at the time of the hearing to the effect that the Receiver to the estate of Prince Nunhey Mirza was dead and, therefore, the executing decree-holder was not entitled to maintain the application without adducing proof of the fact that the estate had been inherited by him. The learned Judge granted the application of the decree-holders and I am unable to hold that in the circumstances to which I have referred, he exercised his discretion wrongly in allowing the decree-holders to adduce further evidence although arguments had already been heard in the case.

The last objection urged on behalf of the judgment-debtor Appellant is with regard to the question of limitation. The learned Judge has found in his judgment that there was a successful application for execution in the year 1914 and he is of opinion that, it having been proved that there was such an application, the present application is not barred by limitation. It is urged on behalf of the Appellants that the learned Judge was wrong in supposing that there was such an application in 1914 and that, as a matter of fact, what was put in before the learned Judge was a copy of an application for execution—not in respect of the decree which is at present under execution but of some other decree. We have gone into this matter with some degree of care and we are satisfied that there is no substance in this contention. In any event, when the witness Mozaffer Ali Khan who spoke to this application and the proceedings in connection with it was examined on behalf of the decree-holders, he was not at all cross-examined

with regard to this matter and no question was put to him to show that, as a matter of fact, this application of the year 1914 did not relate to the decree now under execution. The Appellant's further grievance is that certain documents which he had filed in order to show that the execution was barred by limitation had not been received by the learned Judge. Those papers are on the record and it does not appear that any attempt was made on his behalf to have them admitted on the record as evidence and further, even if the statements contained in those documents be accepted as correct, the fact still remains that there was a successful application in the year 1906 and there was a further application in the year 1914 which was also successful and, consequently, the present application cannot be said to be barred by limitation.

For all these reasons, I am of opinion that there is no substance in this appeal and that it should be dismissed with costs—hearing-fee, ten gold mohurs, which will be divided equally between the two sets of Respondents who have appeared.

WALMSLEY, J.—I agree.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 675 OF 1922.

SANDERSON, C. J.

CHAKRAVARTI, J.

1924,

17, April.

SATYA RANJAN ROY

CHOUHRY and anr.,

Defendants Nos. 2 &

3, Appellants,

v.

SARAT CHANDRA

Biswas, Plaintiff,

Respondent.

Civil Procedure Code (Act V of 1908), sec. 2, cl. (11)—Legal representatives—Executors de son tort if and when can be added as parties Defendants to the suit when a legal representative within the meaning of the term who represents the estate exists—Executor de son tort, meaning of.

SATYA RANJAN ROY CHOUDHRY v. SARAT-CHANDRA BISWAS.

The Defendant L having died pending this suit against him on a hand-note, the two Appellants were also brought in on the record along with his widow as his legal representatives within the meaning of sec. 2, cl. (11) of the Code, on the ground of their having been his executors de son tort as they appropriated some bricks of his kiln under the orders of the District Board, and a decree was passed against the two Appellants as also against the widow :

Held—That the mere taking away of a portion of a deceased Defendant's property does not make the person who takes away the same his executor de son tort, in the absence of proof of an intention that he intended to act as a legal representative of the deceased, and to represent his estate by intermeddling with it.

That when a legal representative of the deceased Defendant within the primary meaning of the term is in existence, the executors de son tort should not also be added as parties to the suit in addition to such legal representative.

This was an appeal against a decree of the Subordinate Judge of Zillah Nadia (Babu Jamini Kanta Mukerjee), dated the 7th December 1921, modifying a decree of the Munsif of Meherpur (Babu Hem Chandra Bose), dated the 17th June 1921.

The facts will appear from the judgment.

Babus Panchanan Ghose and Girish Chandra Banerji for the Appellants.

Babu Monmotha Nath Roy for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This is a second appeal by Defendants Nos. 2 and 3, and it arises out of a suit which the Plaintiff

brought on a hand-note executed by one Lalit Mohan Bhattacharya.

After the institution of the suit Lalit Mohan died. The Plaintiff brought in on the record as the legal representative of Lalit Mohan not only Defendant No. 1, the widow of Lalit Mohan and admittedly his legal representative, but also added Defendants Nos. 2 and 3 on the ground, to quote the words of the learned Subordinate Judge, that " on his (Lalit Mohan's) death the Defendants Nos. 2 and 3 appropriated some bricks of the kiln " which belonged to Lalit Mohan. The learned Subordinate Judge further found that Defendants Nos. 2 and 3 took away those bricks under the orders of the District Board of Nadia.

The Subordinate Judge held that the claim was valid, and made a decree not only against the widow as representing the estate of Lalit Mohan but also against Defendants Nos. 2 and 3 as the legal representatives of Lalit Mohan.

Defendants Nos. 2 and 3 have preferred this appeal, and it was contended on their behalf that they had no concern with this litigation and were wrongly made parties to it. It was further contended that the widow was the legal representative of the deceased man and she represented the estate of Lalit Mohan, and the bringing in of Defendants Nos. 2 and 3 was therefore not justified in law.

It was further contended on behalf of the Appellants that assuming that a person by intermeddling with the estate of the deceased may make himself liable as an executor *de son tort*, the findings in this case did not show that Defendants Nos. 2 and 3 were really executors *de son tort*.

On behalf of the Respondent, the learned vakil contended that the order of the Courts below adding Defendants Nos. 2 and 3 as legal representatives of the de-

SATYA RANJAN ROY CHOUDHRY vs SARAT CHANDRA BISWAS.

ceased, in addition to the widow, was justified under sec. 2, cl. (11) of the Code of Civil Procedure. It was also contended by the learned vakil for the Respondent that the finding in this case that Defendants Nos. 2 and 3 took away some bricks belonging to the deceased, made them legal representatives of the deceased within the meaning of sec. 2, cl. (11).

Mr. Roy who appeared for the Respondent, however, was unable to produce any authority on the point that the mere taking away of a portion of the property of a deceased man makes the person, who takes away a portion of the property while there is a legal representative present, become an executor *de son tort*. The learned vakil has also not been able to find any authority for the proposition that while a legal representative within the primary meaning of the word is in existence, an executor *de son tort* should also be added as a party to the suit in addition to such legal representative.

It appears to me that the contention of the learned vakil for the Appellants is well-founded and that when Lalit Mohan left a widow who represented his estate after his death in this suit which was brought against Lalit Mohan on a personal obligation of Lalit's, on Lalit's death his widow would be the proper representative of the deceased man in a suit against him.

As to the second point, I think it is only necessary for me to say that I do not think that upon the findings of the learned Subordinate Judge, the Defendants Nos. 2 and 3 were at all executors *de son tort* of the estate of Lalit Mohan. There is no finding that they intended to act as legal representatives of Lalit Mohan and to represent his estate by intermeddling with it.

Therefore, I think that the order bringing in Defendants Nos. 2 and 3 and the

decree which was made in their presence as necessary parties are not correct.

The appeal is, therefore, allowed and the suit dismissed as against Defendants Nos. 2 and 3.

The Plaintiff will pay the costs of the Defendants Nos. 2 and 3 in all the Courts including the costs of this appeal.

SANDERSON, C. J.—I agree.

H. D. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 108 OF 1924.

GREAVES, J.

MUKERJI, J.

1925,

21, April.

SHAMA CHAMAN DE,
Petitioner, Appellant,

v.

SM. REF BALA DASSI,
Opposite Party,
Respondent.

Will (Hindu)—Revocation—Locus standi to apply—Probate obtained by widow upon withdrawal of objection by brother—Nephew, if may apply for revocation.

Where an application for the probate of a Will propounded by the widow of the alleged executant, a Hindu, was at first opposed by his brother, but shortly afterwards the latter filed a petition withdrawing his objections and admitting the genuineness of the Will, and thereupon probate was granted:

Held—That a brother's son of the deceased, who had not been served with citation in the case, had locus standi to prosecute proceedings for revocation of the Will.

This was an appeal preferred on the 5th May 1924 against the decree of the Additional District Judge of Howrah in Zillah Hughly (G. B. Mumford, Esq.), dated the 6th February 1924.

The facts of the case will appear from the judgment.

Mr. Harendra Nath Sarbadhikari and

SHAMA CHARAN DE *v.* SM. REEBALA DASSI.

Babu Nripendra Chandra Das for the Appellant.

Babus Brajalal Chakravarti and Panchnan Ghosal for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of certain proceedings in connection with revocation of a probate granted in respect of a Will of one Basanta Kumar De. Basanta Kumar De died leaving a widow Reebala Dassi, his brother Sital Chandra De, and three nephews, Biman Chandra De, Probodh Chandra De and Shama Charan De. The last mentioned person is the Appellant in this appeal. After the death of Basanta Kumar De the widow Reebala Dassi and her brother one Poran Chandra Sen applied for probate of the Will. The application was made on the 9th January 1923 and the usual notices and special citations were ordered to be issued upon the brother Sital Chandra De and the nephews Biman Chandra De, Probodh Chandra De and Shama Charan De. The nephews did not enter appearance, but the brother Sital Chandra De on the 10th March 1923 put in an objection to the grant of the probate and in the application which he filed on that day he stated that the Will had not been executed by Basanta Kumar De and had not been duly attested and he contested the genuineness of the Will upon various grounds to be found set up in the petition. On the 21st March 1923 Sital Chandra De filed another petition in which he stated that he had come to learn on enquiry that the Will propounded was a genuine document; and upon that petition being put in, the learned Judge on the same day recorded an order to the effect that the objection of Sital Chandra De having been withdrawn, and the usual affidavits having been put in, pro-

bate should issue. On the 16th June 1923 the Appellant appeared through one Nani Lal De and alleged that he was a minor living under the guardianship of Nani Lal De who was his maternal uncle. In the petition which he filed on that date he stated that no notice of the proceedings had been served on him, that he was residing with his said maternal uncle Nani Lal at Jangipara Krishnagore within the District of Hooghly, and that as a matter of fact he had been described as a major in the application for probate and that the notice that had been issued in his name appeared to have been served at Jadavbati which was quite a different place. He stated further that the applicant for probate in collusion with Sital Chandra De had obtained probate in respect of the Will. He applied for revocation of the probate under sec. 50 of the Probate and Administration Act—Act V of 1881. The learned District Judge on the 6th February 1924 refused the application of Shama Charan De on the preliminary ground that he had no *locus standi*. The learned Judge was of opinion that Shama Charan De being the nephew of the testator was not an immediate reversionary heir and he held that the probate having been granted in the presence of the immediate reversionary heir, namely, Sital Chandra De . . . the Petitioner had no *locus standi* to come in and apply under sec. 50 of the Probate and Administration Act. Shama Charan De has thereupon preferred this appeal.

On behalf of the Appellant reliance has been placed on the decision of this Court in the case of *Brindaban Chandra Shaha v. Sureswar Shaha Paramanick* (1). That was a case in which a question arose as to whether the reversioner was entitled to come in and oppose the grant of probate. The reversioner in that case was an im-

SHAMA CHARAN DE v. SM. REEBALA DASSI.

mediate reversioner. In that case it was laid down that any interest, however slight, and even the bare possibility of an interest is sufficient to entitle a party to oppose a testatory paper or instrument. It is not necessary to consider in the present case whether the proposition that was laid down in that case is really applicable in this country or whether the rule enunciated there as having been laid down in the English cases is applicable to cases like this. I would prefer to rest my decision upon the particular facts of the present case.

It cannot be disputed that as a matter of fact the Appellant being one of the next reversioners has an interest in this matter. The only question is whether he should be allowed to come in having regard to the circumstances to which I have referred. Now the principle applicable to such a case seems to be well-settled. In the case of *Abinash Chandra Mazumdar v. Harinath Saha* (2), which was a case relating to a declaratory suit by a remote reversioner it was laid down that where the nearest reversioner precludes himself or herself from maintaining a declaratory action by omitting to sue within the statutory period and has practically allowed improper alienations the remote reversioner is entitled to maintain the suit. What is necessary to be investigated in a case like this is whether the interest which the Appellant undoubtedly has would or would not be affected by reason of his not being allowed to come in to oppose the grant of the probate. The circumstances of the present case are somewhat peculiar. A petition was filed by the immediate reversioner challenging the genuineness of the Will in distinct and definite terms and within a short time of the filing of the petition he put in a petition not merely withdrawing

his objections, but stating that he was satisfied upon enquiry that the Will was a genuine one and that probate should issue. These circumstances seem to me to indicate that there may have been some sort of arrangement between Sital and the propounder of the Will and in this view of the matter the case comes within the principles laid down in the case of *Satindra Mohan Tagore v. Sarala Sundari Devi* (3) and I hold that upon the circumstances of the present case the Appellant had sufficient interest which would entitle him to come in and contest the proceedings. In this view of the matter we think that the learned Judge's order cannot be supported.

We accordingly set aside the order of the Additional District Judge and send the case back to him in order that he may take further steps to have the Will proved in solemn form before him. The Appellant will be entitled to intervene and cross-examine the witnesses and examine witnesses on his own behalf. If, however, the Appellant takes undue or unreasonable advantage of the opportunity thus granted it will be open to the learned Judge to make such orders as he thinks fit for the purpose of compensating the propounder of the Will with regard to the costs of the proceedings.

Costs—hearing-fee, three gold mohurs—will abide the result.

GREAVES, J.—I agree.

N. G.

(3) 27 C. L. J. 320 (1917).

CIVIL REVISIONAL JURISDICTION

REVISIONAL JURISDICTION, 1925.

CUMING, J.

PAGE, J.

1926,

Heard, 15 and

16, February.

Judgment,

9, March.

BASA ATULL MEAN and
ors., Petitioners,

v.

RAZUDDIN MEAN and
ors., Opposite Party.

Civil Procedure Code (Act V of 1908), secs. 115, 141, Or. 9, r. 4, Or. 21, rr. 90, 92, Or. 43, r. 1 (j)—Application to set aside sale dismissed, in the absence of both parties, for default—Application to set aside order of dismissal for good cause, if entertainable under Or. 9, r. 4—Proceeding, if proceeding in execution and so proceeding in suit or miscellaneous proceeding in the nature of suit—Order, if bars fresh application—Revision, interference in—Appeal, remedy by, if available.

An application under Or. 21, r. 90, of the Civil Procedure Code, to set aside a sale of immoveable property in execution of a decree was dismissed for default, neither party being present when the case was called. An application to set aside the order of dismissal and for a re-hearing of the matter was refused by the trial Court on the ground that Or. 9, r. 4 of the Civil Procedure Code did not apply. On an application to the High Court for revision:

Held—That the procedure in Or. 9, r. 4, which applies to suits did not become applicable to proceedings under Or. 21, r. 90 by force of sec. 141 of the Code.

That, in any case, there was nothing to prevent the Petitioner from making, subject to the law of limitation, a fresh application under Or. 21, r. 90, and there being this alternative remedy, the High Court ought not to interfere in revision.

Per CUMING, J.—The error of the trial Court, if any, was an error of law and not one calling for revision under sec. 115 of the Code.

Per PAGE, J.—An order dismissing an application to set aside a sale merely on

default of appearance of the parties is not appealable under Or. 43, r. 1 (j), of the Code unless that order also confirms the sale within the meaning of Or. 21, r. 92, of the Code.

The importance of doing away with uncertainties on questions of practice and procedure adverted to by PAGE, J.

These were Rules issued on the 18th December 1925, against two orders of the Munsif of Sudharam (B. C. Sen Gupta, Esq.), dated the 14th November 1925.

The facts of the case will appear from the judgment.

Mr. Gunada Charan Sen and Babu Hem Kumar Bose for the Petitioners.

Babus Nagendra Nath Ghose and Bankim Chandra Banerji for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

CUMING, J.—The facts of the case out of which these two Rules which were granted by my learned brothers Greaves and Panton, JJ., arise are briefly these: A certain property was mortgaged by the tenant one Ganga Charan Sen. A mortgage decree was obtained. The Petitioner is the assignee of this mortgage decree. The mortgage decree was obtained on the 19th July 1922. The landlord of the tenant who had mortgaged the property obtained a rent decree against the tenant for arrears of rent of the property. The property was sold in execution of the rent decree on 22nd November 1924. The Petitioner coming to know of this made an application on 20th January 1925 under Or. 21, r. 90 to set aside the sale on the usual grounds. Notices were issued and after various adjournments the case was fixed for 4th July 1925. When the case was called on for hearing neither party was present and the Munsif dismissed the ap-

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plication. The Petitioner then applied under Or. 9, r. 4 to the Munsif on 6th July 1925 to restore the case and also on 9th September 1925 made an application, under Or. 47, r. 1, for a review of the order.

Both these applications were rejected. The learned Munsif held following the ruling in *Narendra Nath v. Rakhal Das* (1) that Or. 9 of the Code does not apply to execution proceedings. With regard to the application for review the learned Munsif held that Or. 47, r. 1 had no application. Against these two orders these Rules have been obtained. The Rules must be discharged for the following reasons:—In the first place I cannot see how either order comes within the mischief of sec. 115, Civil Procedure Code.

Take first of all the order of the learned Munsif refusing to review the order under Or. 47, r. 1.

The contention is that by so doing he refused to exercise a jurisdiction vested in him by law and by misdirecting himself in the interpretation of the ruling cited by him in the exercise of the jurisdiction acted illegally and with material irregularity. With regard to the first part of the contention it is not correct to say that the learned Munsif refused to exercise a jurisdiction vested in him by law. An application was made to him to review a certain order. The application was duly registered. The pleaders on both sides were heard and the learned Munsif decided after hearing them and relying on certain decision of this Court that the application did not come within Or. 47, r. 1, because the reasons for which he was asked to review his order did not fall within the provision of Or. 47, r. 1. He did not, therefore, refuse to exercise his jurisdiction. Had he refused to consider the petition at all that

would have been a refusal to exercise his jurisdiction; but he did consider it, heard the parties and came to a decision that this was not a case in which he could review his former order under Or. 47, r. 1. Obviously if it were to be held that a Munsif so acting refused to exercise his jurisdiction there would always be what amounts to an appeal whenever a Court refused to review its judgment.

Yet Or. 41, r. 7 provides that there is no appeal against such an order.

As for the second ground that he misdirected himself as to a point of law and so acted in the exercise of his jurisdiction illegally or with material irregularity it only requires to be stated to be rejected. A Court cannot at the same moment refuse to exercise his jurisdiction and act in the exercise of it with material irregularity. The one ground excludes the other.

The order of the learned Munsif rejecting the application for review does not attract the provision of sec. 115, C. P. C.

Finally on its merits the order is so obviously right that the learned Advocate who appeared for the Petitioners did not seriously attempt to assail it. This Rule must be discharged with costs.

Taking now the other Rule No. 1474.

In this Rule the Petitioner had applied to the Court under Or. 9, r. 4 to restore his application which had been dismissed on account of the absence of both parties. Here again the Munsif heard the parties and after hearing them decided relying on a decision of this Court that Or. 9, r. 4 did not apply to execution proceedings. He exercised his jurisdiction and came to a decision. The decision may be right or may be wrong. But if wrong, he has at the most been guilty of an error of law which cannot form the subject of revision under sec. 115. It may be noted that the same two self-contradictory grounds are

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given in this Rule also that I have referred to in dealing with the former Rule. On the merits it has no substance. The learned Advocate for the Petitioners has contended that there are conflicting rulings on this point in the Court, *viz.*, whether an application to set aside a sale under Or. 21, r. 90 is or is not a proceeding in execution. If it is, it is admitted that Or. 9, r. 4 has no application. If it is not, it is contended that Or. 9, r. 4 does apply. No doubt there are conflicting rulings on the point, the case of *Deljan Nichha Bibi v. Hemanta* (2) being an authority for holding that such applications are not proceedings in execution while the opposite view has been taken in the case of *Narendra Nath Chatterji v. Rakhal Das Tarafdar* (1). The learned Advocate for the Petitioners has contended that in view of these conflicting decisions we must refer the case to a Full Bench. I see no necessity for any reference, for it seems to me quite clear on the authority of the case of *Thakur Prosad v. Fakirulla* (3), a case of the Privy Council, with special reference to page 111, that an application under Or. 21, r. 90 is a proceeding in execution.

Their Lordships remark :—

“ It is not suggested that sec. 373 of the Civil Procedure Code (the old Code of 1882) would of its own force apply to execution proceedings.

The suggestion is that it is applied by force of sec. 647 (now sec. 141). But the whole of Chap. XIX of the Code consisting of 121 sections is devoted to the procedure in execution and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that

the procedure for suits should be followed as far as applicable.”

Now sec. 311 which corresponds to Or. 21, r. 90 is one of these 121 sections referred to contained in Chap. XIX. Clearly therefore the Privy Council hold that the procedure applicable to suits is not to be applied by sec. 647 (now sec. 141) to application under sec. 311 (now Or. 21, r. 90). In the circumstances I am bound to follow the ruling of the Privy Council and there is no room for a reference to a Full Bench.

There is a further reason why we should not interfere. If Or. 9, r. 4 does apply the Petitioner can make a fresh application. If it does not and if the application under Or. 21, r. 90 is to be considered as a proceeding in execution there is nothing in the Code, as far as I can see, which would bar a fresh application when an application has been dismissed for the default of both parties. When there is an alternative remedy I should be slow to interfere by way of revision.

This Rule also must be discharged.

Costs, two gold mohurs in each Rule.

PAGE, J.—These two Rules have been obtained under sec. 115 of the Civil Procedure Code for revision of two orders passed by the third Munsif of Sudharam on the 14th December 1925 (1) dismissing an application by the Petitioners for a review of an order of the learned Munsif on the 4th July 1925 by which he dismissed the Petitioners' application under Or. 21, r. 90 to set aside an execution sale on default of appearance, (2) dismissing an application by the Petitioners under Or. 9, r. 4 for an order setting aside the dismissal of the said application. The learned Advocate for the Petitioners admitted that in the circumstances obtaining in this case there was no ground upon which the Court would be entitled to review the order

(1) 41 O. L. J. 286 (1924).

(2) 19 O. W. N. 758 (1915).

(3) L. R. 22 I. A. 44; s. c. I. L. R. 17 All.
108 (1904).

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in question either under Or. 47 of the Code [*Chhajju Ram v. Neki* (4) and *Bindu Bashini Roy Choudhuri v. Secretary of State for India* (5)]; or in the exercise of its inherent jurisdiction, or that which the Court possesses under sec. 151 of the Civil Procedure Code [*Debi Baksh Singh v. Habib Shah* (6), *Bharat Chandra Nath v. Iasin Sarkar* (7), *Lalta Prosad v. Ram Karan* (8) and *Bilasirai v. Cursondas* (9)].

When the application under Or. 21, r. 90 was called for hearing on the 4th July 1925 neither party appeared, and the learned Munsif dismissed the application in default of appearance and subsequently rejected the Petitioners' application for the restoration of the application to set aside the sale upon the ground that Or. 9, r. 4 did not extend to execution proceedings, and therefore, he had no jurisdiction to hear the application. The learned Advocate for the Petitioners contended that the learned Munsif in taking this course "failed to exercise a jurisdiction with which he was vested" (sec. 115), and urged that the order of 14th December ought to be set aside, and the learned Munsif directed to hear and determine the Petitioners' application for the restoration of the case on the merits. The question which falls for determination is whether the provisions of Or. 9, r. 4 are extended to execution proceedings by sec. 141 of the Civil Procedure Code. As it is conceded that Or. 9, r. 4 is not made applicable to proceedings in execution otherwise than under sec. 141, it is necessary for the Court to decide what is the meaning and effect

of that section. Now, the construction of sec. 141 and of sec. 647 (the corresponding section of the Code of 1882) has remained a vexed question, and been a fruitful source of litigation for more than forty years, during which period a wide diversity of opinion has been disclosed in this Court as to whether, and if so to what extent, the procedure in the Code relating to suits has been made applicable to execution proceedings. Having regard to the admitted divergence of opinion in the Court as to the meaning and effect of sec. 141, I should have been disposed to refer the question in issue to the Full Bench for final determination. It is, I think, a matter both for surprise and regret that so many questions of practice and procedure have been allowed—in some instances for decades—to remain, and still are unsettled. Uncertainty as to procedure must needs militate against the due administration of justice. It is, of course, inevitable that differences of opinion should arise as to the substantive rights of a prospective litigant, but there should be no ground for doubt or perplexity as to the mode in which his rights are to be determined. It is of the utmost importance that the practice and procedure of the Courts should be well-defined and clearly understood, and that in the Mofussil Judges should not be compelled to waste their energy in endeavouring to ascertain the practice they are to follow from a number of apparently diverse decisions which can only be rendered consistent (if at all) by the exercise of the most subtle reasoning. Upon these grounds, and because I feel strongly that the rules and regulations relating to practice should be the handmaid and not the mistress of the law, I should have been inclined to refer the question in issue in this case to the Full Bench. My learned brother, however, takes a different view, and as I have form-

(4) L. R. 49 I. A. 144; s. c. 26 C. W. N. 697; 36 C. L. J. 459 (1922).

(5) 40 C. L. J. 163 (1923).

(6) I. L. R. 35 All. 331; s. c. 17 C. W. N. 829 (P. C.) (1913).

(7) 21 C. W. N. 769 (1917).

(8) I. L. R. 34 All. 426 (1912).

(9) 21 Bom. L. R. 952 (1919).

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ed a clear opinion as to what our decision should be I am content that we should decide this case without referring the question in issue to the Full Bench, because, in my opinion, the matter is concluded by the decision of the Judicial Committee in *Thakur Prosad v. Fakirulla* (3), and also because since 1917 the question has arisen in the High Court on six occasions, and in each instance the Court has determined the issue as we propose to decide it in the present case. In such circumstances these rulings, I think, may now be regarded, and should be followed, as a settled *cursum curiæ*. *Bharat Chandra Nath v. Iasin Sarkar* (7); Civil Revision Cases Nos. 521 and 522 of 1923; Civil Rule No. 1313 of 1923; Civil Rule No. 1286 of 1923; and *Narendra Nath Chatterji v. Rakhal Das Tarajdar* (1). It will not be inopportune, however, to point out the source of the diversity of opinion which has arisen. In sec. 647 of the Code of 1882 it was enacted that "the procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction other than suits and appeals." Divergent views having been expressed by the Courts as to whether sec. 647 extended the provisions of the Code relating to suits to execution proceedings [see, e.g., *Biswa Sonan v. Binanda Chunder* (10), *Bunku Behari Gangopadhyaya v. Nil Madhab* (11), *Fakirullah v. Thakur Prosad* (12) and *Pirade v. Pirade* (13)], the legislature added to sec. 647 the following: "Explanation—This section does not apply to applications

for the execution of decrees which are proceedings in suits" [Civil Procedure Code Amendment Act (VI of 1892)]. In 1894 the case of *Thakur Prosad v. Fakirulla* (3), which had been decided in the Allahabad High Court before the passing of Act VI of 1892, was reversed on appeal to the Judicial Committee [*Thakur Prosad v. Fakirulla* (3)], and in the course of his judgment Lord Hobhouse, who delivered the opinion of the Board, observed that—"It is not suggested that sec. 373 (now Or. 23, r. 1) would of its own force apply to execution proceedings. The suggestion is that it is applied by force of sec. 647. But the whole of Chap. XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as possible. Their Lordships think that the proceedings spoken of in sec. 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions." Later in his judgment his Lordship added that—"Their Lordships' attention has been called to the recent Act VI of 1892 which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings. That Act is framed so as to apply to the present appeal, and would have controlled their Lordships' opinion had it been the other way. But having regard to the controversies which have arisen and the difference of opinion between the various High Courts, their Lordships have thought it right to state their opinion that the Act of 1892 does

(1) 41 C. L. J. 285 (1924).

(3) L. R. 23 I. A. 44; s. c. I. L. R. 17 All. 106 (1894).

(7) 21 C. W. N. 769 (1917).

(10) I. L. R. 10 Cal. 416 (1884).

(11) I. L. R. 18 Cal. 635 (1891).

(12) I. L. R. 12 All. 179 (1890).

(13) I. L. R. 12 All. 681 (1882).

(3) L. R. 23 I. A. 44; s. c. I. L. R. 17 All. 106 (1894).

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nothing more than express the true meaning of the Civil Procedure Code."

In 1908 the legislature enacted the Code of Civil Procedure (Act V of 1908), and sec. 141 of the Code runs as follows: "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction."

There is no substantial difference between the terms of sec. 647 of the Code of 1882 in its original form and sec. 141 of the Code of 1908, and, in my opinion, the broad and general proposition may be laid down that none of the provisions of the Code are made applicable to execution proceedings by reason of the provisions of sec. 141. Proceedings in execution are not controlled by Or. 21 alone, for many other provisions in the Code are made applicable to execution proceedings, but it should clearly be understood that such other provisions are not extended to proceedings in execution by reason of sec. 141. [*Asim Mandal v. Raj Mohan Das* (14), *Hari Charan Ghose v. Manmatha Nath Sen* (15), *Charu Chandra Ghose v. Chandi Charan Roy* (16), *Balasubramania Chetti v. Swarnammal* (17), *Hajrat Akramannisa Begum v. Valiunnissa Begum* (18), *Bhubaneswar Prosad Singh v. Tilukdhari Lal* (19) and the cases cited *supra*]. The following decisions in so far as they are based upon, or support a view of, the law inconsistent with what is stated above to be the meaning and effect of sec. 141, in my opinion, must now be regarded as having been incorrectly decided; *Krishna*

Chandra Pal v. Pratap Chandra Pal (20), *Safdar Ali v. Kishun Lal* (21), *Deljan Nichha Bibi v. Hemanta Kumar Roy* (2), *Bhuban Behari Nag v. Dharendra Nath Banerji* (22) and *Bipin Behari Saha v. Abdul Barik* (23). Now, in the present case, the Court has been moved to set aside the order of the 14th December 1925 in the exercise of its revisional jurisdiction. If an appeal lies to the High Court from the order complained of the Court has no jurisdiction to entertain an application for revision of the order under sec. 115, and in any case the Court would be slow to exercise its power of revision if some other adequate remedy were available to the Petitioner. But an order of dismissal for default is not a decree [sec. 2 (2)], and is not appealable under sec. 96, and no appeal lies from the order refusing to restore an application to set aside the sale [*Charu Chandra Ghose v. Chandi Charan Roy Chaudhuri* (16) and *Ghasiti Bibi v. Abdul Samad* (24)]. Unless, therefore, the order dismissing for default of appearance the application to set aside the sale is "an order under r. 92 of Or. 21 refusing to set aside a sale," a remedy by way of appeal is not open to the Petitioner (sec. 104). R. 92, however, relates to orders confirming the sales, and with all due respect for the opinion expressed by Richardson, J., in *Kali Kanta v. Shyam Lal* (25) and *Bharat Chandra v. Iasin Sarkar* (7) (in which cases Or. 9, r. 9 and not Or. 9, r. 4 were in question), I am disposed to think that an or-

(14) 13 O. L. J. 532 (1910).

(15) I. L. R. 41 Cal. 1: n. o. 18 O. W. N. 343 (1913).

(16) 19 O. W. N. 25 (1914).

(17) I. L. R. 38 Mad. 199 (1913).

(18) I. L. R. 18 Bom. 479 (1898).

(19) [1919] Pat. 75; 4 P. L. J. 135 (1919).

(20) 19 O. W. N. 758 (1915).

(21) 21 O. W. N. 769 (1917).

(16) 19 O. W. N. 25 (1914).

(20) 3 O. L. J. 276 (1906).

(21) 12 O. L. J. 6 (1910).

(22) 20 O. W. N. 1203 (1916).

(23) 21 O. W. N. 30 (1916).

24 I. L. R. 29 All. 506 (1907).

(25) 25 O. L. J. 164 (1910).

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der dismissing an application to set aside a sale merely on default of appearance of the parties cannot be regarded as in any way confirming the sale. No doubt, if the Court not only dismisses the application but orders that the sale be confirmed, such an order is within r. 92, and is appealable under Or. 43 (1) (j). On the other hand, in dismissing the application for default when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not. Such an order, in my opinion, is not appealable under Or. 43 (1) (j). Whether an appeal lies from an order or not in each case must depend upon the construction of the order. In my opinion, where an order is passed dismissing an application to set aside a sale merely on default of appearance by the parties and not on the merits, the applicant is not debarred from making a fresh application for the same purpose, if he prefers the application within the time allowed by the statute of limitation, and the application otherwise is duly made according to the requirements of the law.

There appears to be no provision in the Code which expressly disentitles the applicant from making a fresh application to set aside the sale in such circumstances. Such an application is not barred as *res judicata* [*Delhi and London Bank v. Orchard* (26)], and I can see no reason or equity in refusing to allow the applicant to prefer it. On the contrary, the rulings in *Dhonkhal Singh v. Phakkar Singh* (27), *Thakur Prosad v. Fakirulla* (3), *Delhi and*

London Bank v. Orchard (26) and *Hajrat Akramannisa Begum v. Valiulnessa Begum* (18) appear to me to support the view that such an application may be preferred. Moreover, an examination of Or. 9, rr. 4 and 9, leads me to the same conclusion, for whereas under r. 4 when neither party appears a fresh suit may be brought under r. 9 when a suit has been dismissed under r. 8 on the non-appearance of the Plaintiff alone, the Plaintiff is precluded from bringing a fresh suit in respect of the same cause of action, and is restricted to an application for an order to set aside the dismissal of the suit. The practice in England is to the same effect; see Or. 36, *Armour v. Batu* (28) and *per Walton, J.*, in *Dowse v. Cecil* (29). Thus a distinction is drawn between suits in which neither party appears, and suits in which the Defendant appears but the Plaintiff fails to appear when the case is called for hearing. In my opinion, a like distinction should be drawn in cases where an application to set aside a sale in execution proceedings is dismissed for default. Now, in *Kali Kanta v. Shyam Lal* (25) and *Bharat Chandra v. Iasin Sarkar* (7), to which I have adverted, when the application to set aside the sale was called for hearing, the Opposite Party appeared but the applicant did not appear and it may be that in such circumstances if the application is dismissed on default of appearance by the applicant, the only remedy open to the applicant is to apply to the Court to reverse the order in the exercise of its inherent jurisdiction or that conferred upon

(7) 21 C. W. N. 769 (1917).

(18) I. L. B. 18 Bom. 429 (1893).

(26) 25 C. L. J. 164 (1916).

(20) L. R. 4 I. A. 127; s. c. I. L. B. 3 Cal. 47 (1877).

(28) [1891] 2 Q. B. 233.

(29) Annual Practice, 1925, p. 604.

(3) L. R. 22 I. A. 44; s. c. I. L. B. 17 All. 106 (1894).

(20) L. R. 4 I. A. 127; s. c. I. L. B. 3 Cal. 47 (1877).

(27) I. L. B. 15 All. 64 (1893).

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it under sec. 151 of the Code. [*Debi Baksh Singh v. Habib Shah* (6), *Lalla Prosad v. Ram Karan* (8), *Bilasirai v. Cursondas* (9) and *Bharat Chandra Nath v. Iasin Sarkar* (7)]. But I am of opinion that where neither party appears and an order is passed dismissing the application merely for default of appearance the applicant is entitled subject to the law of limitation duly to prefer a fresh application to set aside the sale. In these circumstances, in my opinion, the Court ought not to exercise its power of revision in favour of the Petitioner, and for the reasons which I have stated I agree that these Rules should be discharged.

N. G.

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE RESIDENT
AT HYDERABAD (DECCAN).]

VISCOUNT FINLAY.

BANSILAL ABIRCHAND,

LORD CARSON.

Appellant,

LORD BLANESBURGH.

v.

1925,

GHULAM MAHBUB

Heard, 29, June.

KHAN and anr.,

Judgment,

Respondents.

20, October.

Civil Procedure Code (Act V of 1908), sec. 20 (c)
—*Suit on contract of loan—Cause of action, where arises—Suit brought against non-resident foreigner in British Court to avoid bar of limitation—British Court established in cantonment by cession from the Nizam—Jurisdiction—Debtor and creditor—Duty of former to pay latter at his place, if arises when creditor out of realm.*

The Plaintiff who had a place of business at Secunderabad, a British cantonment in which jurisdiction was exercised by certain British Civil Courts, from cession by the Nizam, sued the Defend-

ants, both residents of Hyderabad, in the Nizam's dominions, one as principal debtor and the other as surety, in one of such Courts, asserting that the loans were both made and re-payable at Secunderabad. The claim, if brought in the Hyderabad Court, would be time-barred but would be within time in the Secunderabad Court on account of the foreign residence of the Defendants. The finding upon the contract of the parties being that no part of the obligation either of the principal debtor or of the surety was to be discharged at Secunderabad and no obligation was assumed there:

Held—That the question of jurisdiction was different in character from such a question when it arises between one Court and another in British India, but that no part of the cause of action arose at Secunderabad even within the meaning of sec. 20 (c) of the Code of Civil Procedure.

The duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm.

This was an appeal (No. 131 of 1924) from a decree, dated the 27th September 1922, of the Court of the Resident at Hyderabad, reversing a decree, dated the 22nd November 1921, of the Assistant Resident and restoring the decree, dated the 8th July 1919, of the Civil Judge of Secunderabad.

The Appellant brought the suit to recover money due under 3 bonds executed by Muhammad Ala-ud-din and guaranteed by the late Sir Asnam Jah, whose estates were represented by the Respondents.

Both the borrower and the surety and their representatives were residents of Hyderabad (Deccan) but the Plaintiff alleged that the loans were made in and were re-payable at Secunderabad where

(6) I. L. R. 35 All. 331; s. c. 17 O. W. N. 229 (P. C.) (1913).

(7) 21 O. W. N. 769 (1917).

(8) I. L. R. 34 All. 426 (1912).

(9) 21 Bom. L. R. 953 (1919).

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the Plaintiff carried on business. The Defendants denied that the Court had jurisdiction.

The Civil Judge held that there was jurisdiction, but he dismissed the suit finding that the Appellant had been paid in full. The Secretary to the Resident without dealing with the question of jurisdiction reversed the finding of the Civil Judge and passed a preliminary decree for the taking of accounts to ascertain the sum due.

On second appeal the Resident dismissed the suit for want of jurisdiction.

The facts are more fully set out in the judgment of the Judicial Committee.

Messrs. DeGruyther, K. C. and B. Dubé for the Appellant.

Sir G. Lowndes, K. C. and E. B. Raikes for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—This is an appeal by the Plaintiff from a judgment and decree, dated the 27th September 1922, of the Court of the Resident at Hyderabad, reversing a decree, dated the 22nd November 1921, of the Assistant Resident there, and restoring, albeit on other grounds, a decree made by the Civil Judge of Secunderabad, dated the 8th July 1919.

The suit was commenced by the Appellant in the Court of that Judge in September 1911. Its purpose was to recover money lent by him so long ago as 1891 to the grandfather of the first Respondent with re-payment guaranteed, so it was alleged, by the late Sir Asnam Jah, Prime Minister of Hyderabad, whose estate is represented in the suit by his son, the second Respondent. The borrower, the alleged surety, and their respective representatives were, or are, all resident in Hyderabad, the capital of the Nizam's

dominions. The Appellant, however, has a place of business at Secunderabad, a neighbouring British cantonment, and asserting that the loans were both made and re-payable there, he claimed that his suit in respect of them was cognizable by the local British Court.

But this was not the Appellant's only reason for invoking that jurisdiction—if he could successfully do so. In the Courts of the Nizam his demands had long since been barred by lapse of time. In the British Court, however, he claimed to be entitled to escape from the operation of the Indian Limitation Act—an Act otherwise entirely applicable to the case—on the ground that the residence of the Defendants in Hyderabad was a "foreign" residence which took his claim against them outside the statute although their residence was in fact only six miles away.

In the Courts below many matters of fact were canvassed. Most of these, concluded by concurrent findings, were before their Lordships treated as settled, and the arguments were addressed to one question only, *viz.*, was the Court of the Civil Judge of Secunderabad entitled to entertain the suit at all.

That learned Judge had held that he had jurisdiction in the matter, but he dismissed the suit, holding on the view taken by him of the facts, that the Appellant had been re-paid all that was due to him.

The Appellant appealed to the Assistant Resident at Hyderabad. His appeal was resisted only by the second Respondent, and he, it is stated, did not there raise again his objection to the jurisdiction of the Court taken before the trial Judge, and certain at least it is that the learned Assistant Resident made no reference to the point in his judgment, by which the claim of the Appellant was in

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effect allowed in full. The second Respondent then appealed to the Resident, and he, taking up the consideration of the question afresh, held that the Civil Judge of Secunderabad had no jurisdiction in the matter. On that ground he allowed the appeal and dismissed the Plaintiff's suit, expressing, however, at the same time his concurrence with the findings of fact of the Assistant Resident where these were at variance with the findings of the trial Judge. The Plaintiff again appeals.

At the outset their Lordships would express their entire concurrence with the learned Resident in his observations upon the importance of this question of jurisdiction in such a case as the present. The Respondents are both of them subjects of the Nizam, from whose cession, as the learned Resident points out, the jurisdiction of the Secunderabad Court practically proceeds. In these circumstances, and especially where, as here, the liability or non-liability of such Defendants may actually depend upon it, the question of jurisdiction becomes of first importance, different in character from such a question when it arises merely as between one Court and another in British India. And, while their Lordships would not here have upheld, even if it had been pressed, the contention raised in his printed case by the Appellant that this question of jurisdiction, decided by the trial Judge in his favour, and not re-opened before the Assistant Resident, must now be treated as concluded against the Respondents, they are gratified to record that that contention was not persisted in before the Board. Indeed, as they have already said, the arguments before them were confined to its discussion.

Its determination turns solely upon the question whether, in this case, within the meaning of sec. 20 (c) of the Code of Civil

Procedure, the cause of action, wholly or in part, arose within the local limits of the Civil Judge of Secunderabad. The facts upon which the answer depends lie in a small compass.

In 1891 Muhammad Ala-ud-din Khan, deceased, grandfather of the first Respondent, was Silladar of Sir Asnam Jah Bahadur, Prime Minister of the Nizam. Having agreed to purchase 100 horses to form part of the bodyguard of the Prime Minister Ala-ud-din borrowed from the Plaintiff Rs. 40,000 to pay for them, and arranged with the Paigah of the Minister for re-payment of the loan with interest by monthly instalments by means of deductions from his salary in the manner which is thus described in a communication addressed on the 29th July 1891, by the Secretary of the Minister to the Pay Office of the Paigah :—

"The said Silladar for purchasing the horses has borrowed from Rai Bahadur Bansilal Abirohand the sum of Rs. 40,000 with interest at $1\frac{1}{4}$ per cent., and has assigned the liability to pay the principal and interest by monthly instalments of Rs. 1,000 upon this Secretariat. Wherefore you had better pay to the person who may bring the chitti of the said sowcar the sum of Rs. 1,000 every month."

The promise made to the Plaintiff, the fulfilment of which was thus directed, was contained in a note which had been addressed by the same secretary to the Plaintiff on 21st July 1891, in which it is stated that every month at the time of distribution of pay of the force, after taking receipt of Khan Sahib, a sum of Rs. 1,000 will be paid from the Ilaqa to the Plaintiff's Ilaqadar, who may bring chitti signed by the Plaintiff without any objection or prevention from the Sarkari Treasury until the principal and interest are fully liquidated.

In these terms was the promise of the Treasury made, and their Lordships are willing to accept without deciding that, as

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alleged by the Plaintiff, they constituted a contract of suretyship, Ala-ud-din being the principal debtor.

His own obligation as such is expressed in a bond of the 25th July 1891, in which he promises the Plaintiff :—

"That in re-payment of the said sum [of Rs. 40,000] and until the principal and interest is re-paid one instalment of a sum of Rs. 1,000 will be reaching you every month from out of the distribution of the pay of the force. Accordingly I have also caused a guarantee to be made for the said sum of money by means of a Rubkar, dated the 21st July 1891, from the office of the Secretary of Revenue. The instalment of Rs. 1,000 which has been agreed will reach you directly from the Treasury irrespective of the fact whether there is any saving from out of the salary of the horses or not There will be no failure in the instalments reaching you. If for any reason perchance one instalment is defaulted the said sowcar will have the power to sell immediately the horses by auction and recover and pay himself the total amount."

A further advance of Rs. 5,000 was made by the Plaintiff on 9th August 1891, and a final advance of Rs. 7,628 on the 6th June 1894. These for present purposes may be treated as having been made on the same terms.

As to their meaning and effect their Lordships are not in doubt. The Treasury or surety re-payment is to be made to the Plaintiff or his representative at the office of the Treasury at Allahabad, and the instalments, which in the principal debtor's bond are described as "reaching" the Plaintiff, are the very instalments of which payment is so to be made. There is no promise either by the principal debtor or the surety to make any payment at Secunderabad, and so far as the principal debtor is concerned the bond above abstracted is the only promise on his part which is forthcoming. It is quite true that on failure of any instalment there is doubtless an implied promise by him to re-pay the loan. But there is no implied promise to re-pay it at Secunderabad.

Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the Plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor it extends in this respect further than in England. Accordingly so far as the principal debtor is concerned there is no obligation upon him, either express or implied, to make any payment to the Plaintiff at Secunderabad.

Nor so far is there any such obligation assumed by the surety.

But it is contended, and the trial Judge took the view, that such an obligation is to be found in two documents written in the year 1904, one on the 30th March, addressed by the Treasury Secretary to the Appellant, and the other, on the 13th April, addressed by one department of the Prime Minister's establishment to another, a copy being forwarded to the Appellant.

Their Lordships do not consider it necessary to discuss these documents in detail. They are satisfied that they were never intended to alter the contractual obligations of the surety. At most they indicated a substituted arrangement to be continued only so long as was convenient; there was neither intention to alter nor any consideration present for the alteration of the obligations as they then existed.

It follows that in their Lordships' judgment no part of the obligations either of the principal debtor or of the surety was to be discharged at Secunderabad. And no obligation was assumed there. No part of the Plaintiff's cause of action accordingly arose within the local limits of the Court of the trial Judge. He had no jurisdiction to entertain the suit, and in

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their Lordships' judgment the decree of the learned Resident was quite right.

Their Lordships accordingly will humbly advise His Majesty that this appeal therefore be dismissed with costs.

Solicitors : Messrs. T. L. Wilson & Co. for the Appellant.

Solicitors : Messrs. Lattey & Hart for the Respondents.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM LAHORE.]

VISCOUNT HALDANE.

LORD DUNEDIN.

SIR JOHN EDGE.

1924,

Heard,

25, February.

Judgment,

25, February.

BEGU and ors,
Appellants,

v.

THE KING-EMPEROR,
Respondent.

Criminal Procedure Code (Act V of 1898), ss. 236, 237—Charge of murder—Conviction for removal of dead body, if legal—Assessors' opinion taken in writing and not orally, not shown to cause miscarriage of justice, if ground for consideration by Privy Council.

Under sec. 237 read with sec. 236 of the Criminal Procedure Code, a man may be convicted of an offence although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.

Where several persons were charged under sec. 302 of the Penal Code with murdering the deceased, and the evidence went to show that several persons had set upon the deceased in a field, and after he had been killed, his corpse was wrapped up in a cloth, placed on a horse and in that way removed, and as regards some of the accused, the Judge was of opinion that the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder, but on

the other hand, he convicted each of them of having removed the body and convicted them of that offence :

Held—That they were properly convicted under sec. 237 of the Criminal Procedure Code of that offence though they were not formally charged with it.

Unless an alleged aberration from the precise directions of the Code of Criminal Procedure is shown to have led to a miscarriage of justice, the point is not one for consideration by the Judicial Committee.

DILLET v. QUEEN (1) re-affirmed.

This was an appeal (No. 151 of 1924) from a judgment of the High Court at Lahore, dated the 8th April 1924, upholding the judgment of the Sessions Judge of Montgomery, dated the 22nd September 1923.

The Appellants Bakhu and Walia were convicted of murder under sec. 302 of the Indian Penal Code and were sentenced to death. Begu, Rajah and Hamid, the other three Appellants, were convicted of causing evidence of the commission of the murder to disappear with the intention of screening the offenders from legal punishment and they were sentenced under sec. 201 of the Indian Penal Code to seven years' rigorous imprisonment.

The facts are set out at length in the judgment of the Judicial Committee. The convicts appealed on 4th January 1924 to the High Court contending that the evidence recorded was unreliable and did not establish their guilt, and also that the trial was not according to law inasmuch—(1) As the opinion of the assessors had not been taken in compliance with the imperative provisions of sec. 309 of the Code of Criminal Procedure.

(2) As Begu, Rajah, and Hamid had not been charged with an offence punish-

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able under sec. 201 of the Indian Penal Code, their convictions under that section could not be upheld.

(3) As Begu, Rajah and Hamid could not be tried legally for an offence under sec. 201 of the Indian Penal Code jointly with Walia and Bakhu who were tried and convicted under sec. 302.

The learned Judges of the High Court (Broadway and Campbell, JJ.) dismissed the appeal and held that having regard to the provisions of sec. 237 of the Criminal Procedure Code, the conviction under sec. 201 of the Indian Penal Code was not either irregular or illegal even though the accused had not been charged under that section.

The Appellants obtained special leave to appeal to His Majesty in Council. Subsequent to the grant of such leave a statement was received by the Registrar of the Privy Council in which the Sessions Judge denied that the provisions of sec. 309 of the Code of Criminal Procedure had not been duly observed.

Mr. W. Wallach for the Appellants.

Messrs. A. M. Dunne, K. G. and Kenworthy Brown for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—This is an appeal against a judgment of the High Court of Judicature at Lahore in a case which came before it on appeal from the Sessions Judge of Montgomery. By their judgment the High Court affirmed the sentence of death which had been pronounced by the Sessions Judge on two of the Appellants and the sentence of seven years' rigorous imprisonment pronounced on the three other Appellants.

Shortly stated the case made out by the prosecution was this. On the night of 15th June 1928, one Bakhsha, the mur-

dered man, was riding home accompanied by a man called Turez, who was the chief witness for the prosecution. The latter parted from him about 9 P.M. to go to a well in one of his fields, and Bakhsha continued on his way. Very shortly after they had parted Turez heard a cry from the direction in which Bakhsha had gone; he ran forward and saw Bakhsha being assaulted by the five accused, and another man, who has since absconded. It was said in the evidence that friction had existed between the families of Bakhsha and the accused. Turez came sufficiently close to them to see what was happening. Two of the accused, seeing him, threatened him and went towards him; but he ran away to the neighbouring village of Tibbi Hamid Sahu, where he raised an alarm and stated what he had seen. A party from the village at once went to the place where the assault had taken place, but they found no trace of Bakhsha, only signs of a struggle and blood on the ground. There was a certain amount of conflict of evidence. Turez said all the accused fell upon Bakhsha and inflicted on him many wounds with weapons which included a hatchet and other sharp weapons. It was afterwards found that when they had killed him they wrapped up his corpse in a cloth and placed it on a horse and went away with it. That is important in view of what took place at the trial. The horse was identified and trackers were able to trace the footprints of the accused, and the Court was satisfied that each of the Appellants was identified.

The Appellants were committed for trial at the Sessions Court on a charge of murder under sec. 302 of the Indian Penal Code. The case was tried by the learned Judge at the Sessions Court with the aid of three assessors, and at the end of the case the assessors gave their opinions,

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which were recorded; that they were unanimously of opinion that Bakhsh and Walia, the accused, had attacked Bakhsha with intent to kill him; that they murdered him; that two of the others who were present took part in the assault, as stated by Turez, the eye-witness; that there might be some doubt as to whether Hamid, one of the accused, was also present and took part in the assault or not; and, finally, that the prosecution case and evidence appeared generally reliable throughout. That is what the learned Judge regarded as being the opinion of the assessors. The learned Judge, having the evidence and the views of the assessors before him and having considered them, on the 22nd December delivered his judgment. With regard to Bakhsh and Walia he decided that they intended to kill Bakhsha and were guilty of murder and he sentenced them to death. With regard to the other three, he was of opinion that the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder, but, on the other hand, he convicted each of them of having removed the body, and he sentenced them each to seven years' rigorous imprisonment.

From this judgment the Appellants appealed to the High Court, and the appeal was heard by Mr. Justice Broadway and Mr. Justice Campbell, who dismissed the appeal.

A petition for special leave to appeal from this judgment was presented to their Lordships. Leave was given, and the appeal now comes before the Board for determination.

The substantial question upon the appeal arises upon sec. 237 of the Criminal Procedure Code that follows sec. 236, which provides that :—

"If a single act or series of acts is of such a nature

that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences."

That is followed by sec. 237, which is the vital one in this case :—

"If, in the case mentioned in sec. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under sec. 237.

Their Lordships entertain no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure.

The only other point remaining is this. The Code prescribes that the assessors shall give their opinions orally to the Judge. It is said that here they gave them in writing and the Judge dealt with them on that footing. The learned Judge says that is not so, and it is only faintly that this point is persisted in now. No such point was taken at the trial and no such point was raised until the end of the proceedings in the High Court, when the vakil for the prisoners raised it. Not only is it not shown that that aberration from

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the precise directions of the Code took place but, if it did take place, it has not been shown that it led to any miscarriage of justice at all.

This tribunal is not a Court of Criminal Appeal. When there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence, their Lordships will not disturb that conclusion; they will only interfere in such circumstances as are referred to in the well-known case of *Dillet v. The Queen* (1), where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process. Here there has been no abuse of that kind, and there is a large amount of evidence on which the Court could come to the conclusion at which they arrived. It is therefore outside the constitutional powers of their Lordships' Board, conforming to the principles which it has laid down, to interfere with the decision of the Court below.

In these circumstances their Lordships are unable to advise His Majesty to take any other course than to dismiss the appeal.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Appellants.

Solicitor: *Solicitor, India Office*, for the Respondent.

G. D. M.

(1) L. R. 12 A. C. 459 (1897).

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM APPELLATE DECREE
No. 1117 of 1922.**

GHANER, J.	NRITYA GOPAL MITRA,
CHAKRAVARTI, J.	Defendant No. 1,
1924,	Appellant,
Heard, 27 and	v.
28, November.	JARIT MANJURI DAS
Judgment,	and anr., Plaintiffs,
22, December.	Respondents.

Civil Procedure Code (Act V of 1908), Or. 47, rr. 1, 4, 7—Review improperly granted—Jurisdiction of Appellate Court.

Under Or. 47, r. 7 read with rr. 1 and 4 it is open to the Appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of Or. 1 then the Appellate Court is competent to hold that the review was improperly admitted and should have been rejected.

Where the review was granted by the District Judge against the judgment passed by his predecessor for re-consideration of the evidence in the case:

Held—That the review was not permissible on the ground on which it was admitted and the judgment reviewed must be restored.

This was an appeal against the decree of J. W. Nelson, Esq., District Judge of Zillah Murshidabad, dated the 19th April 1922, affirming the decree of Babu Sat-chidananda Mukerjee, Munsif, 1st Court at Kandy, dated the 2nd of July 1920.

The facts of the case will appear from the judgment.

Babu Panchanan Ghose for the Appellant.

Babu Tarakeswar Pal Chaudhury for the Respondents.

NRITYA GOPAL MITRA v. JARIT MANJURI DAS:

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This second appeal is on behalf of the Defendant and arises out of a suit for possession of land, decreed by the District Judge of Murshidabad on the 19th April 1922.

The facts shortly stated are these :—The Plaintiff sued the Defendants as trespassers with reference to the lands which admittedly comprised the holding of a tenant Khetra Nath Pal under the Plaintiff and the Defendants are in possession of those lands as purchasers of the holding which was not transferable by custom. The defence mainly was that the entire holding had not been sold and therefore the Plaintiff could not treat the holding as abandoned.

The learned Munsif decreed the suit but his judgment was reversed on appeal by Mr. Ross, the Additional District Judge, and the suit was dismissed on the 25th November 1921.

The Plaintiff filed an application for review of that judgment and a notice was issued by the learned Judge who had dismissed the suit.

Mr. Nelson, the successor in office of Mr. Ross, heard the parties and admitted the application for review and re-heard the appeal and set aside the decree of his predecessor and in the result the Plaintiff's suit was again decreed with costs.

The present second appeal is against this judgment.

The first point raised by the learned vakil for the Appellant was, that the learned District Judge was in error in admitting a review of the judgment of his predecessor, because the grounds for the review did not come within the purview of Or. 47, r. 1, cl. (2).

The learned vakil for the Respondents submitted that there was no appeal to this

Court on the ground that the review was not in accordance with the provision of Or. 47, r. 1 (1). He submitted further that the appeal was limited to the grounds set out in Or. 47, r. 7, and it was further argued that this review was admitted on the ground of "for other sufficient reasons" and that a review granted on such a ground was not open to correction by appeal.

We do not think that the objection raised by the learned vakil for the Respondents is sound. Or. 47, r. 7 expressly provides that when an application for review is granted the party dissatisfied with the order may appeal against that order or may take the same objection in an appeal filed against the final decree.

Under r. 7 read with rr. 1 and 4, it appears that it is open to the Appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of Or. 1, then the Appellate Court is competent to hold that the review was improperly admitted but should have been rejected under r. 4 (1). This is clear from the case of *Chhaju Ram v. Neki* (1) and this was the ground which was pointed out by their Lordships for their interference in that case when they say "that there could be no re-hearing for the purpose of seeing whether the different conclusion on the merits should be adopted."

In this view we think the review was really granted for re-consideration of the evidence in the case and in fact the learned District Judge has reversed the findings of fact by his predecessor.

Although the judgment of the District Judge which was set aside in review is not quite satisfactory still we think that, as

(1) L. B. 49, I. A. 144; s. c. 26 C. W. N. 697 (1922).

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the review was not permissible on the grounds upon which it was admitted, we should not allow the last judgment to stand. If the previous judgment was not open to review it must stand. The result is that the judgment and decree of the District Judge, dated 19th April 1922, is set aside and that of the District Judge, dated 25th November 1921, is restored. In the circumstances we allow only the costs of this appeal. The parties must bear their costs in the Courts below.

GREAVES, J.—I agree.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE ORDER

No. 386 of 1923.

NEWBOULD, J.	GOUR ROUTH,
PEARSON, J.	Plaintiff, Appellant,
1925,	v.
Heard, 4, May.	DIGAMBOR GIRI and
Judgment,	ors., Defendants,
12, May.	Respondents.

Civil Procedure Code (Act V of 1908), Or. 21, r. 90—Order setting aside sale in execution of rent decree, if a decision of conflicting titles to land—Bengal Tenancy Act (VIII of 1885), sec. 153, proviso.

An order setting aside a sale in execution of a rent decree on an application under Or. 21, r. 90 is not excepted from the operation of sec. 153 of the Bengal Tenancy Act, the operation of the Full Bench decision in *KALI MANDAL v. RAM-SARBASWA* (2) having been restricted by the proviso added to the section by the Amending Acts, I, B. C., of 1907 and I, E. B. & A. C., of 1908.

Where an appeal against such an order was improperly entertained and the same was reversed, and a second appeal was filed in the High Court:

Held—That no second appeal lay.

(2) I. L. R. 32 Cal. 957: s. c. 9 C. W. N. 721 (1906).

But the High Court set aside the decision of the lower Appellate Court. in the exercise of its powers of revision.

This was an appeal preferred on the 12th November 1923 against an order of the Additional District Judge of Zillah Midnapur (Mr. A. L. Mukerjee), dated the 9th July 1923, reversing an order of the Munsif of Dantan (Babu Lalit Mohan Basu), dated the 21st April 1923.

The facts of the case will appear from the judgment.

Mr. Amarendra Nath Bose (Advocate), Babu Hira Lal Chakravarty (for Babu Jati Nath Ghose) for the Appellant.

Babu Monmotha Nath Ganguly for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This was an application by a judgment-debtor under Or. 21, r. 90, Code of Civil Procedure, to set aside a sale in execution of a rent decree on the ground of irregularity. It was resisted by the decree-holder and by the auction-purchaser.

The purchase price was Rs. 50, though the value is found to be about Rs. 1,000. The learned Munsif set aside the sale on the ground that the processes were not properly served and the lands had been sold at an extremely inadequate price. On appeal to the District Judge it was held upon the facts that the application was barred by limitation; and upon the merits also the Judge found that there was no fraud or irregularity as regards the proclamation or in publishing and conducting the sale. Consequently the appeal was allowed and the application dismissed.

Before us on second appeal it is contended that the decision of the learned District Judge cannot stand because no appeal lay from the judgment of the Munsif.

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It has been shown to our satisfaction that the learned Munsif was specially empowered by the Local Government under sec. 153 (b) of the Bengal Tenancy Act and it has not been disputed in argument that an order made in execution proceedings would come within the section as an order passed in a suit: *Shyma Charan Mitter v. Debendra Nath Mukherjee* (1). In the case of *Kali Mandal v. Ramsarbaswa* (2), it was decided by a Full Bench of this Court that an order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, was appealable as falling within the proviso to sec. 153 of the Bengal Tenancy Act, though the decree itself was not appealable by reason of the prohibition in the section. The *ratio decidendi* in that case was that such an order in execution was the decision of a "question relating to title to land or to some interest therein" and therefore appealable in terms of the exception to sec. 153. Following upon that decision, however, came the amendment of that section of the Act by Acts I of 1907 and I of 1908, in Bengal and East Bengal respectively, which added to the section an explanation which is as follows:—"A question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto." It would seem that the explanation as it now stands goes to restrict the effect of the decision of the Full Bench above-mentioned [see *Sheo Parsan v. Bishen Pargash* (3)], though it does

not completely supersede it [*Beni Madhab v. Bissessar* (4) and *Arjun Das v. Gunendra* (5)]. The question therefore is what its effect must be taken to be in relation to the circumstances of the present case. Apart from the explanation, the Full Bench ruling would apply, for it can make no difference to the principle of the decision that the auction-purchaser in the present case was a third person and not the decree-holder himself. Following the explanation, if the question in the present case is one merely as to the regularity of the proceeding in publishing or conducting the sale, then that is not a question relating to land or to some interest in land: no appeal therefore would lie. The Munsif finds that there is "no explanation of the inadequacy of the price fetched at the sale. The only plausible inference is that as proclamation was not made no bidder was present at the time of auction sale." No question of fraud was raised, and no issue of fraud was framed. It appears to us that the fact that the irregularity was directly responsible for the substantial injury occasioned to the judgment-debtor and was the cause of the gross inadequacy of price, does not avail to take the case out of the explanation; it is still a "question as to the regularity of the proceeding in publishing or conducting a sale" within the explanation to sec. 153. We think therefore it is not within the exception and that no appeal lay to the lower Appellate Court. As contended on behalf of the Respondents, the order being one under Or. 21, r. 90 of the Code of Civil Procedure, no second appeal lies to this Court. But the order of the Additional Judge being clearly without jurisdiction we think we should interfere in exercise of our revisional powers

(1) I. L. R. 27 Cal. 484 (1900).

(2) I. L. R. 32 Cal. 957: s. c. 9 C. W. N. 721 (1905).

(3) 15 C. W. N. 760 (1911).

(4) 17 C. W. N. 84 (1911).

(5) 18 C. W. N. 1266 (1914).

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without putting the Appellant to the trouble and expense of making a separate application. We therefore dismiss this appeal as incompetent but under sec. 115, Code of Civil Procedure, we set aside the order of the Additional District Judge and restore the order of the Munsif of Dantan setting aside the sale. The Appellant will get his costs in this and the lower Appellate Court. We assess the hearing-fee at two gold mohurs.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE DECREE
No. 2209 of 1923.

SUHRAWARDY, J.	TRAILAKYANATH CHAR,
GRAHAM, J.	Plaintiff, Appellant,
1926,	v.
Heard, 12 and	CHINTAMONY DUTT and
13, January.	ors., Defendants,
Judgment,	Respondents.
22, January.	

Hindu law—Joint family property—Existence of nucleus of joint property necessary to raise presumption of jointness as to property in the hands of any one member—Circumstances varying strength of presumption—Ancestral property in joint possession not sufficient to provide fund for acquiring property—Separate property subsequently acquired by individual member—Suit to recover such property—Presumption of jointness, how far arises as to such separate property—Onus of proof.

It is necessary to establish the existence of a nucleus of joint family property before property in the possession of any one member can be presumed to be joint family property.

In order to hold that property purchased in the name of one of two brothers was the joint property of both, it is not enough to find that at the time of the purchase they were living together. It has to be found further that they were joint in mess and estate and that there was sufficient estate out of which it may be presumed that the property was acquired.

The onus of proof in a case where the property is said to be the joint property of a joint family must depend upon the circumstances of each particular case. Where the family was joint in mess and estate at the time of the acquisition and there was a nucleus of joint fund, however small it may be, the onus is undoubtedly upon a member of the family to prove that the property though purchased in his name was not a joint property. But when the only fact found was that the two brothers lived together, this circumstance alone did not throw any burden of proof on the Plaintiff, who claimed the property as the self-acquisition of one of the brothers, more than is to be borne by him as the Plaintiff in the case to prove that the property was purchased by the brother through whom he claimed.

This was an appeal preferred on the 25th of August 1923, against the decree of A. L. Mukerjee, Esq., Additional District Judge of Zillah Midnapur, dated the 16th of May 1923, reversing the decree of Babu Nitye Charan Ghosh, Subordinate Judge, 2nd Court, Midnapur, dated the 13th December 1922.

The facts of the case will appear from the judgment.

Mr. S. C. Maity and Babu Apurba Charan Mukherjee for the Appellant.

Mr. Sarat Ch. Bose and Babu Pramatha Nath Bandopadhyaya for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SUHRAWARDY, J.—The Plaintiff's case is that his father purchased the property in suit out of his own funds and was in possession thereof since the date of purchase in Sriban 1297 and re-purchase in Falgoon 1309. The suit is for recovery of possession of the lands in suit on the strength of Plaintiff's title as purchaser

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and also on his title by adverse possession for more than 12 years. The principal Defendant (Defendant No. 1) contended in his defence that the properties were the joint properties of the Plaintiff's father Uday Char and his brother Dinabandhu Char, that the two brothers were joint in mess and property and that the disputed properties were acquired with their joint fund in the Plaintiff's father's name. The contesting Defendant has now purchased the property under a mortgage decree against Dinabandhu Char and he contends that the Plaintiff is not entitled to the entire 16 annas of the property of the suit. There is no dispute with regard to the 8 annas share of the Plaintiff in the property.

The learned Subordinate Judge in the trial Court found for the Plaintiff and decreed the suit. On appeal the learned Additional District Judge of Midnapur by his judgment, dated the 16th May 1923, reversed the decree of the first Court and dismissed the Plaintiff's suit.

The Plaintiff has appealed and on his behalf various objections have been taken to the decision of the lower Appellate Court which will be noticed in the course of the judgment. The Plaintiff's case was that his father Uday Char and his brother Dinabandhu Char had separated sometime in 1290 before the acquisition of the present property. The Subordinate Judge accepted this version; but the learned Additional District Judge has not been able to believe it and has found, as stated by the Defendant, that the separation took place sometime in 1310. The first point which the learned Judge placed before himself for decision is whether the Plaintiff has got his exclusive right to the 16 annas of the plaint lands. In considering this point he observed thus: "As regards the first point the question of separation

of the brothers Dinabandhu and Uday Char is the most important point." And on his finding that the Plaintiff failed to prove that the separation took place in 1290 as alleged by him he dismissed the suit. In my opinion the determination of the question when the separation took place is not decisive of the point in issue. It has to be found that at the time of the acquisition the brothers were not only joint in mess but joint in estate and also that there were some joint funds out of which the acquisition might have been made. It is admitted that the property was purchased in the name of the Plaintiff's father Uday Char. It has been proved by means of documentary evidence that Uday Char sold a portion of this property subsequent to his purchase, that thereafter he took mortgage of it from the person to whom he had sold it and subsequently re-purchased this property in execution of his mortgage decree. He took settlement from the Burdwan Raj of two Dags of plot 2 of Schedule Ka in respect of which he in his own name had to fight a suit with some persons. These dealings of the property raise a presumption that it was Uday's self-acquired property unless it is displaced by proof that it was acquired under such circumstances as to raise the counter presumption that it was joint family property. Now it has not been found that it was purchased with joint funds or that there was any joint fund.

There are numerous cases bearing on this question to which it is not necessary to refer as the result of the case-law on the subject has been stated in the standard work on Hindu law by Mayno in these words: "It may now be considered as settled law that it is necessary to establish the existence of a nucleus of joint family property before the property

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in the possession of any one member can be presumed to be joint family property. This is really a logical corollary to the rule that there is no presumption that a family, because it is joint, possesses joint property or any property"—Mayne's Hindu Law, sec. 290. It has therefore to be found that there was a nucleus out of which the properties in suit could have been acquired. The trial Court made the following observation on this point: "It is not shown that the two brothers had any nucleus of joint property to admit of further acquisition. The share of each brother in the paternal land was 3 or 4 bighas; surely the income from 6 or 8 bighas of land could not be sufficient to enable them to acquire landed property after meeting the expenses of food and clothes of their family members. Besides, it appears from documentary evidence that Dinabandhu Char had a separate money-lending transaction and that he made separate purchases of some land. The evidence on the record further discloses that Uday Char had a business in betel leaves and Dinabandhu Char had a business in iron works. The Defendant No. 1 failed to prove that the purchase money for the *jotes* of Nidhiram Jana and Nabin Mannah came from the joint fund of both the brothers." The learned Judge in appeal has not considered this question at all. He has not found that there was any nucleus of joint fund or any such estate out of the income of which it might be said that the property was acquired.

In Hindu law there is no doubt a presumption in favour of jointness of subsequently-acquired properties where the family is a joint one. But according to the circumstances of each particular case the strength of the presumption varies a great deal.

In *Bodh Singh v. Gunesh Chunder* (1), their Lordships of the Judicial Committee have expressed their view on this point that even where it appears that the family have some ancestral property in joint possession, but that some of the members of the family acquired separate property from their own funds and dealt with it as their own without reference to other members of the family, such a state of things may be fairly held to weaken, if not altogether rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon those who claim as joint property that of which they have allowed their coparcener, trading and incurring liabilities on his separate account to appear to be sole owner, the obligation of establishing their title by clear and cogent evidence. The jointness of property may arise either from the fact that in its present condition it was ancestral property or that it was acquired by means or with the assistance of ancestral property or by means of joint labour or joint funds or both or that it was acquired by a single member without aid from other funds or from other members and then thrown into the common stock (Mayne's Hindu Law, sec. 291). The Defendant's case is that at the time when the property was purchased the brothers were joint and that it was purchased out of the joint funds. The learned Judge has not found that there was any joint fund at the time of the purchase of the property. His decision is based only on the finding that the brothers were living together at the time of the purchase. It is not enough to find that the brothers were living together at the time of the purchase; but it has to be found that they

(1) 12 B. L. R. 317 (P. C.), 19 W. R. 356 (1873).

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were joint in mess and estate and that there was sufficient estate out of which it may be presumed that the property was acquired.

On the question of onus also I do not think that the learned Judge has taken a correct view in the circumstances of this case. He observes, after referring to the Defendant's evidence, "Whatever that may be, the Defendant is not required to prove his title. The Plaintiff must stand or fall on his own case." On the facts as disclosed in the present case, this statement of the law can hardly be supported. The property was purchased so long ago as 1297 in the name of the Plaintiff's father. The subsequent dealings with the property showed that he was the sole owner. It is therefore necessary for the Defendant to establish that the property which appears to be self-acquired was as a matter of fact acquired out of the joint fund of the family.

The onus of proof in a case where the property is said to be the joint property of a joint family must depend upon the circumstances of each particular case. Where the family was joint in mess and estate at the time of the acquisition and there was a nucleus of joint fund, however small it may be, the onus is undoubtedly upon a member of the family to prove that the property, though purchased in his name, was not a joint property. But where the only fact found is that the two brothers lived together, this circumstance alone does not throw any burden of proof on the Plaintiff more than is to be borne by him as the Plaintiff in the case to prove that the property was purchased by his father.

The learned Judge in appeal has examined the evidence adduced on behalf of the Plaintiff and though it appears that he was not satisfied with the evidence on

the side of the Defendant he is of opinion that the Plaintiff having failed to establish his case, his suit must fail. The evidence to which he directed his attention was mostly documentary evidence; and it has been divided by him into three groups. The first group consists of documents executed in favour of Dinabandhu in respect of lands, one of the boundaries of which has been stated in all the documents as Uday Char's land. These documents, the learned Judge says, do not help the Plaintiff's case of separation. But there is no doubt that they are evidence against the Defendant; and, if good evidence, they certainly help the Plaintiff's case. There are mortgage bonds executed in favour of the Defendant in respect of some lands, one of the boundaries of which is said to be Uday Char's land. Ext. 27 is the plaint of a suit on that bond by Dinabandhu Char in which the land is described as in the bond bounded on one side by Uday Char's land. Then there are *kobalas* in which the same statement appears. The learned Judge has attempted to get rid of these documents by observing that they do not contain Dinabandhu's statements and the plaint must be taken to have followed the mortgage bond. He is certainly entitled to attach whatever value he thinks proper to these documents. But it cannot be said that they are of no use to the Plaintiff. The same remark will apply to some of the documents contained in the second group also, which show some admission by conduct of Defendant No. 1 and his father. The Appellant's contention is that if the property was joint property, Dinabandhu would not have allowed the name of Uday Char alone to appear as the holder of the property. The third group of documents consists of the various deeds by which the Plaintiff's father

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dealt with this property. He has produced all the *kobalas*, *challans* showing payment of money by his father, rent receipts, plaints in respect of the land in suit, mortgages made by the Plaintiff's father, *khatians*, maps, etc., etc. The effect of all these documents has been minimised by the observation that the property was purchased in the name of the Plaintiff's father. It appears on a perusal of the learned Judge's judgment that he has been to a very great extent influenced by the fact that the Plaintiff's father though the younger brother was literate whereas Dinabandhu was illiterate and therefore it may be presumed that the Plaintiff's father was the *karta* of the family. But it appears that Dinabandhu though illiterate was a man of business as he had a separate business of his own in iron works out of the income of which he purchased separate properties. If all the properties purchased by the brothers were purchased out of the joint fund or joint family properties, it is curious that some of the properties were purchased in the name of one brother and some others in the name of the other. My view of the learned Judge's judgment is that the learned Judge has taken a one-sided view of the case and has not considered all the material points which should be determined before the property in suit can be declared to be joint.

There has been one other omission in the judgment of the learned Judge which must necessitate a remand. His judgment began with the words "this appeal arises out of a suit for recovery of possession of the plaint lands upon establishment of Plaintiff's auction-purchase right and right by adverse possession for more than 12 years." The learned Judge after disposing of the question of title against the Plaintiff dismissed the Plaintiff's suit

by observing that the properties being joint Plaintiff has only 8 annas share in them. He did not refer to the issue with regard to adverse possession on which the finding of the trial Court is definite. The Subordinate Judge has thus observed in his judgment: "I can safely hold on the evidence on the record that Plaintiff's title by adverse possession was complete before his dispossession in 1916." As the learned Judge's judgment was one of reversal it was incumbent on him to consider all the grounds on which the judgment of the first Court was based.

The result of the view that I have expressed is that this appeal has to be re-heard in the light of the observation I have made above and the points that have been left undetermined must be determined by the lower Appellate Court. I may recapitulate them. If the Court finds that the brothers Uday and Dinabandhu were joint in mess and estate at the time of the purchase of the property and that there was a nucleus of fund out of which it may be presumed that the property was purchased, the decision will be against the Plaintiff, if the Court finds that the Plaintiff has failed to prove that it was purchased by his father from his own fund. As the Defendant's case is confined to one of the various modes by which joint property can be acquired, namely, that the property was purchased with the joint funds of the brothers in the Plaintiff's father's name, he must prove that it was so or that there was a sufficient nucleus. The lower Court has also to find whether the Plaintiff has succeeded in proving his title by adverse possession.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and the case remanded to that Court

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for a re-hearing of the appeal. Costs will abide the result.

Affidavits have been filed before us by the vakils who represented the Plaintiff in the lower Appellate Court and it is stated therein that they did not get full opportunity of placing all the materials before that Court. A counter-affidavit has been filed on behalf of the Defendants. We regret very much that there was an occasion for making such allegation and swearing of affidavits with reference to the conduct of the case in the Court below. But as we are sending the case back to the lower Appellate Court for a re-hearing of the appeal, we do not think it necessary to make any further observation in this matter.

GRAHAM, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM APPELLATE DECREE**

No. 1693 of 1923.

SUBHAWARDY, J.	GANANADA GOBINDA
MUKERJI, J.	CHAUDHURI and ors.,
1925,	Plaintiffs, Appellants,
Heard, 26 and	v.
30, November.	NALINI BALA DEBI and
Judgment,	ors., Defendants,
4, December.	Respondents.

Res judicata, essence of the doctrine of—Applicability of the doctrine in suit for rent or other recurring liability—Decision of question not raised in the issue but necessary to be decided, effect of, as res judicata—Suit for rent of putni—Previous rent suit for a different period against Defendant's estate dismissed but liability for rent for all times not discussed nor decided—Previous decision, if res judicata.

The Plaintiff sued for the rent of a putni tenure, eight annas interest in which belonged to one N, the same according to the Plaintiff having been purchased by the estate of N's mother-in-law which descended to N. In a previous suit for rent

of the same putni against the executor of the estate of N's mother-in-law the said estate had been absolved from liability to pay. The facts relating to the purchase appeared to be that the owner of the eight annas interest owed a certain amount to N's mother-in-law on a note of hand on which a decree was obtained and in execution of that decree the share of the putni was purchased.

Held—That the decision in the previous suit did not operate as res judicata:

The essence of the doctrine of res judicata is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated by them again in another suit.

In the case of suits for rent or other recurring liability the causes of action for suits for successive periods are different. In the case of such suits for the doctrine to apply it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided, the decision would be res judicata in respect of any suit for a subsequent period.

If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally.

In a suit for rent no issues need be framed, but where issues are framed the

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non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue.

The principle that the decision of a question in an earlier suit which was not raised in the issues but which it was necessary to decide therein operates as res judicata in respect of the same question when it is raised in a subsequent suit had no application to the present case as it was not at all clear that the question of liability of the estate for the rent of the putni for all times was either raised or decided; while, on the other hand, the matters on the record pointed to a contrary conclusion, namely, that the estate was absolved from liability in respect of the particular decree and the question of the liability of the estate for all times was undetermined.

This was an appeal, preferred on the 18th of June 1923, against the decree of G. C. Sen, Esq., District Judge of Zillah Pabna and Bogra at Pabna, dated the 19th of March 1923, modifying the decree of Babu Haripada Majumdar, Subordinate Judge, 2nd Court at Pabna, dated the 11th of August 1922.

The facts of the case will appear from the judgment.

Babus Broja Lal Chakraborty and Sushil Kumar Bose for the Appellants.

Mr. Sarat Chandra Roy Choudhuri, Babu Sarat Chandra Khan, Mr. Gopal Chandra Das and Babu Nirode Bandhu Roy for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This appeal arises out of a suit for rent in respect of a *putni* tenure for the years 1824 to 1827. The Defendants may be classified into two groups,

the Defendants Nos. 1 to 5, 8 and 9 being the holders of an 8 annas interest, while the other 8 annas which was formerly held by the Defendant No. 6, Jamini Kumar Pakrasi, is now alleged to be held by the Defendant No. 7, Nalini Bala Debi. The Plaintiffs' case is that this 8 annas share was purchased by the estate of one Bidhumukhi Debi which now belongs to Nalini Bala Debi. Bidhumukhi is dead, and so is her adopted son Birendra, whose widow is Nalini Bala.

The Subordinate Judge decreed the Plaintiffs' suit against the Defendants Nos. 1 to 5, and 7 to 9. On appeal preferred by the Defendant No. 7, Nalini Bala, the learned District Judge absolved her from liability for payment and set aside the decree in so far as it was against her. The Plaintiffs have appealed.

On the merits the learned District Judge was of opinion that the 8 annas share of Jamini was purchased for the estate of Bidhumukhi and with her money and therefore the estate was liable for the rent. He, however, held that a previous decision stood as a bar in the Plaintiffs' way and operated as *res judicata*.

The facts relating to the previous litigation are these : that suit was instituted for rent of the *putni* for the years 1820 to 1823 B. S. The holders of an 8 annas share of the *putni* were the Defendants Nos. 1 to 7 therein. Jamini Kumar Pakrasi was the Defendant No. 8. The Defendant No. 9 was one Soshi Bhusan Chatterji (or Bhattacharjya), executor to the estate of Brojendra Mohan Roy, husband of Bidhumukhi. Defendant No. 9, (ka) was Birendra Mohan Roy, son of Brojendra Mohan Roy, and No. 10 was the said Soshi Bhusan Chatterji (or Bhattacharjya), executor to the estate of Bidhumukhi. It is not very clear when exactly the said Defendant No. 10 was impleaded

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in the suit, but, in any event, he was added after the issues in the suit had been framed. There was a debt due to Bidhumukhi by Jamini on a note of hand, on which a decree was obtained and in execution of that decree Jamini's 8 annas share in the *putni* was purchased. In that suit questions arose as to whether the Plaintiffs were entitled to recover the rents from Soshi Bhusan as executor to the estate of Brojendra or from Birendra or from Soshi Bhusan as executor to the estate of Bidhumukhi. The Subordinate Judge in a long, hesitating and rambling judgment discussed the facts and eventually arrived at certain conclusions which may be gleaned from his judgment and which may be summarised as follows:—The property was an acquisition to the estate of Bidhumukhi; it was not purchased by Soshi Bhusan as executor to the estate of Broja Mohan and so Soshi Bhusan as such executor was not liable; nor was Birendra liable, presumably as Bidhumukhi's estate was then unadministered and Soshi Bhusan as executor to that estate was in seizin thereof. In the judgment recorded by him on the 30th April 1918 the learned Subordinate Judge expressed an opinion that the purchase was made by Soshi Bhusan but not as executor to the estate of Bidhumukhi, and not with due regard to the interest of Birendra, who was a minor, and out of fraudulent and selfish motives and ultimately held, "but as the decree was in a suit on a note of hand by Jamini in favour of Bidhumukhi and the sale was in execution of the decree on a note of hand by Jamini in favour of Bidhumukhi and Soshi is the executor to her estate, and as Soshi as such executor has not put in any objection to the claim against him as such executor, the suit is decreed *ex parte* against him." On the 1st May 1918 an

application was made on behalf of Birendra for amendment of the judgment, and upon that the learned Subordinate Judge amended his judgment in this way: Instead of the decree being that the suit is decreed *ex parte* against Soshi as such executor, meaning executor to Bidhumukhi's estate, it would run thus—"The suit is decreed *ex parte* against Soshi, executor, meaning executor to Bidhumukhi, but he is to be personally liable and not the estate for the rent claimed." It would seem that by this amendment the learned Subordinate Judge wanted to absolve the estate of Bidhumukhi from liability but then he proceeded to conclude his order with these observations:—"I ought to notice here that I have forgot to notice and decide a point raised in the defence of Defendant Birendra and argued by the pleaders of the parties: it was to the effect that Soshi, even if he purchased the *putni* as executor to the estate of Bidhumukhi, could not by the purchase render the estate liable for rent for the *putni* and the estate could not be liable for rent for the period claimed. I regret that this matter escaped me when writing judgment, but I am not competent to decide it now." I confess I am unable to understand what the learned Subordinate Judge meant by these observations, if in point of fact he amended the judgment in the way that he did. On the basis of the judgment a decree was prepared and in that it was declared that "the estate of Bidhumukhi would not be liable for this decree." From this decree two appeals were preferred, one by Jamini with which we are not concerned now, and the other on behalf of Soshi as executor to the estate of Bidhumukhi. The latter challenged in the appeal the part of the decree making him personally liable and absolving Bidhumukhi's estate from

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liability. The learned District Judge held that a decree against Soshi as executor was quite right and the subsequent addition in the judgment "but he is to be personally liable and not the estate for the rent claimed" was wholly unwarranted. He therefore set aside the decree in so far as it purported to make Soshi personally liable and as regards the liability of the estate for the rent claimed he declined to interfere with the decree in that respect as the estate was not represented before him, Soshi Bhusan having ceased to be executor while the appeal was pending, and having thereafter died and Birendra also having died and Nalini Bala, his widow, having been substituted as his heir in his place, but nothing appearing as to where the estate lay at the time. In accordance with this judgment a decree was drawn up in which it was declared that "Soshi Bhusan is exonerated from the personal decree."

The learned District Judge has held that the decision of the Subordinate Judge absolving Bidhumukhi's estate from liability operates as *res judicata* and there can be no decree against Nalini Bala who now holds that estate. He seems to have been of opinion that the question as to whether the estate was liable or not was specifically raised and decided in that case, that the previous suit was dismissed as against the estate of Bidhumukhi and that the decree of the trial Court exonerating Bidhumukhi's estate became final.

The essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a proper Court as to the status of one of them in relation to the other or as to the right or title claimed by one of them against the other, the same question cannot be agitated

ed by them again in another suit [*Krishna Behari Roy v. Bunwari Lal Roy* (1)]. In the case of suits for rent or other recurring liability, the causes of action for suits for successive periods are different. In the case of such suits, for the doctrine to apply it will have to be shown that the question of right or liability not merely for the period in the previous suit but that for all times or once for all was directly and substantially in issue and was tried and determined. If a direct issue on the point was raised and decided, the decision would be *res judicata* in respect of any suit for a subsequent period [*Nobo Durga v. Foyez Bux* (2), *Vishnu v. Ramling* (3), *Natesa v. Venkatarama* (4) and *Dwarka Das v. Akhay Singh* (5)]. If the decision falls short of that requisite and if the general question was gone into and decided merely for the purpose of deciding the right or liability for the period involved in the suit, then the issue was raised not directly and substantially but collaterally or incidentally. In a suit for rent, no issues need be framed; but where issues are framed, the non-existence of a direct issue of this character has to be seriously taken into account in determining whether the question of right or liability for all times was really directly and substantially in issue.

In the present case, in previous suit the ordering portion of the judgment of the trial Court distinctly stated "that Soshi as executor was to be liable and not the estate for the rent claimed." The decree framed in accordance with the judgment expressly absolved the estate from liability

(1) L. R. 2 I. A. 283; s. c. I. L. R. 1 Cal. 144; 25 W. R. 1 (1875).

(2) I. L. R. 1 Cal. 202; s. c. 24 W. R. 403 (1875).

(3) I. L. R. 26 Bom. 25 (1901).

(4) I. L. R. 30 Mad. 510 (1907).

(5) I. L. R. 30 All. 470 (1908).

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in respect of the particular decree, and the concluding paragraph of the judgment which I have already quoted above left the question of the liability of the estate for all times as undetermined.

The Respondents contend that the decision of a question in an earlier suit which was not raised in the issues but which it was necessary to decide therein operates as *res judicata* in respect of the same question when it is raised in a subsequent suit. They urge on the authority of the decision of the Privy Council in *Soorjomonee Dayee v. Sudanund Mahapatra* (6) that it is not necessary to constitute a matter directly and substantially in issue that a distinct issue should have been raised upon it and that it is sufficient if the matter was decided in substance. In that case the Privy Council followed a decision of Lord Hardwicke in *Gregory v. Molesworth* (7) that "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question, as between themselves, in any other suit in any other form." Their Lordships were of opinion that the expression "cause of action" should be construed with reference rather to the substance than to the form of action; the question which had been decided in the earlier suit in that case was necessary to be decided in the earlier case and it was a question on which the Plaintiff had sought for the decision of the Court. Several other decisions are also relied on on behalf of the Respondents to which it is now necessary to refer: *Lilabati Misra v. Bishun Chowbey* (8) in which it was laid down that a decision may operate

as *res judicata* although no issue had been expressly raised and that the test to be applied was whether it plainly appears that the question so raised by the parties in their pleadings was actually submitted by them to the Court and judgment given on it; *Aghore Nath Mukherji v. Kamini Debi* (9) in which it was observed that where the dispute relates to matters which had already been in controversy and formed the subsidiary considerations in the previous suit, although the cause of action in the two suits are distinct the estoppel is to be limited to matters distinctly put in issue and determined in the prior action; the case of *Midnapur Zemindary Company v. Kumar Nares Narain Roy* (10) in which it was laid down that if in a previous suit a Court having a question before its mind and especially brought to its notice as a thing of importance decided that the issue did arise and was a necessary one, the decision on that issue will be *res judicata* in a subsequent suit though the issue might not be a necessary or proper one to be tried—a decision that was affirmed by the Judicial Committee in the case of *Midnapur Zemindary Company v. Nares Narain Roy* (11) and several other cases in which similar propositions have been laid down. In the present case, however, there is hardly any room for the application of these principles, as it is not at all clear that the question of liability of the estate for the rent of the *putni* for all times was either raised or decided; while, on the other hand, the matters to which I have already referred point to a contrary conclusion.

I am therefore of opinion that the decision of the learned District Judge on the

(6) 12 B. L. R. 314; 20 W. R. 377 (P. C.) (1873).

(7) 3 Atkyns 626 (1747).

(8) 6 C. L. J. 621 (1907).

(9) 11 C. L. J. 461 (1909).

(10) 33 C. L. J. 317 (1921).

(11) L. R. 51 I. A. 293; s. c. 29 C. W. N. 34 (1924).

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question of *res judicata* cannot be supported and must be reversed.

The Respondents have urged that if we consider that the suit is not barred by *res judicata* we should remand the case to the lower Appellate Court in order to deal with the merits of the case. We readily assent to their prayer, because the decision of that Court on the merits is far from satisfactory. No clear or definite findings have been arrived at on the questions of fact which arise in the case and the reasoning on which the finding as to the liability of the estate is based does not commend itself to us.

We therefore set aside the decree of the learned District Judge and send the case back to his Court so that the appeal may now be re-heard and dealt with afresh on the merits. Costs of this appeal will abide the result.

SUHRAWARDY, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1079 of 1925.

C. C. GHOSE, J.

DUVAL, J.

1925,

Heard,

22, December.

1926,

Judgment,

20, January.]

SISHIR KUMAR

MITTER, Petitioner,

²CORPORATION OF

CALCUTTA, Opposite
Party.

Calcutta Municipal Act (III, B. C., of 1923), sec. 537, effect, if any, on sec. 248, Criminal Procedure Code (Act V of 1898)—Absolute right of withdrawal of complaint, if given to the Corporation under the section—Powers given under sec. 537, if to be exercised according to the Code of Criminal Procedure—Municipal Magistrate, if can refuse application for withdrawal filed by Corporation.

Sec. 537 of the Calcutta Municipal Act has not affected or abrogated sec. 248 of the Code of Criminal Procedure so far as

cases or proceedings started by the Corporation are concerned.

Sec. 537 is merely an enabling section and the powers given thereunder can only be exercised according to the Code of Criminal Procedure.

No absolute power of withdrawal is given to the Corporation under sec. 537 and before a withdrawal can be permitted there must be sufficient grounds to the satisfaction of the Magistrate who can in his discretion reject an application for withdrawal filed by the Corporation.

This was a Rule granted on the 14th December 1925 against the orders, dated the 5th and the 26th November 1925, of the Municipal Magistrate of Calcutta (Mr. N. N. Gupta).

The facts of the case will appear from the judgment.

Mr. Narendra Kumar Bose and Babu Sikhar Kumar Bose for the Petitioner.

Babu Bhudar Halidar for the Opposite Party.

The JUDGMENT OF THE COURT was delivered by

C. C. GHOSE, J.—In this case a Rule was issued calling upon the Municipal Magistrate of Calcutta and the Chief Executive Officer of the Corporation of Calcutta to show cause why the orders, dated the 5th and the 26th November 1925, passed by the Municipal Magistrate, should not be set aside and the case instituted against the Petitioner allowed to be withdrawn.

The facts, shortly stated, are as follows:—In or about the month of June 1925, the Corporation of Calcutta prosecuted the Petitioner Sishir Kumar Mitter under secs. 488/386 (1a) of the present Calcutta Municipal Act for using premises No. 85/1, Balligunge Circular

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Road, for manufacturing *sarkhi* without a license for 1924-25. The case came on for hearing on the 26th June 1925, when the examination of Dr. R. R. Bhattacharya, Sanitary Inspector, on behalf of the Corporation was proceeded with. After Dr. Bhattacharya had been partially cross-examined, the case was adjourned to the 9th July for further hearing. On the last mentioned date Dr. Bhattacharya was further cross-examined and the hearing was adjourned to the 16th July. The next effective hearing was on the 5th August 1925, when the case for the Corporation was closed. On the 27th August 1925, the accused made his statement to the Court. On the 9th September 1925, the accused called evidence in support of the defence. Evidence was closed on behalf of the defence on the 15th October 1925, and the case thereafter stood over for arguments to be addressed to the Magistrate. A fresh adjournment was obtained by the pleader for the defence to enable him to prepare his argument and the hearing was fixed for the 5th November 1925. On the last mentioned date Dr. Bhattacharya on behalf of the Corporation filed the following application before the Magistrate:—

"Under orders from the Chief Executive Officer, the undersigned prays that the Court may be pleased to allow the withdrawal of the above case, as the party has removed the mill from the place." This application was rejected by the Magistrate on the same date and the hearing of the case was adjourned to the 26th November 1925. On this date the accused was absent and thereupon the Magistrate recorded the following order:—"Corporation pleader says that in view of the defiant attitude of the accused at the trial, he leaves the matter in the hands of the Court. Accused absent though he was

directed to appear to-day. Issue warrant of arrest (bail—Rs. 500) for 17th December."

Against the said orders of the 5th and the 26th November 1925, the present Rule is directed and it is contended on behalf of the Petitioner that inasmuch as the Chief Executive Officer had asked for the withdrawal of the case under sec. 537 of the Calcutta Municipal Act, the learned Magistrate ought to have permitted the withdrawal of the prosecution and had no jurisdiction to pass the orders complained of. The argument is based on the suggestion that sec. 537 of the Calcutta Municipal Act controls, in cases of prosecution by the Corporation of Calcutta, the provisions of sec. 248 of the Code of Criminal Procedure. Sec. 537 of the Calcutta Municipal Act runs as follows:—The Corporation may (a) institute, defend, or withdraw from, legal proceedings under this Act or under any rule or bye-law made thereunder; (b) compound any offence against this Act or against any rule or bye-law made thereunder which, under any enactment for the time being in force, may lawfully be compounded; (c) admit, compromise or withdraw any claim made under this Act or under any rule or bye-law made thereunder; and (d) obtain such legal advice and assistance as they may from time to time think it necessary or expedient to obtain, for any of the purposes referred to in the foregoing clauses of this section, or for securing the lawful exercise or discharge of any power or duty vesting in or imposed upon the Corporation or any Municipal Officer or servant.

Sec. 248 of the Code of Criminal Procedure is as follows:—If a complainant, at any time before a final order is passed in any case under this chapter, satisfies the Magistrate that there are sufficient

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grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

It is argued on behalf of the Petitioner that the Calcutta Municipal Act being an Act later in point of time than the Code of Criminal Procedure and as the bill which afterwards became the Calcutta Municipal Act of 1923 had been introduced in the Bengal Legislative Council with the previous sanction of the Governor-General under the provisions of sec. 80A of the Government of India Act, it must now be taken that the provisions of sec. 248 of the Code of Criminal Procedure had been modified in their application in cases of proceedings instituted by the Corporation of Calcutta by the provisions of sec. 537 of the Calcutta Municipal Act. In answer to the present Rule the Chief Executive Officer of the Corporation through his learned vakil contended before us that sec. 248 of the Code of Criminal Procedure had not been affected as contended for on behalf of the Petitioner and further that the Corporation did not now want to withdraw the case against the Petitioner but desired that the proceedings should be brought to their natural termination.

It is perfectly true that the Calcutta Municipal Act is a piece of legislation which was introduced into the local legislature with the previous sanction of the Governor-General and that it is in point of time an Act later than the Code of Criminal Procedure, but it does by no means follow that the provisions of sec. 248 of the Code of Criminal Procedure have been affected or abrogated in cases or proceedings by the Corporation by the provisions of sec. 537 of the Calcutta Municipal Act. It is to be remembered that the Corporation is a creature of

statute and that specific power to institute, defend, or withdraw from, legal proceedings was needed and had to be provided for, under and by the statute which called the Corporation into existence. Sec. 537 of the Calcutta Municipal Act, as we read it, is merely an enabling section and the powers given thereunder to do the various acts specified therein can in our opinion only be exercised in accordance with the provisions of the Code of Criminal Procedure. Sec. 248 of the Code of Criminal Procedure enables a complainant at any time before a final order is passed by the Magistrate to apply to the Magistrate for withdrawal of a case; it is only when he satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint that such permission is granted. It follows therefore that there is no absolute power of withdrawal and that, before a withdrawal can be permitted, there must be sufficient grounds to the satisfaction of the Magistrate.

In our opinion, on the facts of this case there were abundant grounds entitling the Magistrate to refuse to permit the withdrawal of the case against the Petitioner. The Magistrate was obviously right in declining to allow himself to be guided by the caprice of the complainant. We have examined the record for ourselves and are satisfied that there are no grounds whatsoever, of law or of fact, for our interference in this matter at the present stage.

The result, therefore, is that this Rule must stand discharged.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER
OF THE CENTRAL PROVINCES.]

LORD SUMNER.

SIR JOHN EDGE.

MR. AMER ALI.

SIR LAWRENCE JENKINS. | DHANRAJ JOHAR-

1921,

MAL, Appellant,

v.

Heard, 18 and

SONI BAI,

20, November.

Respondent.

1925,

Judgment,

2, February.

Hindu law—Agarwalla Jains, law of adoption governing—Power of brothers to give in adoption—Adoption made in fact but not good in law—Conduct affirming fact of adoption, if estops from denying validity of adoption in law—Estoppel, law of, as affecting adoptions—Evidence Act (I of 1872), sec. 115.

The Agarwallas generally adhere to Jainism and repudiate the Brahmanical doctrines relating to obsequial ceremonies, the performance of shraddh, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father.

An Agarwalla boy who has lost both his parents cannot, according to the admitted rule of Hindu law, be adopted, for he cannot be given in adoption by anybody but his father, or if he be dead, by his mother—not even under authority delegated to him by the parent.

Where the facts were that such a boy was given to J in adoption by his brothers, the parents being both dead, and it was alleged that R, a brother of J and a coparcener with J, brought the boy from his native village to J's place, became a witness to the deed of adoption, allowed him to perform the cremation ceremony of J and at the time of his marriage represented him to be the adopted son of J:

Held—That there was no misrepresen-

tation of fact by R, and R's heir was not estopped from denying the validity of the adoption in law.

GOPEE LALL v. MUSSAMAT SREE CHUNDRAOLEE BUHOJEE (3) followed.

Precedents bearing on the question of estoppel in relation to adoption considered and it was pointed out that in those cases the Courts considered in substance that a long course of recognition and acquiescence by the person making the adoption—the person best acquainted with the circumstances—gave rise to the inference that the conditions relating to the adoption were duly fulfilled, whilst in RANI DHARAM KUNWAR v. BALWANT SINGH (4), the estoppel was considered purely personal.

Quære.—Whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel.

Bringing forward exceptions to a decree never urged before at the hearing of the appeal upon notice served on the opponent shortly before the hearing deprecated.

This was an appeal (No. 133 of 1923) from a decree, dated the 12th March 1920, of the Court of the Judicial Commissioner, Nagpur, which reversed a decree, dated the 28th January 1918, of the Court of the District Judge of East Berar.

The Appellant claimed to be the adopted son of Joharmal, deceased, the Respondent was the daughter of Joharmal's brother Ramdhan and she instituted the suit denying the validity of the Appellant's adoption and claiming possession of the estate which she alleged came to her through her father.

Ramdhan who was a Hindu of the Agarwalla caste died on 24th June 1914. The Appellant contended that Ramdhan and

(3) L. R. I. A. Sup. Vol. 131; 19 W. R. 12, 11 B. L. R. 391 (1872).

(4) L. R. 39 I. A. 143; a. c. 16 C. W. N. 675 (1912).

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his adoptive father were joint. That plea was traversed by the Respondent who while admitting the execution of a deed of adoption denied its validity.

The Additional District Judge found in favour of the adoption and held that Ramdhan and Joharmal were joint in estate and dismissed the Respondent's suit.

On appeal the Judicial Commissioners reversed the decree of the trial Judge. They held that the Appellant's adoption had not been proved and that the present Respondent was not estopped from denying it and they ordered possession of the property in dispute to be given to her. The facts are more fully set out in the judgment of the Judicial Committee.

Messrs. DeGruyther, K. C. and S. Hyam for the Appellant.—The evidence establishes the adoption which took place in 1903 prior to the death of the adoptee's parents. It was then that the giving and taking took place. It is immaterial that the document evidencing the adoption was executed in 1908. The Respondent is estopped both in equity and under sec. 115 of the Evidence Act, 1872, from challenging the validity of the adoption.

They referred to the following decisions:—*Kannammal v. Virasami* (5), *Parvatibayanamma v. Ramakrishna Rao* (6), *Vaithilingam Mudali v. Murugaian* (7) *Sarat Ch. Dey v. Gopal Ch. Laha* (8) and *Corper v. Phipps* (9).

Messrs. Dunne, K. C. and Dubé for the Respondent were asked to confine their argument to the form of the decree.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMBER ALI.—This appeal arises out

(5) I. L. R. 15 Mad. 486 (1892).

(6) I. L. R. 18 Mad. 145 (1894).

(7) I. L. R. 37 Mad. 539 (1912).

(8) L. R. 19 I. A. 203 (1892).

(9) L. R. 2 H. L. 149, 170 (1867).

of a suit brought by the Plaintiff, Soni Bai, in the Court of the Additional District Judge of Amraoti, in East Berar, for a declaration that she was entitled by inheritance to the estate of her father, Ramdhan Marwari, who died at Amraoti on the 24th June 1914. She was a minor at the time and brought the suit by her guardian, her father-in-law, Narain Das, as next friend.

The facts of the litigation may be stated shortly for the purposes of this judgment. Ramdhan, the Plaintiff's father, resided at a place called Khanapur, Taluk Morsi, in the District of Amraoti and carried on business there; whilst his brother, one Joharmal, lived in the township of Chandur Bazar, in Taluk Ellichpur, where he had a shop. Both were Agarwallas by caste.

Joharmal died in September 1912, and the Defendant Dhanraj claims to have been adopted by him some years before his death. On the death of Ramdhan in 1914 Dhanraj took possession of his estate, claiming to be entitled to Ramdhan's property as the adopted son of his brother Joharmal. There appears to have been a proceeding under sec. 145 of the Code of Criminal Procedure with regard to the possession of certain lands belonging to Ramdhan, and by an order of the District Magistrate made on the 17th September 1914, the Defendant was put in possession of that property also.

In order to establish his right to the succession to Ramdhan's estate, in opposition to the claim of Ramdhan's rightful heir, the Defendant alleged that he had been adopted in accordance with the rules prescribed by the Hindu law and that the essential rites were duly performed. He further alleged that Joharmal and Ramdhan were joint and undivided.

The Plaintiff's case, on the other hand, is that in the year 1908, when the formal

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adoption of Dhanraj took place, he was an orphan and as such could not be validly adopted under the Hindu law. She further controverted the Defendant's allegation that Joharmal and Ramdhan were joint. She alleged that they were separate in estate and carried on separate businesses and that consequently Dhanraj, even if he had been validly adopted, which he was not, could not claim the estate of Ramdhan. As a contradictor to the allegation of the Plaintiff that in 1908, both his parents being dead, he could not be validly adopted, the Defendant averred that some years before, *viz.*, in 1903, his mother, who was alive at the time, gave him in adoption to Joharmal, although the usual ceremonies and documents connected with the adoption were completed in 1908. He further contended that Ramdhan was estopped by his conduct from impugning the validity of the adoption and that, consequently, the Plaintiff was affected by the same estoppel.

On these respective allegations of the parties a number of issues were framed by the Additional District Judge, three of which only need consideration, *viz.*: (1) whether the Defendant was validly adopted; (2) whether Joharmal and Ramdhan were joint in estate; and (3) whether the Plaintiff is estopped from challenging the validity of the Defendant's adoption.

It is contended on the Plaintiff's behalf that, unless the Defendant can establish that the "giving and taking" required by the Hindu law took place in the life-time of his mother in 1903, nothing which occurred in 1908 would constitute him a validly adopted son of Joharmal, or entitle him to the estate of Ramdhan, even if Ramdhan and Joharmal were joint. A mass of evidence was adduced on both sides; the Additional District Judge was of opinion that the Defendant had estab-

lished the adoption, and accordingly dismissed the suit. On appeal, the Court of the Judicial Commissioner, after a careful analysis of the evidence, came to a totally different conclusion. They have held that the Defendant had failed to prove that there was a "giving and taking" as required under the Hindu law in 1903; nor were Ramdhan and the Plaintiff "estopped" from impugning the validity of the Defendant's adoption. In view of the minute examination of the facts by the learned Judicial Commissioners, their Lordships are relieved of the necessity of discussing them in detail; they, therefore, propose to confine their attention to the salient features of the case.

On the 25th May 1908, two deeds were executed, one by Joharmal in favour of the Defendant, whose parental name was Ghanasham, declaring that he was being adopted by Joharmal as a son and that thenceforth he would be called Dhanraj; the other was executed by the brothers of Dhanraj, the Defendant, in favour of Joharmal, declaring that they had from that day forth given their younger brother Ghanasham to Joharmal in adoption. The deed of adoption executed by Joharmal is Ex. "D. 63," and the agreement by the two brothers of Dhanraj is Ex. "D. 62."

This document "D. 62" contains the passage, "Our mother gave him in adoption just in his childhood," on which the Defendant's allegation of the "giving and taking" in 1903 mainly, if not entirely, rests. The Plaintiff charges that this passage is an interpolation made after its execution for the purpose of corroborating the statements of witnesses as to the "giving and taking" in the life-time of the mother. The reasoning of the Additional District Judge on this point appears to be open to criticism; he seems to think

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that as the evidence of the witnesses for the Defendant was "consistent" and was corroborated by the passage in question in "D. 62," their statements being thus corroborated he was of opinion that it could not be an interpolation. Relying practically on the statement in question contained in "D. 62," in conjunction with the oral testimony, he came to the conclusion, as already stated, that the Defendant had been validly adopted by Joharmal, and that, as Joharmal and Ramdhan were joint in estate, Dhanraj was entitled to the latter's estate.

The Judicial Commissioners consider the passage on which the Additional District Judge rested his decision, as corroborating the story of the Defendant's witnesses, was an interpolation.

They also held against the Defendant on the plea of estoppel. In view of their decision on the question of fact relating to the adoption, they did not consider it necessary to determine whether Joharmal and Ramdhan were separate or joint.

In the appeal to His Majesty in Council, exception is taken to the conclusions of the Judicial Commissioners on both points. Firstly, it is urged that the factum of a valid adoption in accordance with the rules of Hindu law is conclusively established on the evidence; and, secondly, that Ramdhan was estopped by his conduct and representations from questioning the validity of the adoption, which equally affects the Plaintiff.

Admittedly, under the Hindu law, it is essential to the validity of an adoption that the child should be "given" to the adopter by the father or, if he be dead, by the mother. No other person has the right, nor can such right be delegated to anybody else (Mayne's Hindu Law, para. 192). Consequently, a boy who has lost both his parents cannot be adopted,

In 1908 both the parents of the Defendant were dead. In order to establish his adoption as valid under the Hindu law, he has put forward two allegations, viz., that his mother before her death went actually through the formal ceremony of "giving," and that before she died she delegated the authority "to give" to his two elder brothers. If she had already given him in adoption, the subsequent delegation of authority would seem to be superfluous. Any such delegation would, however, be invalid. The Defendant, therefore, had to establish that in 1903, when his mother was alive, she gave him in adoption to Joharmal, and that consequently he is vested with all the rights that appertain to an adopted son under the Hindu system.

The language of the deed of adoption, to which reference has already been made, requires careful attention. After reciting that he has no male issue and old age has approached, he goes on to say:—

"I have this day taken you in adoption before the *panchas* and with the consent of your brothers. You are my kinsman and your father was my *gotraj bandhu*. Consequently, for religious purposes and with a view to perpetuate my lineage, I have taken you in adoption, performing the adoption ceremony presenting you with the turban and giving a feast to all the *panchas*. Therefore you have become the owner of my moveable and immoveable property from this day. You have acquired the same rights as my born son has from this day. None else than you is my heir. You have become the owner of my shop. From this day you will be named Dhanraj, son of Jawharmal Gargoti. May you live long! This is my sincere blessing. I have executed this deed of adoption with my free will and pleasure. It is binding against my estate and heirs. Dated the 25th May, 1908. By the pen of Bhagwant Balaji of Chandur Bazar."

It will be noticed that in this document there is no reference to the essential ceremony of "giving and taking" which, if performed, would naturally occupy the forefront of the deed. It expressly states in so many words that he (Joharmal) had taken the Defendant in adoption "this

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day" (25th May 1908) "before the *panchas*" (the principal members of the caste). No Brahmin or Jati (priest) is mentioned, and the ceremony performed to effectuate the adoption, "presenting him with a turban and giving a feast to the *panchas*," has no connection with religious rites. The last part of the document is precise in its language and in effect :—

"You have acquired the same rights as my born son from this day . . . From this day you will be named Dhanraj."

The agreement executed by Kaluram and the other brother of the Defendant is as follows :—

"We both and Ghanasham are three real brothers. You and we are kinsmen of the same caste. You having no male issue, we have, with a view to perpetuate your line, given you in adoption our younger brother Ghanasham, 13 years of age, with our free will and pleasure this day, and having his adoption ceremony performed with our free will and consent have presented him with a turban. Ghanasham being regarded as your son has acquired the same rights as your born son would have had. He has become the owner of your moveable and immovable property from this day. We both have ceased to have any interest whatsoever in that boy. And that boy has ceased to have any ownership to our property henceforward. The boy in question is given in adoption in the presence of you and us and the village *panchas*. Our mother gave (him) in adoption just in his childhood. From this day the boy in question is named Dhanraj, son of Jawharmal, and will be so called in future also. May this family thrive!

"Our right of brotherhood to the said boy has been given up from this day. We have ceased to have any ownership whatsoever henceforward. If we set forth any right, it will be null and void by virtue of this document. We have executed this agreement with our free will and consent. It is binding against our estate and heirs. Dated 25th May, 1908. By the pen of Bhagwant Balaji of Chandur."

It will be noticed that it declares :—

"Ghanasham, being regarded as your son, has acquired the same rights as your born son would have had. He has become the owner of your moveable and immovable property from this day. That boy

has ceased to have any ownership in our property henceforward. The boy in question is given in adoption in the presence of you and us and the village *panchas*."

After the passage charged by the Plaintiff as having been interpolated, comes the following :—

"From this day the boy in question is named Dhanraj, son of Joharmal, and will be so called in future also."

Then comes the following passage :—

"Our right of brotherhood has been given up from this day. We have ceased to have any ownership whatsoever henceforward."

The reference in D. 62 to the giving of the boy by the mother, considering the importance of the ceremony under Hindu law, strikes one as cursory and creates the impression that the casualness of the reference was due to its compression owing to the exigencies of space. It is in these words : "Our mother gave him in adoption just in his childhood." This solitary reference to a vitally important ceremony has been held by the Judicial Commissioners to be an interpolation. They point out that it was perfectly possible to insert this sentence immediately after the previous words. However that be, there is great force in their observation that the words alleged to be interpolated are quite inconsistent with the main purpose of, and the statements in, the documents "D. 63" and "D. 62." These two deeds, in their Lordships' opinion, instead of supporting the evidence on behalf of the Defendant, appear to contradict the allegation of a ceremony, and a real effective ceremony, in 1903.

Bhagwant, the writer of the two deeds, was cross-examined respecting the reason why he had omitted in "D. 63" all reference to the ceremony by the mother. His answer, in their Lordships' opinion,

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is most unsatisfactory. He said as follows :—

"There were two drafts. It did not strike me then that there was any difference between the actual facts and the recitals of the drafts. The recitals in the deeds were not inaccurate at the time of writing. (The recital about the name of Dhanraj starting that day is read out.) Strictly speaking, there is a mistake. It is customary to write in this way that the name is changed from the date of writing, and so I did not object to it. I do not remember which of the two documents was written first. Though I knew that the boy had been actually adopted I did not insert that as it was not in the draft. I have been writing documents for the last 35 to 36 years."

Bhagwant professes to have been present at the ceremony said to have been performed in 1903. But neither Kaluram nor Chaturbai, the widow of Joharmal, who is supporting the Defendant, mentions him. He is a professional "petition writer" and he gives no reason why, if he was present, no document was executed on that occasion. Another statement of his, to say the least, is extraordinary. He said, evidently in answer to a question why the ceremony of adoption was not completed in 1903 :—

"The boy was given in adoption on Dashera day in Sambat 1960, but no writing was made that day. His mother and his brothers had come there. His mother gave the boy in adoption to Jowarmal. No document was written then as they wanted to wait for an auspicious year. Jowarmal executed Exhibit D. 63 in my presence. Kaluram and Jowarmal (his brother) executed Exhibit D. 63 in my presence."

According to him the auspicious year did not occur until 1908.

The boy's family lived at the village of Thugaon. The school register produced by the schoolmaster of that place shows that between 1903 and 1907 long after the alleged "giving and taking" he lived in his parental home in Thugaon. As the Appellate Court points out, this circumstance is wholly inconsistent with his having been adopted in 1903, when it is said he was actually made over to Joharmal. Had he been then given in adoption

he would have resided with his adopting parents, his name would have been changed, and he would have taken up his position as the adopted son of Joharmal. In the school register he is entered in his original name of Ghanasham. The question, why was he entered as Ghanasham if he had been adopted in 1903, is answered by the deeds executed on the 25th May 1908.

The statement of Chaturbai, the widow of Joharmal, contradicts in material particulars those of Kaluram, the brother of Dhanraj. In their Lordships' opinion the oral evidence regarding an adoption in 1903 is wholly unworthy of credit.

Their Lordships agree with the Judicial Commissioners in holding that the Defendant has failed to establish his allegation of the adoption in 1903.

But it has been strongly contended that Ramdhan and his heir are estopped by the provisions of sec. 115 of the Indian Evidence Act (I of 1872) from questioning the adoption.

That section runs as follows :—

"Where one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

What are the "declarations, acts or omissions" of Ramdhan which are said to constitute the estoppel? It is not necessary to decide in this case whether a status that rests on religious rules and religious sanctions and involves the performance of religious duties can be established by mere estoppel. Assuming, however, that such a status can be established by applying the doctrine of equitable estoppel embodied in sec. 115, so as to affect the rights of persons other than the adopter, it is necessary to consider in

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the first place what actually happened in 1908, and what were the acts and representations of Ramdhan which created the estoppel. He is said to have brought the boy to Chandur Bazar from his native village, to have become a witness to the deed of adoption; allowed him to perform the cremation ceremony of Joharmal; and at the time of his marriage represented him to be the adopted son of Joharmal.

The parties to this litigation belong to the caste or sect of Agarwallas. These Agarwallas, as has been pointed out in the case of *Bhagwandus Tejmal v. Rajmal* (1), generally adhere to Jainism and repudiate the Brahminical doctrines relating to obsequial ceremonies, the performance of *shraddh*, the offering of oblations for the salvation of the soul of the deceased, nor do they believe that a son, either by birth or by adoption, confers spiritual benefit on the father.

The Agarwallas are said to be divided into a number of sub-castes or sects. In the case of *Sheosingh Rai v. Mussamat Dakho* (2) in the High Court of Allahabad, which afterwards came before the Judicial Committee, and the judgment of the learned Judges was affirmed by this Board, the parties belonged to the Saraoji sub-caste. In the present case it is not clear to what sub-sect Joharmal adhered, but the evidence shows that the Defendant belongs to the Sekhavati sect. The majority of the Defendant's witnesses appear to be Moheshris. Whatever difference there might be between these sub-sects in the ritual of worship, there does not appear to be any in the rules relating to adoption recognised by the caste as a whole. The learned Judges, who decided in the High

Court of Allahabad the case of *Sheosingh v. Mussamat Dakho* (2) state the difference between the Brahminical Hindus and the Jains in the following words:—

"They differ particularly from the Brahminical Hindoos in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried. They also regard the birth of a son as having no effect on the future state of the progenitor, and consequently adoption is a mere temporal arrangement and has no particular object."

Among the Agarwallas the qualifying age for adoption extends to the 32nd year; and the only ceremony consists in tying a turban round the head of the young man who is being adopted, in the presence of the principal men of the community (the *panchas*) and giving them a feast. According to the document D. 63, as well as the agreement D. 62, this was the only ceremony performed in 1908, and it is exactly the ceremony referred to in *Sheosingh Rai v. Mussamat Dakho* (2).

Their Lordships have no doubt on the evidence that the story about a regular Hindu or, rather, Brahminical adoption in 1903 was invented with the object of giving to an ordinary Agarwalla adoption, the rights of collateral succession, and with the same object the statement had been put forward that the Defendant had been adopted by both brothers, Joharmal and Ramdhan, which is held to be illegal under the Hindu law.

If the Brahminical fringe is taken off, the whole of the evidence in the present case points to a secular adoption in 1908, and so far as the representation and acts of Ramdhan are concerned, they only relate to that adoption.

This Board in the case of *Gopee Lall v. Mussamat Sree Chundralee Buhoojee* (3),

(1) 10 Bom. H. C. R. 241 (1873).

(2) 6 N. W. P. H. C. R. 382 (1874); on P. C., L. R. 5 I. A. 87; s. c. I. L. R. 1 All. 688 (1878).

(2) 6 N. W. P. H. C. R. 382 (1874); on P. C.: L. R. 5 I. A. 87; s. c. I. L. R. 1 All. 688 (1878).

(3) L. R. I. A. Sup. Vol. 131; 19 W. R. 13 11 B. L. R. 391 (1872).

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on the question of estoppel, urged in similar circumstances, said as follows :—

"It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favour, inasmuch as they have represented in former suits and in various ways, by letters and by their actions, that Luchminjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchminjee or the defendant on any matter of fact. They are alleged to have represented that Luchminjee was adopted. The plaintiff's case is that Luchminjee was in fact adopted. So far as the fact is concerned there is no misrepresentation, it comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties."

A number of rulings of this Board and a decision of the Madras High Court have been referred to in support of the contention that the Plaintiff is estopped. Closely examined, it will be seen that those cases relate to adoptions acquiesced in and recognised for a number of years by the person making the adoption, and the Courts considered in substance that a long course of recognition and acquiescence on the part of the person, who was best acquainted with the circumstances, gave rise to the inference that the conditions relating to the adoption were duly fulfilled. In *Rani Dharam Kunwar v. Balwant Singh* (4) the estoppel was considered purely personal.

Their Lordships are in entire agreement with the ruling of the Board in *Gopee Lal's case* (3) and think that there is no substance whatever in the plea of estoppel raised by the Defendant. On the whole they are of opinion that the judgment of the Court of the Judicial Commissioner is

(3) L. R. I. A. Sup. Vol. 131; 19 W. R. 12; 11 B. L. R. 391 (1873).

(4) L. R. 39 I. A. 142, 148; s. c. 16 O. W. 475 (1912).

sound and that this appeal should be dismissed with costs.

The Appellant has, however, taken some exception to the decree made by the Appellate Court. No such objections were either embodied in the grounds of appeal or brought to the notice of the learned Judges. It was only shortly before the hearing of the appeal here that notice was given to the Respondent to the effect that objections would be urged against the decree on the hearing. Their Lordships think that to allow a litigant to bring forward at this stage exceptions to a decree, which have never been urged before, is open to very grave objection. The course adopted in the present case was reprehended by the Board in the case of *Sheo-singh Rai v. Mussamat Dakho* (2) already referred to, and their Lordships propose to adhere to the principle laid down there. It seems, however, necessary that the decree as framed should be put into a more practical shape in order to avoid difficulties in the execution Court.

The Plaintiff attached six schedules to her plaint. Sch. "A" sets out the amount standing to the credit of the Plaintiff's mother in the books of Ramdhan including her ornaments. Sch. "B" refers to immoveable property consisting of fields, etc. Sch. "C" includes money lent on mortgages, etc.

Sch. "D" relates to outstandings on current accounts, decrees, etc. Sch. "E" gives the amounts due by the Plaintiff to certain specified people, and Sch. "F" relates to moveable property alleged by the Plaintiff to have been taken by the Defendant.

The Appellant in his reply denied that he took forcible or unlawful possession of

(2) 6 N. W. P. H. C. R. 382 (1874); on P. O.; L. R. 5 I. A. 87; s. c. I. L. R. 1 All. 688 (1878).

DEANRAJ JOHARMAL v. SONI BAI.

the property in dispute. He did not deny the fact that he did take possession of the property. In para. 6 of his reply he denied that the property mentioned in Sch. "A" was the property of the Plaintiff's mother. In para. 7 he stated that he had not removed any ornaments and cash from the safe of Ramdhan. In para. 8 he stated that the ornaments pledged by Ramdhan to Kaluram belonged to the joint estate of the Defendant and Ramdhan and that he was entitled to them; in para. 11 he says that the property mentioned in Schs. "B," "C," "D," "E," and "F" does not belong to the Plaintiff but to the Defendant. Practically he admits having taken possession of all the property which the Plaintiff claimed to belong to the estate of Ramdhan. In these circumstances their Lordships think that the decree should run in the following terms:—

(1) That it should be declared that the Plaintiff is entitled by right of succession to the estate of her father Ramdhan; (2) that there should be a decree for possession of the immoveable properties claimed by the Plaintiff; (3) that there should be a decree for the delivery of the ornaments and other moveable property taken possession of by the Defendant; (4) that the Defendant should deliver to the Plaintiff all documents of title, securities for loans, such as, mortgages, decrees, etc., which came into his hands as appertaining to Ramdhan's estate; (5) that if necessary there should be an enquiry as to what was the *stridhan* property of the Plaintiff's mother; an account of what is due to Kaluram on the ornaments pledged to him, and (6) an account of the debts of, and outstandings belonging to, Ramdhan's estate realised by the Defendant with liberty to the parties to apply to the Court for directions.

In case any of the debts have been barred by the wilful neglect or default of the Defendant he would necessarily be liable for those debts. For the purpose of taking these accounts and giving effect to the decree generally a Receiver should be appointed.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs, and that the amendments they have indicated should be embodied in the decree.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellant.

Solicitor: *Mr. H. S. L. Polak* for the Respondent.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE ORDER

No. 419 OF 1924.

CUMING, J. }

PAGE, J. }

1926,

Heard, 1 and

2, February.

Judgment,

2, February. }

JOYMAN BEWA,
Appellant,

v.

EASIN SARKAR,
Respondent.

Civil Procedure Code (Act V of 1908), sec. 145—Contract of suretyship, if may be embodied in petition of compromise filed in execution case—Whether it must be in favour of the Court—Proper stamp which such a petition should bear—Insufficiently stamping such petition, effect of—Stamp Act (II of 1899), secs. 35 and 36, effect of, when such document admitted in evidence.

In an execution case a joint petition was filed by the judgment-debtor, the decree-holder and the surety embodying the terms of the agreement arrived at. The petition bore the court-fee stamp appropriate to a petition:

Held (on an application for execution of the decree against the surety)—That the contract contained in the petition amounted to a contract of guarantee within sec.

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126 of the Contract Act and the surety having expressly contracted in the petition that he should be personally liable to perform the decree as provided in the compromise the instrument in question was within sec. 145 of the Code of Civil Procedure, under which it is not incumbent that the contract of suretyship must be in the form of a security bond in favour of the Court.

That the contract must be stamped not only as a petition but also with a further stamp appropriate to a contract of guarantee as provided by the Stamp Act and under sec. 35 of the Stamp Act the instrument in question ought not to have been received in evidence or acted upon unless it was duly stamped; but it, having been admitted in evidence, fell within the ambit of sec. 36 and could not be called in question.

This was an appeal against an order of the Subordinate Judge of Mymensingh (Mr. Mohendra Nath Das), dated the 25th August 1924, affirming an order of the Munsif at Mymensingh (Mr. J. C. Neogi), dated the 9th June 1924.

The facts of the case will appear from the judgment.

Babu Urukramdas Chakrabarty for the Appellant.

Babus Bimal Ch. Das Gupta and *Pro-santa Bhusan Das Gupta* for the Respondent.

THE JUDGMENT OF THE COURT was as follows :

PAGE, J.—This is an appeal from an order refusing to permit execution to be levied against a person who is alleged to have stood surety for the judgment-debtor in execution proceedings.

The suit out of which the controversy arose resulted in a consent decree under which the judgment-debtor was ordered to

pay Rs. 380 and the costs of the suit. An execution case followed. In the course of that case an agreement was arrived at between the surety, who is the present contending Respondent, the decree-holder and the judgment-debtor. The decretal amount was not paid by the judgment-debtor, but after an application had been made to execute the decree against the surety, a petition was filed on behalf of all the parties concerned stating the terms of the tripartite agreement which had been arrived at, and praying that the execution case might be withdrawn. That petition bears a court-fee stamp appropriate to a petition, but is not stamped either as a contract of suretyship or as a security bond. The Court, having regard to the petition, permitted the execution case to be withdrawn.

Subsequently, the judgment-creditor applied for execution of the decree against the surety to the extent to which he had made himself personally liable for the decretal amount. This application was made under sec. 145, Civil Procedure Code, which provides that—

“Where any person has become liable as surety (a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree, or (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of sec. 47.”

The objection of the surety to an order being made under sec. 145, Civil Proce-

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Code, was that he had never become a surety within sec. 145, C. P. C., or otherwise for the fulfilment of any obligation of the judgment-debtor under the decree. Now the contract of suretyship upon which it was sought to make the Respondent liable in execution of the decree obtained against the judgment-debtor was contained in the petition of compromise, which was in the following form :—

“ Both sides hereby state :—It being inconvenient to pay money at present and the judgment-debtor, Petitioner, having approached the decree-holder and Easin Sarkar of Mahajanpur having stood surety for the said money it is arranged that the judgment-debtor will pay the entire amount due after deducting the amount paid and the costs of this execution case to the decree-holder by the month of Kartik 1328 B. S., otherwise I, Easin Sarkar, stand surety for the entire amount aforesaid. If Easin Sarkar does not pay the money to you, the decree-holder, then you, the decree-holder, will be able to realise the money from me Easin Sarkar by executing this decree. Let it be known that the entire cattle attached are released from attachment. Let it be known that we, the decree-holders, have got Rs. 100 which was in deposit with Kutub Mandal which will be credited in the decree. The judgment-debtor and the surety remain liable for Rs. 253-1-3 (two hundred and fifty-three rupees, one anna and three pies only) and costs of this execution case after deducting the aforesaid Rs. 100.”

The contest of fact at the hearing of this application was whether the Respondent had become liable as surety for the performance of the decree or for the payment of any money within the meaning of sec. 145, C. P. C. The Respondent asserted that he had not signed and was neither a party nor privy to the contract

set out in the petition. The finding of fact by the trial Court was adverse to this contention.

It was held by the learned Munsif that the Respondent signed this petition and that the petition embodied the terms of the agreement which had been arrived at between the parties. This finding was not animadverted upon by the lower Appellate Court and must stand.

In both the lower Courts this document was admitted in evidence and was marked as an exhibit. The lower Appellate Court, however, dismissed the application upon the ground that, inasmuch as the contract of suretyship was not duly stamped, it was not valid as a contract, and further held that whether that were so or not, the only mode by which a person could become liable as a surety under sec. 145, Code of Civil Procedure, was by executing a security bond in favour of the Court, which the Court accepted.

On a further appeal to this Court, the contention that the contract contained in the petition was rendered void because it was not duly stamped was not persisted in.

In my opinion there is no substance in that contention. Failure duly to stamp a document which must needs be stamped by reason of the provisions of the Stamp Act does not affect the validity of any contract therein contained, but renders the document inadmissible in evidence.

In my opinion, the contract contained in the petition signed by the three parties concerned amounted to a contract of guarantee within sec. 126 of the Contract Act. Under sec. 126 such a contract “ may be either oral or written.” In my opinion, the contract must be stamped not only as a petition but also with a further stamp appropriate to a contract of guarantee as provided by the Stamp Act. Under sec. 35 of the Stamp Act, the in-

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strument in suit ought not to have been received in evidence or acted upon unless it was duly stamped. It was conceded, however, that this instrument was admitted in evidence in the Courts below. It falls therefore within the ambit of sec. 36 of the Stamp Act, which provides that—

“Where an instrument has been admitted in evidence such admission shall not, except as provided in sec. 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.”

The admissibility of the document therefore cannot be challenged in this appeal or in any proceeding subsequent to the trial and incidental to the suit.

Now, the meaning and effect of sec. 36 of the Stamp Act was considered in the case of *Rung Lal v. Kedar Nath* (1). In that case Richardson, J., at page 520, observed with reference to sec. 36 :—

“Under that provision if any penalty is to be exacted, it can only be exacted under sec. 61. The revenue is then protected, so far as it is protected, by that section.

“In my opinion, once an instrument is admitted in evidence in any proceeding, either under sec. 35 or under sec. 36, it is available in that proceeding for all purposes as if it had been properly stamped from the outset. The proceeding will go through to a valid termination and cannot afterwards be challenged for want of jurisdiction merely by reason of non-compliance with the Stamp Act.

“Sec. 36 would be entirely nullified if on the conclusion of the proceeding in which the instrument is admitted, the proceeding could be set aside by a separate proceeding initiated by one of the parties on the sole ground that the person having authority to receive evidence had admitted

or acted upon an unstamped or insufficiently stamped instrument.”

See also *per* Chitty, J., in *The Bombay Company, Ltd. v. National Jute Mills* (2).

The learned pleader for the Respondent, however, contended that such a contract of suretyship not being a security bond in favour of the Court but merely a private arrangement between the decree-holder, the judgment-debtor and the surety did not render the surety amenable to the provisions of sec. 145, Code of Civil Procedure. In my opinion, for such a contention there is no warrant either in the Code of Civil Procedure or in the Contract Act. Under sec. 145, Code of Civil Procedure, in order that execution may be levied against a surety, it is incumbent upon the applicant to prove that the surety had rendered himself personally liable for the performance of some obligation as provided in the section.

Having regard to the terms of the contract of suretyship in this case, it is apparent that the Respondent expressly contracted that he should be personally liable to perform the decree as provided in the compromise, and that if he failed to fulfil his obligation as a guarantor of the judgment-debtor, “the decree-holder will be able to realize the money from me Easin Sarkar by executing this decree.” It is clear therefore that if the instrument in question is within sec. 145, Code of Civil Procedure, the contract is one under which the Respondent rendered himself liable to have the decree executed against him personally to the extent to which he had guaranteed the performance by the judgment-debtor of his obligations under the decree. It is urged, however, that a contract of suretyship under sec. 145, Code of Civil Procedure, must be in the form of a security bond. No authority for such a

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contention has been cited before us, although we have been referred to numerous cases upon the subject and the terms of the section contain no reference to the form which a contract of suretyship within the meaning of the section must take. The words are: "Where any person has become liable as surety," and under sec. 126 of the Contract Act a contract of suretyship "may be either oral or written." In my opinion, the instrument in suit conforms to the requirements of sec. 145, Code of Civil Procedure.

Lastly, it is urged that it is only where the contract of suretyship is in favour of the Court that execution can be levied against the surety under sec. 145, Code of Civil Procedure.

No doubt in many cases the security for the performance of the obligation referred to in sec. 145 will be given to the Court, and in such a case it is usual to require that a security bond should be entered into. But I see no warrant in any of the cases to which we have been referred for the proposition that it is only a security bond in favour of the Court which can be executed against the surety under sec. 145.

No such limitation is contained in the section, and, in my opinion, it follows from the *ratio decidendi* of the judgments delivered in *Mukhta Prosad v. Mohadeo Prosad* (3) and *Brojendra Lal Das v. Lakhmi Narain Khanna* (4) that no such limitation as is suggested ought to be placed upon the language used in sec. 145, Code of Civil Procedure. In my opinion, in a case where a person has contracted expressly that he will guarantee the performance of any of the obligations set out in sec. 145, whether such a contract be oral or in writing, he has rendered himself liable to be proceeded against in execution of the de-

cree as provided in sec. 145, Code of Civil Procedure.

For these reasons, in my opinion, the order against which this appeal is brought should be set aside and the decree-holders would be permitted to proceed with the application under sec. 145, Code of Civil Procedure, for execution against the surety.

In my opinion, this instrument ought not to have been admitted in evidence without having been stamped with an additional eight annas stamp, and we determine that the amount of duty with which the instrument is now chargeable is eight annas exclusive of any penalty which may be levied, and that the duty is payable by the decree-holders. The document will be impounded, and a copy of the declaration of the Court as to the duty payable will be sent to the Collector.

The Appellants are entitled to their costs in all the Courts. The hearing fee on this appeal is assessed at three gold mohurs.

CUMING, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 2212 of 1923.

BAHADUR AHMED
MOULAVI, Defendant
No. 1, Appellant,
v.

CUMING, J.
B. B. GHOSE, J.
1925,
3, December.

HEMANTA KUMAR ROY
and ors., Plaintiffs,
Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 3, cl. (9), 173, sub-sec. (3), cl. (1)—Undivided share in parcel of land, if "holding"—Abandonment—Kabuliyat by tenant in possession of undivided share of lands of a holding—Stipulation in such kabuliyat restraining alienation and reserving right of re-entry by landlord in case of breach of covenant, if contravenes provisions of sec. 173, B. T. Act—Breach of covenant—Landlord's right to re-enter.

(3) I. L. R. 38 All. 327 (1916).

(4) 19 C. W. N. 901 (1915).

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B and G jointly held a non-transferable occupancy holding in equal shares and afterwards there was an amicable partition between them. G's share was inherited by N who executed a kabuliyat in favour of the landlord by which the rent was increased for excess area and it was stipulated that N would not be competent to transfer the leasehold lands in any way and in case of transfer the landlord would be entitled to take khas possession of the same. It appeared that undivided portions of lands of the holding were included within this kabuliyat. After N's death the Defendants came into possession of these lands by purchase from P who was the daughter's son of G. Plaintiff thereupon sued the Defendants for khas possession :

Held—That N's tenancy did not constitute a holding as defined by the Bengal Tenancy Act, inasmuch as undivided portions of the holding were included within that leasehold, and the sale of that tenancy being of a part of the holding the landlord was not entitled to recover possession on the ground of abandonment of the holding.

HURRY CHARAN BOSE v. RANJIT SINGHA
(1) referred to.

Held—That though N's tenancy did not constitute a holding still the landlord was entitled to khas possession of the said leasehold lands on the ground of transfer of the same in breach of the covenant contained in N's kabuliyat which did not contravene the provisions of sec. 178 of the Bengal Tenancy Act and which was valid under that Act.

Plaintiff's claim for khas possession was allowed.

This was an appeal against the decision of Babu Nagendra Nath Bhattacharjee,

(1) I. L. R. 25 Cal. 917n : s. c. 1 C. W. N. 581 (1899).

Subordinate Judge of Zillah Jessore, dated the 1st of May 1923, reversing the decree of Babu Raman Chandra Banerjee, Munshif, 3rd Court at Narail, dated the 19th of November 1921.

The facts of the case material to this report are as follows :—

Plaintiff sued the Defendants for recovery of khas possession of several plots of land and half share in some plots on establishment of Plaintiff's title to the same. Plaintiff's case was that under his *patni mahal* there was a non-transferable occupancy holding bearing a *jama* of Rs. 25 which formerly belonged to Baidyanath Mandal and Golak Mandal in equal shares.

The *jama* was afterwards divided in two equal shares with distribution of rent of Rs. 12-8 in each share. After Golak's death Nityamoyi came to hold his lands as his successor and executed a *kabuliyat* on the 28th Chaitra 1313 B. S., in favour of Plaintiff's father, and there being increase of area the rent of Rs. 12-8 was increased to Rs. 15-10. Nityamoyi died in 1323 B. S. without leaving any heir. On the 15th Magh 1326 B. S., there was an attempt on Plaintiff's behalf to take khas possession of the land but the Defendants Nos. 1 to 7 resisted and gave out that they purchased the lands in suit from one Pitambari Dassi. Plaintiff thereupon brought this suit for khas possession.

Defendant No. 1 alone contested the suit, and his defence, *inter alia*, was that there was no division of the tenancy of Rs. 25 and distribution of rent, there was no separate tenancy for the share of Golak Mandal, and there were lands in *ijmali* of both the shares and there could not be any separate holding for Golak's portion legally; that the *jama* was a tenure and it was transferable and the Defendants Nos. 1 to 7 purchased the share of Golak

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by a *kobala*, dated the 28th Jaista 1325 B. S., from Pitambari who was the widow of the daughter's son of Golak and who executed the *kobala* on behalf of her minor sons who were legal heirs and entitled to the *jama*.

It appeared that the original *jama* of Rs. 25 was not created by any written instrument.

The following portions of the *kabuliyat* executed by Nityamoyi in favour of Babu Raj Kumar Roy, father of the Plaintiff, dated the 28th Chaitra 1318 B. S., will be found material to this report :—

“ Under this *putni* mahal there was the non-transferable, variable *jama* of Rs. 12-8 in village Taleswar, Mouja Ashti Baria recorded in the office of the former *malik* as being in my possession and bearing the names of Baidyanath and Golak Mandal. The lands of this *jama* having now increased on measurement, Rs. 15-10 is settled to be the annual *jama* for 10 bighas and $1\frac{1}{2}$ cottas of land For the said lands of 10 bighas $1\frac{1}{2}$ cottas I shall pay the rent of Rs. 15-10 every year ”

Cl. (9) of the *kabuliyat* was as follows :—
“ With respect to this *jama* or any portion thereof, I shall not be entitled to make a gift or sell or give settlement of, or create any lien or incumbrance in favour of anybody or otherwise transfer the same in any way. In case I do so, you shall be entitled to take *khas* possession of the entire mahal either of your own motion or through the Court and I shall not be able to object to the same.”

The lands in the schedule to the *kabuliyat* comprised 21 plots, total area of which was 10 bighas $1\frac{1}{2}$ cottas. Of these 21 plots, 5 plots, *viz.*, plots Nos. 1, 17, 19 to 21 were described as *nishpi* (*nishpi*) 8 cottas, 4 cottas, 6 cottas, 12 cottas and $1\frac{1}{2}$

chattaks respectively after giving the boundaries.

The way in which these plots were stated in the *kabuliyat* will appear from the following description of plot No. 1 :—

Plot No. 1.—To the south of the homestead of Sitanath Samaddar, to the east of the house of Taramani Debya, to the north of the house of Golak Mandal and to the west of the road *nishpi* (*nishpi*) 8 cottas.

The Munsif dismissed the Plaintiff's suit. He held that the *jama* of Rs. 25 was a tenure, and even if it was taken as an occupancy holding the Plaintiff was not entitled to *khas* possession.

The following portion of his judgment will be found material :—

“ There is, however, nothing to shew that there was a division of the lands of the tenancy by metes and bounds. All that we find is that there were some plots of land exclusively possessed by Nityamoyi and some by her other co-sharer, but there were some other plots which were never divided but possessed jointly by both the co-sharers. The plaint itself will shew that plots Nos. 17, 19, 20 and 21 of the schedule are only undivided half shares of some plots. Thus it cannot be held that there was division of the tenancy, and each portion of the *jama* could not become a separate holding of the tenancy. There being no separate holding for the moiety share of Nityamoyi the transfer of this portion or abandonment of it could not operate as abandonment of the entire holding so as to entitle the Plaintiff to take *khas* possession of it. *Baidya Nath De v. Ilim* (2), *Hurribole v. Tasimuddi* (3), *Ahadullah v. Ganga* (4), *Binayak Das v. Sominuddi* (5)

(2) I. L. R. 25 Cal. 917: s. c. 2 C. W. N. 44 (1897).

(3) 2 C. W. N. 680 (1898).

(4) 2 C. L. J. 10 (1902).

(5) 24 C. W. N. 1022 (1920)

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and *Karim Chakladar v. Saporunnessa Bibi* (6)."

On appeal by the Plaintiff, the Subordinate Judge of Jessore allowed the appeal and gave the Plaintiff a decree for *khas* possession.

The following portion of his judgment will be found material to this report :—

"Supposing, however, that Nityamoyi has the interest of a tenure-holder in the land I fail to perceive how the Defendants' position is in any way improved thereby. By cl. (9) of the *kabuliyat* it is provided that if the lessee gives away, sells, sublets or encumbers it or in any way transfers it, the lessor will have a right to re-enter.

• This clause in the *kabuliyat* will be binding upon subsequent holders of the demised land. The lease was given effect to in the record-of-rights and in the very *kobala* by which the Defendants made the purchase the lease is accepted as the binding contract. I therefore hold that the Defendants cannot avoid eviction even if it be held that a permanent tenancy of the nature of the tenure was created in respect of Nityamoyi's share.

It is an admitted fact in the case that Golak and Baidyanath divided the *khamar* land amongst themselves and held separate possession of such *khamar* land. The Defendants, however, contended that the tenanted plots remained *ijmali* between them. From the *kabuliyat*, Ex. 3, it appears that moiety shares of 5 plots were included in it along with 17 other entire plots. The pleader for the Appellant tried to explain away the occurrence of a moiety share of some plots in the *kabuliyat* by saying that it was due to indolence of the Plaintiff's officers who did not take the trouble to ascertain the precise portion of the land of which Nityamoyi was in possession in those plots and in support of his

contention he pointed to the parchas of the record-of-rights (Exs. B to B 8) in which Nityamoyi's tenancy is represented as consisting of a number of entire plots. In view, however, of the fact that in the plaint the *jama* is described as consisting of a moiety share of some plots along with some entire plots I am unable to accept the contention of the Plaintiff. It seems to me that the tenanted lands might have been partitioned at the time of the record-of-rights, but the Plaintiff has not accepted the partition of these plots. A holding under the law must consist of entire parcels of land. Nityamoyi's *kabuliyat* did not therefore create a new holding but by it the landlord confirmed an imperfect partition that had been made before the former holding ceased to exist upon it. Thus a new tenancy was created in Nityamoyi's favour with a rent of Rs. 15-10 as. which was not an aliquot part of the previous rent. The Tenancy Act makes no provision for tenancy of this character and its incidents are rather uncertain, but at any rate such a tenancy will not be transferable in the absence of local custom or usage. The Defendants did not plead any such custom or usage but rested their defence solely on the basis that it was a tenure. I have seen that even if it was a tenure the Defendants did not acquire any right by the transfer in their favour. In my opinion it was merely a raiyati lease that was effected by Ex. 3 and it was not transferable."

Against the decision of the Subordinate Judge Defendant No. 1 preferred this second appeal.

Mr. Harendra Kumar Sarbadhikari and Babu Nripendra Chandra Das for the Appellant.

Babus Hemendra Chandra Sen and Surendra Nath Basu (Sr.) for the Respondents.

BAHADUR AHMED MOULAVI *v.* HEMANTA KUMAR ROY.

The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This appeal arises out of a suit for recovery of *khas* possession of certain land. The trial Court dismissed the suit which was decreed on appeal by the Subordinate Judge.

Defendant No. 1 has appealed to this Court. The facts found by the Subordinate Judge are that certain lands belonged jointly to two persons Baidyanath and Golak in equal shares. There was a partition between the two co-sharers and the lands belonging to Golak's share were inherited by one Nityamoyi. She died sometime in 1916. Before her death she executed a *kabuliyat* in favour of the Plaintiff, dated the 11th of April 1907. It was stated in that *kabuliyat* that the lands of which she had been in possession were found on measurement to be in excess of the original *jama* and therefore the rent was altered and certain terms were arranged between the landlord and Nityamoyi with regard to her leasehold property. The Defendants came into possession by right of purchase from one Pitambari who was the widow of the daughter's son of Golak.

The Plaintiff claimed possession of these lands on two grounds :—First, that the transfer to the Defendants was made in contravention of the terms of the *kabuliyat* executed by Nityamoyi and secondly, that the tenancy being that of an occupancy raiyat the purchasers had acquired no title as against the landlord as the occupancy right was not transferable by custom.

The trial Court found that the leasehold was a permanent tenure, that the sale was of a portion of the tenancy which was saleable and that therefore the Plaintiff was not entitled to succeed in ejectment. On appeal by the Plaintiff the Subordinate Judge held that if the leasehold interest

of Nityamoyi be held to be a permanent tenancy then the sale having been effected in breach of the covenant contained in the *kabuliyat* executed by her the landlord was entitled to re-enter. He, however, held that the interest of Nityamoyi in the lands was that of a raiyat. He found that the leasehold did not form a holding as defined by the Bengal Tenancy Act, because it did not consist entirely of parcels of land but some undivided shares of land under the occupancy of tenants were included within the leasehold. He came to the conclusion that the Bengal Tenancy Act made no provisions for a tenancy of this character and the incidents of such a tenancy were rather uncertain, but that, at any rate, such a tenancy would not be transferable. In that view he made a decree in favour of the Plaintiff.

Defendant No. 1 by this appeal contends that the leasehold having been found not to consist of a holding as defined by the Bengal Tenancy Act the sale to the Defendants cannot be considered to be an abandonment of the holding by an occupancy raiyat which would entitle the landlord to take *khas* possession as on an abandonment under the Bengal Tenancy Act. It is contended by the learned vakil on behalf of the Plaintiffs-Respondents that the leasehold really consisted of a holding and he placed the *kabuliyat* before us. On reading the descriptions of the lands in the schedule there cannot be any doubt that the undivided portions of lands have been included within the leasehold and therefore according to the decision in the case of *Hurry Charan Bose v. Ranjit Singha* (1) the tenancy cannot be said to comprise a holding as defined in the Bengal Tenancy Act. The sale therefore cannot be construed into an abandonment of a holding

(1) I. L. R. 25 Cal. 917n; s. o. 1 O. W. N. 621 (1898).

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by an occupancy raiyat and the landlord is not therefore entitled to recover possession on that ground. But it is contended on behalf of the Respondents that the Plaintiff is entitled to take advantage of the provision with regard to the restriction as to alienation contained in the *kabuliyat* of Nityamoyi and that he is entitled to re-enter on account of the breach of that covenant. Cl. (9) of the *kabuliyat* runs thus:—"With respect to this *jama* or any portion thereof, I shall not be entitled to make a gift or sell or give settlement of or create any lien or incumbrance in favour of anybody or otherwise transfer the same in any way. In case I do so, you shall be entitled to take *khas* possession of the entire mahal either of your own motion or through the Court and I shall not be able to object to the same." This is a clear provision restricting alienation and reserving the right of re-entry by the landlord in case of breach of the covenant. According to the Plaintiff's case there has been a transfer which is a breach of the covenant. It is, however, argued on behalf of the Appellant that this covenant is not valid under the Bengal Tenancy Act. I cannot find any provision in sec. 178 of the Bengal Tenancy Act which prevents any such agreement being entered into. An attempt was made on behalf of the Appellant to bring this covenant within the provisions of cl. (d), sub-sec. (3) of the sec. 178 of the Bengal Tenancy Act, which enacts that nothing in any contract made between a landlord and a tenant shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage. But the answer is that this leasehold is not a holding and the Defendants have not been able to prove that there was any local usage authorising them to transfer their tenancy. There is no provision in the Act which the clause in

the *kabuliyat* mentioned above offends against. In my opinion therefore the Plaintiff is entitled to re-enter for the breach of the covenant above referred to.

The appeal must, therefore, be dismissed with costs.

CUMING, J.—I agree.

H. C. S. *Appeal dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]
APPEAL FROM APPELLATE DECREE
No. 2343 of 1923.

SUHRAWARDY, J.	} LAL BEHARY MAITY and ors., Plaintiffs, Appellants, v. RAJENDRA NATH MAITY and ors., Defendants, Respondents.
GRABAM, J.	
1926,	
Heard,	
12, February.	
Judgment,	
15, February.	

Revenue Sale Act (XI of 1859)—Non-service of proper notice under sec. 6, effect of, under sec. 33—Combined notice under sec. 5 and sec. 6, if valid notice under the latter—Object of the respective notices under secs. 5 and 6—Sale, when to be set aside—Necessity of showing substantial injury—Case, if to be included in arrears of revenue—Revenue money order—Collector, if can appropriate remittance to kist other than that mentioned by remitter—Contract Act (I of 1872), sec. 59.

The notice under sec. 5 is to be issued for the purpose of giving warning to the people concerned of the liability of the mehal being sold in the event of the payment not being made within the time fixed therein. It must therefore issue before the mehal has become liable to sale; whereas the notification under sec. 6 has to be issued after the property has become liable to sale—a date for sale having been fixed. Therefore a combined notification under secs. 5 and 6 cannot be legally issued and when such a notification is issued the effect is non-service of a proper notification under sec. 6.

Under sec. 38 of the Act what is meant by irregularity is the fact of the sale

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having been held contrary to the provisions of the Act. There is no distinction made between illegality and irregularity. The authorities show that when the Collector has jurisdiction to hold the sale, non-compliance with any of the provisions of the Act will render the sale liable to be set aside only on the ground that a party has sustained substantial injury by reason of the illegality or irregularity complained of.

The finding of fact that the low price fetched at the sale was not due to the failure of the Collector to issue a proper notification under sec. 6 of the Act is a finding of fact which must be accepted, and whether the non-compliance with the provisions of sec. 6 amounts to illegality or irregularity, the Plaintiffs are not entitled to succeed in view of the finding of the Court below that the inadequacy of price was not due to the breach of any provisions of the Act.

Cesses should not be included in the amount recoverable under the Revenue Sale Act, but if there be arrears of revenue due and unpaid, the fact that the amount of arrears claimed was different from what is found really due did not take away the jurisdiction of the Collector.

Where an amount is sent to the Collector by postal money order it must be appropriated by the Collector to the kist mentioned by the remitter under sec. 59 of the Contract Act.

Per GRAHAM, J.—Act XI of 1859 is a stringent enactment for the realisation of arrears of revenue and that being so, there is an obligation to comply exactly with its requirements.

A notification under sec. 6 ought to be issued in all cases and it cannot be dispensed with on the ground that a notification has already been issued under sec. 5.

This was an appeal against the decree of A. Henderson, Esq., District Judge of Zillah Midnapur, dated the 29th of June 1923, reversing the decree of Babu Amrita Lal Mukerjee, Subordinate Judge of Zillah Midnapur, dated the 29th of July 1922.

The facts of the case will appear from the judgment.

Mr. Amarendra Nath Basu and Bubu Rama Prosad Mukhopadhaya for the Appellants.

Dr. Dwarka Nath Mitter, Mr. Harendra Kumar Sarbadhikari, Babus Subodh Chandra Dutt and Nripendra Chandra Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J.—This appeal by the Plaintiffs arises out of a suit for recovery of possession of their 6 annas share in Touzi No. 1666 of the Midnapur Collectorate after setting aside the revenue sale of the said Touzi held on the 10th January 1921 or in the alternative for a direction upon the Defendants to reconvey the Plaintiffs' share in the Touzi to them. The learned Subordinate Judge in the trial Court being of opinion that there were no arrears and that there was no publication of the notice under sec. 6 of the Revenue Sale Act (XI of 1859) which omission rendered the sale *ipso facto* void passed a decree in favour of the Plaintiffs setting aside the sale as null and void and allowing the Plaintiffs to recover possession of their 6 annas share in the mehal. On appeal the learned District Judge of Midnapur held that the decree of the trial Court was apparently wrong in setting aside the entire sale when the other proprietors of the Touzi did not object to it. The only decree in his opinion that could have been passed was for an order upon Defendant

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No. 1 (purchaser) to reconvey the property to the Plaintiffs. The learned Judge further held that there was service of a notice which might be taken to be one under sec. 6 of the Act; but if there was no service of a separate notification under sec. 6, it amounted only to an irregularity and that as the Plaintiffs failed to prove substantial injury the sale was not liable to be set aside under sec. 33 of the Act. In this view the learned Judge dismissed the Plaintiffs' suit.

The Plaintiffs have appealed and on their behalf it is urged in the first place that the sale was bad in law as no notification under sec. 6 of the Revenue Sale Act was served and as this amounted to an illegality the sale should be held to be invalid. In the second place it is contended that on proper calculation it should have been found that there were no arrears; and that the Courts below were wrong in considering the amount claimed for cess as part of the revenue recoverable under Act XI of 1859.

As regards the first ground, it is necessary to state the facts of the case. The mehal was assessed with revenue of Rs. 107-11-9 and cesses of Rs. 2-12-0 payable in four quarterly instalments. It is found that the amount due for March and June *kists* of 1920 was short by Rs. 5-7-9 pies. According to the notification made by the Board of Revenue under sec. 3 of the Act the March *kist* was to have been paid on or before the 28th March and the June *kist* on or before the 28th June. Under sec. 2 of the Act these *kists*, if unpaid, were arrears on the 1st May and 1st August. On the 9th August 1920 the Collector directed the issue of notice under sec. 5 of the Act, which was served in September 1920, as there were some attachments on the mehal. This notice was in the following form :—“ Notice is

hereby given under secs. 5 and 13 of Act XI of 1859 that unless the arrears of revenue mentioned below are paid on or before the next latest date of payment, *viz.*, the 28th August 1920, the under-mentioned estates or share of the estate in the District of Midnapur will be put up for sale at the office of the Collector of that District on the 10th January 1921 at noon for the said arrears.” On the 17th November 1920 the Collector ordered that the mehal should be advertised for sale. The sale was held on the 10th January 1921 and the mehal was purchased by Defendant No. 1 for Rs. 2,100. Before the sale, on the 25th and 29th September 1920 the Plaintiff remitted the sum of Rs. 5-1 to the Collector by two money orders with the direction that the amount should be credited towards the September *kist*.

It appears that there was only one notice served purporting to be under secs. 5 and 13, referred to above. The learned District Judge is of opinion that the notice was in the form of the notice prescribed by the Board of Revenue and in fact it amounted to a combined notice under secs. 5 and 6 of the Act. I must express my regret that the form should have been adopted for the purpose of necessary notifications under the Act. The notice under sec. 5 is to be issued for the arrears of the description mentioned in that section. That section says that such notice shall specify the nature and amount of the arrear so demanded and the latest date on which the payment thereof shall be received and shall be served not less than 15 clear days preceding the date fixed for payment according to sec. 3 of the Act. According to sec. 3 of the Act, the Board of Revenue has fixed the dates of payment of the *kists* which in the present case were the 28th March and the 28th June. The notice under sec. 5 should have issued 15

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clear days before those dates. The notification under sec. 8 is to be issued after the latest date of payment fixed in the manner prescribed in sec. 3 of the Act.

The notice under sec. 5 apparently is to be issued for the purpose of giving warning to the people concerned of the liability of the mehal being sold in the event of the payment not being made within the time fixed therein. It must therefore issue *before* the mehal has become liable to sale; whereas the notification under sec. 6 has to be issued *after* the property has become liable to sale—a date for sale having been fixed. In this view I fail to understand how a combined notification under secs. 5 and 6 can be legally issued. The effect of the issue of this notice in the present case must be that there was no service of a proper notification issued under sec. 6 of the Act.

The next question that arises for consideration is the effect of non-service of a notification under sec. 6 of the Act. In order to decide this question it is necessary to consider the second point raised on behalf of the Appellants, namely, that there were no arrears of revenue at the time of the sale. If the Appellants succeed in establishing that there were no arrears at the date of sale, they must succeed in the suit as in that case the Collector had no jurisdiction to bring the mehal to sale. It has been held in several cases that where there were no arrears there was no sale under the Act and therefore the Civil Court has jurisdiction to set aside the sale apart from the Act. It is argued on behalf of the Appellants in the first place that the amount of cesses could not be included in the amount recoverable under the Revenue Sale Act; and for this view reliance was placed on sec. 42 of the Bengal Cess Act of 1886 and the case of *Gujraj Sahai v.*

Secretary of State for India in Council (1). In my opinion this contention is right. But the amount of cesses comes to about Rs. 3 and if that is deducted from the amount due, namely, Rs. 5 and odd, there would still be a balance of Rs. 2 and odd due on account of arrears of Government revenue. It cannot therefore be said that there was no arrear due at the date of sale. This gave jurisdiction to the Collector to hold the sale under the Act. The fact that the amount of arrears claimed was different from what is found really due did not take away that jurisdiction. The sale was therefore held with jurisdiction.

It remains to be seen whether the sale is liable to be set aside in the absence of service of notification under sec. 6 of the Act. The matter really rests upon the construction to be put on sec. 33 of the Act. That section provides that no sale for arrears of revenue shall be annulled by a Court of justice except on the ground of its having been made contrary to the provisions of this Act and then only on proof that the Plaintiff has sustained substantial injury by reason of the irregularity complained of. It is argued on behalf of the Appellants that the failure to serve the notification under sec. 6 of the Act is not an irregularity and is not covered by sec. 33. In support of this view reliance has been placed on some passages in the judgment in the case of *Maharaja Mahashur Singh v. Hurruck Narain Singh* (2). That case was decided under the provisions of Act I of 1845, which did not contain any provision corresponding to sec. 33 of Act XI of 1859. Therefore it is no authority in support of the view pressed before us. The sheet-anchor of the Appellants' case is the decision of a Full Bench of this Court in the case of *Lala*

(1) L. L. B. 17 Cal. 414 at p. 431 (1889).

(2) M. I. A. 268 at pp. 278, 282 (1882).

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Mobarak Lal v. The Secretary of State for India in Council (3). It was therein decided by a majority of 4 Judges that a non-compliance with the provisions of sec. 6 of Act XI of 1859 is not a mere irregularity curable by sec. 8 of Bengal Act VIII of 1868, but an illegality; and the sale held without compliance with the provisions of sec. 6 of the Act is null and void as not being a sale under the provisions of Act XI of 1859. Tottenham, J., dissented from this opinion and held that the sale held under such conditions is not *ipso facto* null and void, but is liable to be annulled only on proof that the person whose land has been sold has sustained injury by reason of the informality in the publication of the notification. It is submitted on behalf of the Respondents that this decision has, by the Judicial Committee as well as by later decisions of this Court, been impliedly overruled and the correct view that is now established upon the authorities is that non-compliance with the provisions of sec. 6, be it an illegality or irregularity, does not render the sale *ipso facto* void but makes it liable to be set aside on proof of substantial injury to the party complaining under sec. 33 of the Act. In support of this view reliance is placed upon the cases of *Radha Charan Das v. Sharafuddin Hossein* (4) and *Gangadhar Das v. Bhikari Charan Das* (5). In the former case it is held that the Full Bench ruling in *Lala Mobarak Lal v. Secretary of State* (3) has in effect been overruled by the decision of their Lordships of the Judicial Committee in the case of *Gobindalal Roy v. Ram Janam Misser* (6). In the latter case the learned Judges held that *Lala Mobarak's*

case (3) has ceased to be binding by reason of the decisions of their Lordships of the Judicial Committee in *Tasadduk Khan v. Ahmad Hossein* (7) and in *Gobindalal Roy v. Ram Janam Misser* (6). The position therefore has to be examined in order to find out if the view taken in these cases is correct. The decision of their Lordships of the Privy Council in *Gobindalal Roy's* case (6) was in an appeal against a decision of this Court reported sub-nomine *Gobindalal Roy v. Bepradas Ray* (8). This was a decision passed by Tottenham and Gordon, JJ. At page 413 of the report the learned Judges stated thus: "We need not express any decided opinion on this latter point" (the application of sec. 33 of Act XI of 1859), "because it seems to us that we are bound by the judgment of a Full Bench of this Court in a somewhat similar case, *Lala Mobarak Lal v. The Secretary of State for India in Council* (3), and that in accordance with that judgment, we are compelled to hold that sec. 33 of Act XI is not applicable to the present case, whatever be our own opinion on that point." The last few words had reference to the dissentient judgment of Tottenham, J., in that Full Bench case. On appeal from this decision the Judicial Committee set it aside and confirmed the sale; but no direct reference was made to the Full Bench case in their Lordships' judgment. It, however, appears from the report of the case that it was argued before their Lordships on the strength of the Full Bench decision of this Court. In giving their judgment their Lordships made the following observation: "In the opinion of their Lordships a sale is a sale made under Act

(3) I. L. R. 11 Cal. 200 (F. B.) (1885).

(4) I. L. R. 41 Cal. 276 (1913).

(5) 16 C. W. N. 227 (1911).

(6) I. L. R. 20 I. A. 165; s. c. I. L. R. 21 Cal. 70 (1893).

(3) I. L. R. 11 Cal. 200 (F. B.) (1885).

(6) L. R. 20 I. A. 165; s. c. I. L. R. 21 Cal. 70 (1893).

(7) L. R. 20 I. A. 176; s. c. I. L. R. 21 Cal. 66 (1893).

(8) I. L. R. 17 Cal. 799 (1889).

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XI of 1859 within the meaning of that Act when it is a sale for arrears of Government revenue, held by the Collector or other officer authorised to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale or in consequence of some express provision for exemption having been directly contravened It is difficult to suppose that the introduction of that sentence " (" and then only on proof that the Plaintiff has sustained substantial injury by reason of the irregularity complained of ") " into the Act of 1859 could have been intended to have the effect of excluding from sec. 33 all cases of illegality as distinguished from irregularity." The case of *Radha Charan Das v. Sharafuddin Hossein* (4) was taken in appeal [*Sharafuddin v. Radha Charan Das* (9)] before the Privy Council and their Lordships confirmed the decision of this Court. It was argued in that case that the publication of the notification under sec. 6 in the Vernacular Local Gazette was an illegality and not a mere irregularity. Their Lordships held that the procedure was not contrary to the provisions of the Act and if it was an irregularity the Appellant had failed to show any substantial injury arising out of the irregularity complained of. On these authorities therefore there is no escape from the conclusion that whether the non-compliance with the provisions of the Act amounts to an illegality or an irregularity, it can only be a ground for setting aside a sale if the party complaining succeeds in proving that substantial injury has resulted from such non-compliance. The divergent views on the effect of an illegality or irregularity on the sale held under Act XI of

1859 is due to the use of the word "irregularity" in sec. 33. But reading all the clauses of the section together there can be no doubt left that what is meant by the word "irregularity" in the section is the fact of the sale having been held contrary to the provisions of the Act. There is no indication in the Act that any distinction was made between "illegality" and "irregularity." The authorities to which I have referred shows that if the Collector has jurisdiction to hold the sale, non-compliance with any of the provisions of the Act will render the sale liable to be set aside only on the ground that a party has sustained substantial injury by reason of the illegality or irregularity complained of. It is no doubt hard to suppose that the Collector may hold a sale without observing any provision of the Act and the sale should be held good if no injury is caused to any party. But the law with regard to the recovery of arrears of Government revenue is strict as their Lordships observed in *Gobindalal Roy's* case (6): "Sales for arrears of revenue are of constant occurrence; anything which impairs the security of purchasers at those sales tends to lower the price of the estate put up for sale."

On the question of injury the learned Judge has found in agreement with the Subordinate Judge that the Plaintiffs have failed to prove any fact which would justify the inference that the inadequacy of price fetched at the sale was in any way due to the failure of the Collector to issue a notification under sec. 6. It was argued on behalf of the Plaintiffs that the property was worth Rs. 4,000, whereas it was sold for Rs. 2,100. On this point the learned Judge remarks that there were several bidders present and that there was a hot

(4) I. L. R. 41 Cal. 276 (1912).

(9) L. R. 45 I. A. 205; s. c. I. L. R. 46 Cal. 255 (1916).

(6) L. R. 20 I. A. 165; s. c. I. L. R. 21 Cal. 70 (1899).

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contest between them and the low price fetched was to be attributed to the fact that the sale was a Court sale.

The finding of fact that the low price fetched at the sale was not due to the failure of the Collector to issue proper notification under sec. 6 of the Act is a finding of fact which must be accepted. That being so whether the non-compliance with the provisions of sec. 6 amounted to illegality or irregularity, the Plaintiffs are not entitled to succeed on the finding of the Court below that the inadequacy of price was not due to the breach of any provisions of the Act.

There is one other point which was urged during the argument on behalf of the Appellants. It was stated that the amount of Rs. 5-1 sent by the Plaintiffs to the Collector by money order should have been credited to the defaulted *kists*. As to that the learned District Judge observed that it was sent with a direction by the Plaintiffs that the amount should be credited towards the September *kist* and that under sec. 59 of the Contract Act, the Collector had no authority to do otherwise. We think that this view is correct. In *Sheikh Mahomed Jan v. Ganga Bishun Singh* (10) under similar circumstances the Collector had appropriated the amount sent with a direction by the defaulter to appropriate it to a certain *kist*, towards the payment of another *kist* and their Lordships of the Judicial Committee held that the appropriation was not to be varied without the consent of the payer.

The result of the above considerations is that this appeal fails and is dismissed with costs.

GRAHAM, J.—I agree that the appeal must be dismissed and propose to state briefly my reasons. The learned Advocate

for the Appellants confined himself to arguing two points. He contended firstly that the Court of Appeal below should have held that the issue of a notification under sec. 6 of the Revenue Sale Law was necessary, and that the omission to issue it was an illegality, and not a mere irregularity, the effect being to render the sale null and void. Secondly, he urged that there were in fact no arrears of revenue at the time of the sale, and that therefore the sale was bad.

In my opinion there is no substance in either of these contentions. With regard to the first point, it is no doubt true that Act XI of 1859 is a stringent enactment for the realisation of arrears of revenue, and that, that being so, there is an obligation to comply exactly with its requirements. There is authority too for the view that omission to issue a notification under sec. 6 is not a mere irregularity, and that it renders such a sale null and void: *Lala Mobaruk Lal v. Secretary of State* (3).

But each case must be decided upon its own particular facts, and in this case there are some special features which require consideration. It is common ground that no notification under sec. 6 was in fact issued, but it is urged on behalf of the Respondents that, though a notification purporting to be made under secs. 5 and 13 of the Act was issued, that notification was in effect a notification under sec. 6 and contained all the particulars required by law to be included in such notification. In short it is argued that it was a combined notification under secs. 5 and 6, and that, as it had already been issued, and gave all the necessary information, it would have been a mere waste of time to publish a separate notification under sec. 6. This contention is plausible, but I think the Courts below were right in holding that

(10) L. R. 38 I. A. 80; s. c. I. L. R. 38 Cal. 191 (1911).

(3) I. L. R. 11, Cal. 200 (F. B.) (1885).

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a notification under sec. 6 ought to be issued in all cases, and that it cannot be dispensed with on the ground that a notification has already been issued under sec. 5.

The matter, however, does not end there. The question next arises whether the omission to issue a notification under sec. 6 is an irregularity, or an illegality; and whether the sale can be set aside upon that ground. The trial Court relied upon the Full Bench ruling in *Lala Mobarak Lal v. The Secretary of State* (3) referred to above, where a distinction was drawn between irregularities and illegalities. But that case was subsequently dissented from by the Privy Council in the case of *Gobindalal Roy v. Ram Janam Misser* (6) and that decision was subsequently followed by this Court in *Radha Charan Das v. Sharafuddin Hossein* (4). In view of the decision in the Privy Council case it must be accepted that the word "irregularity" in sec. 33 of the Revenue Sale Law covers also illegalities and indeed the language used in the section seems to point to that conclusion, for after speaking of the sale having been made "contrary to the provisions of this Act" it goes on immediately afterwards to refer back to this as an "irregularity." However be that as it may, the decision of the Privy Council is binding upon us.

It follows that in order to succeed upon this ground the Plaintiffs must show that they have suffered substantial injury by reason of the irregularity complained of, and here we are confronted by the finding of fact arrived at in the Court of Appeal below. The learned District Judge has found that the failure to publish a notification

under sec. 6 did not affect the price realized. We cannot interfere in second appeal with that finding unless it is vitiated in some way by some error of law or procedure. It cannot be said that there are no materials to support it. The utmost that can be urged on behalf of the Appellants is that the price fetched for the mehal was only Rs. 2,100 although the property has been valued at Rs. 4,000. But estimates of the value of property in cases of this description are apt to be exaggerated, and, on the other hand, it is a matter of common knowledge that properties sold at Civil Court sales do not as a rule fetch anything like their real value. It cannot therefore be held that Rs. 2,100 was an altogether inadequate price. The first contention therefore fails.

It is next contended that at the date of the sale there were no arrears and that consequently the sale was *ultra vires* and bad in law. In this connection it was first argued that cesses ought not to have been taken into account. That no doubt is correct, as demands in respect of cesses are not revenue, and consequently the procedure prescribed by the Revenue Sale Law does not apply to them. There is authority for this, if authority is required, in the case of *Gujraj Sahai v. The Secretary of State* (1). But, even if the cesses be excluded, there was still an arrear of revenue at the date of the sale, unless the amounts remitted by the Plaintiffs by Exs. 7 and 7 (4) are taken into account and credited towards the *kists* in arrears. It is contended on behalf of the Appellants that that is what the Collector ought to have done. But in view of the provisions of sec. 59 of the Contract Act, it was not open to the Collector to appropriate those payments to any *kist* save and except the September *kist* in accordance with the

(3) I. L. R. 11 Cal. 200 (F. B.) (1885).

(4) I. L. R. 41 Cal. 276 (1913).

(6) L. R. 20 I. A. 165; s. C. I. L. R. 21 Cal. 70 (1892).

(1) I. L. R. 17 Cal. 414 at p. 431 (1889).

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express direction of the Plaintiffs at the time when they made the payments. And indeed it is manifest that, if the Collector had adopted the course suggested, awkward complications might have ensued. For example, if any question should arise in future in connection with the payment of the revenue for the September *kist*, there might conceivably be default by reason of the Collector having transferred the moneys instead of crediting them to the September *kist* as requested by the Plaintiffs, and in that case the Plaintiffs might justifiably object that the Collector had no right to appropriate the amounts in a manner not authorised by them.

It was contended by the learned Advocate for the Appellants that sec. 59 of the Contract Act has no application as there were not several distinct debts but one debt. But there is authority for the view that that section applies to payments of Government revenue. *Muhammed Jan v. Ganga Bishun* (10). Arrears due in respect of separate *kists* are distinct debts.

In the result the appeal fails upon both the points urged and must be dismissed with costs.

S. C. M.

(10) L. R. 28 I. A. 80; s. c. I. L. R. 28 Cal. 537 (1911).

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

LORD SUMNER.

LORD BLANESBURGH. |

SIR JOHN EDGE.

MR. AMEER ALI.

LORD SALVESEN.

1925,

Heard, 12, 14, 18,

19 and 21, May.

Judgment,

30, July.

MATA PRASAD and
anr., Appellants,
v.

NAGSHAR SAHAI and
ors., Respondents.

Oudh Estates Act (I of 1869), sec. 13—Amendment Act (III of 1910), sec. 6, if operates retrospectively—Property included in List V, bequeathed to younger son under unregistered Will, effect of—Suit by Hindu law heir to recover from widow of legatee—Compromise by widow retaining property for life, but acknowledging property to be subject to Oudh Estates Act, how far valid as family settlement—Suit by presumptive reversioner against Hindu widow—Decision, if binds whole body of reversioners—Civil Procedure Code (Act V of 1908), sec. 11, Exp. VI.

Reversioners possess individually what has been called a *spes* successionis, the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving any one of them surviving entitled to take immediate possession after her, unless the husband has left the power to her to adopt a son. But the *spes* is common to them all; so is the danger by the widow's act against the interests of the reversioners. The right to sue to set aside that common danger is given for obvious reasons of policy and convenience to the person who, if the widow died at the moment, would take the estate. But the result, favourable or otherwise, affects the reversioners as a body.

Under Expl. VI to sec. 11 of the Civil Procedure Code, in the absence of anything to show that the litigation by the

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presumptive reversioner was collusive or vitiated by fraud or laches on his part in conducting the suit or in asserting his reversionary right, the decision is res-judicata against the reversioners as a body.

Sec. 6 of the Oudh Estates Amendment Act (III of 1910) is not retrospective.

A taluqdar purported to bequeath a property included in List V prepared under the Oudh Estates Act (X of 1869) to his younger son, but the Will was not registered as required by sec. 13 of the Act :

Held—That with the failure of the bequest the property passed out of the Act and became subject to Hindu law and did not once more become subject to that Act on the passing of Act III of 1910.

That in a suit by the heir of the taluqdar according to Hindu law to recover the property from the widow of the younger son who had been in possession up to his death, it was prudent and reasonable on the part of the widow to enter into a compromise with the heir under which she was left in possession of the property for life, on her acknowledging that the estate was subject to Act I of 1869, and it should be upheld as a family settlement, specially as the compromise gave effect to the rule of the Hindu law which applied to the case, the acknowledgment of the widow that the property was subject to Act I of 1869 not affecting the rights of the parties on the basis of the law governing the succession.

It is not open to Courts in India to question any principle enunciated by the Judicial Committee, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them to question its decision on any particular issue of fact.

This was a consolidated appeal (No. 27

of 1924) from two decrees, dated the 2nd March 1922, of the Court of the Judicial Commissioner, Oudh, varying a decree, dated the 31st January 1920, of the Court of the Subordinate Judge, Lucknow.

The Appellant claims possession of two properties known as the Baragaon estate and the Wali estate.

Both estates prior to 1869 belonged to Fateh Chand and on the passing of Act I of 1869 his name was entered in List II as taluqdar of Baragaon and in List V as taluqdar of Wali.

Fateh Chand died in 1873 having made a Will in March 1869 leaving the Wali estate to his son Amir Chand and the Baragaon Estate to a younger son Wazir Chand. That Will was not registered. A pedigree showing the relationship of the parties is set out in the judgment of the Judicial Committee.

On the death of their father, both sons entered into possession of their respective estates, and remained in possession until their deaths in 1887. Amir Chand was succeeded by his son Narindra Bahadur and Wazir Chand by his widow Chandra Kuar.

In 1897 Narindra claimed the Baragaon estate from Chandra Kuar, but the litigation ended in a compromise by which the Plaintiff's title was admitted but Chandra Kuar was permitted to hold the estate during her life.

Narindra died in 1905 and was succeeded by his widow Jagrani Kuar who professed to have adopted the 1st Respondent as a son to her deceased husband.

Jagrani died in 1917.

In 1906 Durga Prasad, a remote reversioner of Narindra, claimed the Baragaon estate. His suit was finally dismissed by the Privy Council (whose judgment is reported in 18 C. W. N. 521) and the

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validity of Narindra's Will was established.

The 1st Respondent Nageshar was recorded as holder of Baragaon estate on the death of Chandra Kuar in 1915 and as holder of the Wali estate on the death of Jagrani.

The Appellant commenced this suit in 1918.

He alleged that both estates were governed by Act I of 1869 and claimed title to them as being the eldest member of the senior branch of the family.

The Subordinate Judge allowed the claim to the Wali estate but dismissed the claim to Baragaon. He held that the Will of Narindra Bahadur was a forgery and that Nageshar's adoption was invalid, and that the decision in Durga Prasad's suit did not operate as *res judicata* on these questions.

In regard to Baragaon he found that Fateh Chand's Will was invalid for want of registration, but that Wazir Chand had obtained proprietary possession of the estate during his father's life-time, that the estate had passed out of the operation of Act I of 1869 and was not brought back with the operation of that Act by the Amending Act III of 1910.

The Judicial Commissioners on appeal held that the genuineness of Narindra's Will had been established in *Durga Prashad's* case (1) and was *res judicata*.

They affirmed the decision of the trial Court with regard to Baragaon and dismissed the claims to both estates.

Messrs. Dunne, K. C. and Wallach for the Appellants.—As regards Wali.—The decision in the case of *Jagrani Koer v. Durga Prashad* (1) does not operate as *res judicata* in the present suit.

That litigation was not contested between the same parties and the present

Appellant does not claim through Durga Prasad but on an adverse title; moreover Durga Prasad was not suing as next reversioner.

They referred to *Anund Koer v. Court of Wards* (7), *Pertab Narain Singh v. Tri-lokinath Singh* (8), *Jhandu v. Tarip* (9), *Venkatanarayana Pillai v. Subbammal* (2), *Janaki Ammal v. Narayanasami Aiyar* (4), *Risal Singh v. Balwant Singh* (10), *Obala Kondama v. Kandasami Goundar* (11), *Kesho Prasad Singh v. Sheo Par-gash Ojha* (5) and *Th. Balraj Kunwar v. Rai Jagatpal Singh* (12).

With regard to Baragaon.—It is admitted that if a taluqdar bequeathes or transfers to a person outside the line of succession the estate ceases to be subject to Act I of 1869. In the present case the Baragaon estate has been brought back within the purview of Act I of 1869 by the Amending Act III of 1910.

Fateh Chand's Will, although not registered, was a bequest within the meaning of the Act—sec. 22 as amended by sec. 14 of the 1910 Act—and further the statements in the *wajib-ul-arzes* of Baragaon must be treated as valid testamentary dispositions by Fateh Chand.

Haidar Ali v. Tassaduk Rasul Khan (13).

(2) L. R. 43 I. A. 125, 130; s. c. I. L. R. 38 Mad. 406; 19 C. W. N. 641 (1915).

(4) L. R. 43 I. A. 207; s. c. I. L. R. 39 Mad. 634; 20 C. W. N. 1323 (1916).

(5) L. R. 51 I. A. 381; s. c. I. L. R. 46 All. 831; 29 C. W. N. 606 (1924).

(7) L. R. 8 I. A. 14; s. c. I. L. R. 6 Cal. 764 (1890).

(8) L. R. 11 I. A. 197; s. c. I. L. R. 11 Cal. 186 (1884).

(9) I. L. R. 37 All. 45 (1914).

(10) L. R. 45 I. A. 168; s. c. I. L. R. 40 All. 593 (1918).

(11) L. R. 51 I. A. 145; s. c. I. L. R. 47 Mad. 181; 28 C. W. N. 1050 (1923).

(12) L. R. 81 I. A. 132; s. c. I. L. R. 26 All. 393; 8 C. W. N. 699 (1904).

(13) L. R. 17 I. A. 32; s. c. I. L. R. 18 All. 1 (1890).

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[LORD SUMNER.—Sec. 13 of Act I of 1869 has as its general object that taluqdars must bequeath by registered instrument unless the bequest is to a person within sub-sec. (2).]

Even though invalid for want of registration the bequest may be valid under sec. 14 of Act III of 1910.

In any event there was a valid Will in 1860 devising this estate to Wazir Chand.

The compromise between Chandra Kuar and Narindra cannot be treated as a family settlement. Chandra had no power as a Hindu widow to part with the estate in favour of Narindra.

If, however, Narindra took under the compromise he took the estate as one under Act I of 1869. On his death his widow took and upon her death the Appellant would become entitled to the estate.

Imrit Kunwar v. Roop Narain (14), *Mohendra Nath Biswas v. Sansunnessa Khatun* (15), *Ramsumran Prasad v. Shyam Kumari* (6) and *Mahadei v. Baldeo* (16).

Messrs. DeGruyther, K. C. and Parikh for the Respondents.—So long as the Will of Fateh Chand is upheld the Appellant has no claim to either estate. The decision in Durga Prasad's suit has established the genuineness of Narindra's Will and the validity of the Respondent's adoption. Durga Prasad was in fact the next presumptive reversioner under Hindu law, Chandika Prasad having surrendered his

interest, and the decision against Durga Prasad binds all the reversioners. The claim to the Wali estate is accordingly barred, the matter being *res judicata*.

The succession to Baragaon must be determined by ordinary Hindu law. Respondent No. 1 is an adopted son and as such a male lineal descendant of Amir Chand and a preferential heir to the Appellant.

Baragaon came out of Act I of 1869 and did not become subject to its provisions owing to Act III of 1910, which is not retrospective in the manner claimed by the Appellant.

The compromise between Chandra Kuar and Narindra was valid as a family settlement and is binding on the Appellant.

Mr. Dunne, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This litigation relates to two properties named respectively Baragaon and Wali, one situated in the District of Hardoi and the other in Kheri, in the province of Oudh. Both belonged to one Raja Fateh Chand who died in 1873. After the annexation of Oudh they were re-granted to Fateh Chand and his name was included with regard to the Hardoi property under List II and in respect of the Kheri property under List V, prepared under Act I of 1869 (the Oudh Estates Act). To these Lists reference will be made more particularly later on in this judgment.

The following genealogical table will explain the position of the parties in this case :—

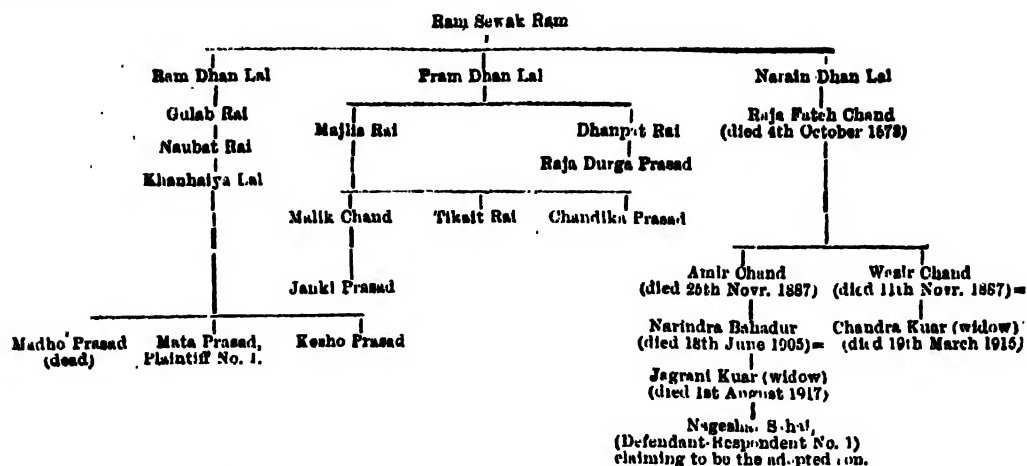
(6) L. R. 49 I. A. 312; A. C. I. L. R. 1 Pat. 74; 27 C. W. N. 269 (1922).

(14) A. C. L. R. 76 (1880).

(15) 21 C. L. J. 157, 163 (1914).

(16) I. L. R. 30 All. 75 (1907).

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Mata Prasad, the Plaintiff No. 1, claims possession of the properties in question on various grounds, which will be set out later. The second Plaintiff is the assignee of Mata Prasad of a share in the two estates. In this judgment wherever the Plaintiff is mentioned it refers to Mata Prasad.

Act I of 1869 came into force in January of that year; and in March following Raja Fateh Chand purported to make a Will, under which he devised the Kheri property, in other words, the Wali estate, to his eldest son, Amir Chand; and the Hardoi property, the Baragaon estate, to the younger son, Wazir Chand. So far as appears on the record, Amir Chand and Wazir Chand appear to have been placed in possession of the two estates respectively. Raja Fateh Chand died as already stated in 1873; but the Will he had made in 1869 was never registered under the provisions of sec. 13 of the Act, which requires a Will in favour of a younger son of the taluqdar whose name does not appear in the third or fifth of the lists mentioned in sec. 8 to be registered within a certain specified time. This section will be referred to later. Consequently, it is not disputed that the bequest to Wazir Chand, the younger son, was in-

valid and inoperative. He, however, remained in possession of the Hardoi estate until his death on the 11th November 1887.

Amir Chand, the eldest son of Fateh Chand, had died two months earlier, viz., on the 26th September 1887; as the Will in his case did not require registration the devise in his favour was valid in law and operative.

Wazir Chand left him surviving a widow named Chandra Kuar who appears, on his death, to have taken possession of the Hardoi property. Chandra Kuar died on the 19th of March 1916.

On the death of Amir Chand, as already stated, his son and heir, named Narindra Bahadur, succeeded to the Kheri estate. In 1897 he brought a suit against the widow of Wazir Chand for a declaration of his own title as regards the Hardoi estate and for possession of the property. To the particulars of his claim their Lordships will refer more fully later on. It is sufficient at this stage to say that he based his title to the Baragaon estate on the allegation that it was subject to the provisions of Act I of 1869 and that he was entitled to it in preference to Chandra Kuar, Wazir Chand's widow. In the alternative, he alleged that, even if the estate

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was not governed by the provisions of the Act and was subject to the Hindu law, pure and simple, the property devolved on him on the death of Wazir Chand, his uncle, as they were joint and undivided at Wazir's death. The Subordinate Judge in that case held that the property was subject to the provisions of Act I of 1869 and that the Plaintiff, Narindra Bahadur, was entitled to it in preference to Chandra Kuar. He accordingly decreed the Plaintiff's claim. On appeal to the Judicial Commissioner's Court it was held that the property in dispute was not subject to Act I of 1869. The decree of the Subordinate Judge was accordingly reversed and the case was remanded for the purpose of deciding whether the claim of Narindra Bahadur was well-founded on the alternative ground, namely, that under the law of the Mitakshara, to which the parties were subject, he was entitled to the property.

Before the trial on the remand the parties compromised the dispute and a decree was made on the 20th December 1899, in accordance with the settlement at which they had arrived. Reference will be made later to the terms of the settlement, as one of the questions raised in the present litigation relates to the power of Chandra Kuar to enter into that compromise.

Narindra Bahadur died on the 18th June 1905, leaving him surviving his widow, Jagrani Kuar. Shortly after his death Jagrani Kuar propounded a Will alleged by her to have been executed by Narindra Bahadur on the 23rd October 1904, giving her power to adopt a son to him.

On the 30th April 1906, one Raja Durga Prasad, claiming to be a reversioner of Narindra Bahadur, brought a suit against Jagrani Kuar in the Court of the Subordinate Judge of Kheri for a declaration that

the Will propounded by her as the Will of Narindra Bahadur was a forgery and that he was entitled to the estate by virtue of his reversionary right. Durga Prasad's suit had a chequered career. His claim was dismissed by the Subordinate Judge on the ground that the Will was genuine and had been duly executed by Narindra Bahadur. The decree of the Subordinate Judge was reversed on appeal by the Judicial Commissioners, who held, chiefly as it appears on suspicion, that the Will was not genuine. They accordingly decreed the claim of Raja Durga Prasad.

Jagrani Kuar appealed to His Majesty in Council from the decree of the Judicial Commissioners, and on the 3rd December 1913, it was held by their Lordships on a careful examination of the evidence relating to the execution of the Will that it was fully established to be the act of Narindra Bahadur. The decree of the Appellate Court was accordingly set aside and that of the Subordinate Judge dismissing the suit of Durga Prasad was restored. [*Vide Jagrani Koer v. Durga Prasad* (1).]

Narindra Bahadur's Will having been thus finally declared to be valid, Jagrani Kuar, in conformity with the power entrusted to her by her deceased husband, adopted, on the 22nd May 1914, the Defendant Nageshar Sahai as the son of Narindra Bahadur.

On the 20th of April 1918, the present suit was instituted by Mata Prasad and his assignee, Plaintiff No. 2, in the Court of the Subordinate Judge of Hardoi for the possession of the two estates lying, respectively, in the Hardoi and Kheri Districts, with a declaration regarding Mata Prasad's title.

It is desirable to notice briefly the allegations on which the claim is founded and on which the long and ingenious argu-

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ments in the course of the trial mainly rest.

In para. 12 of the plaint it is stated that the Baragaon and Wali (Sarawa) estates "are subject to Act I of 1869," and that the Plaintiff, Mata Prasad, as the oldest member of the senior branch, is entitled to them with their appurtenances. In para. 13 he claims alternatively that even if Baragaon "be not deemed" subject to the Act, he is entitled to the same by virtue of the custom.

The reason of this alternative claim will be clear as the judgment proceeds.

He asked, accordingly, for a declaration that the adoption of Nageshar Sahai was invalid and that the Will under which Jagrani Kuar purported to make the adoption was false.

The first Defendant, Nageshar Sahai, is, as already stated, the alleged adopted son of Narindra Bahadur. The other two Defendants are the sons of Narindra's sister, who acquired title to certain portions of the estate under his Will. Both sets of Defendants dispute the title of the Plaintiff, Mata Prasad. Nageshar Sahai further contends that the Plaintiff's claim is barred by the rule of *res judicata* arising out of the decision in Raja Durga Prasad's case, and consequently in respect of the Hardoi estate, it is not maintainable. With regard to the assertion that the Baragaon estate is subject to Act I of 1869, the Defendants further contend that the Will of Fateh Chand, executed in March 1869, under which the testator had purported to devise the Hardoi estate to Wazir Chand was never registered and consequently it had gone out of the operation of Act I of 1869 and succession, so far as that property was concerned, was governed by the general provisions of the Hindu law. They also denied the existence of any cus-

tom such as the Plaintiff alleged in paras. 12 and 13 of his plaint.

In answer to the Defendants' allegation that the Will of Fateh Chand was not operative as it was never registered, the Plaintiff averred that if the Will of 1869 was invalid there was a prior Will made in 1860, the terms of which were formulated or embodied in the village administration papers, called *wajib-ul-arz*; and he claimed that effect should be given to that Will.

He further urged that even if the estate went out of the operation of Act I of 1869 in consequence of the non-registration of the Will it was brought back under the Act on the passing of the Amending Act III of 1910. The arguments in support of this contention have occupied a great deal of the time of the Courts in India and of this Board.

Their Lordships, however, propose to confine their attention to the principal contentions advanced before the Board.

The Subordinate Judge of Lucknow, before whom the case came on for trial, raised a large number of issues which he has discussed at considerable length in his judgment. In dealing with the plea of *res judicata* based on the decision in Durga Prasad's suit he adopted what appears to their Lordships an unprecedented and irregular course; he refused in fact to be bound by the decisions of the Judicial Committee. To show the mistake into which he has fallen their Lordships consider it desirable to refer to two passages in his judgment:—

"Granting on the basis of these authorities that the widow represents the entire estate which consists of herself and the reversioners, I am unable to see how it follows that one reversioner in a suit against the widow represents the entire body of the reversioners. The commonly accepted position of the reversioners is that one does not claim through the other. Obviously, therefore, the judgment in a suit between one reversioner and any other person, widow or some other person, does not stand as a bar to the trial of

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the same question as between another reversioner and the same person on the other side in another suit. I do not see how this principle is changed in this particular case before me.

The basis of this general principle is that the title of one reversioner is quite separate from and independent of the title of any other reversioner. It is all the more so in the present case as the first Plaintiff's title has originated in a special legislation of the Act III of 1910 of the United Provinces Council, the Act, Amending Act, I of 1869. He was not one of the reversioners, at any rate immediate reversioners, of the property at the time the suit was brought by Durga Prasad. He had no title as a reversioner. His title arose on the passing of the Act in the year 1910. It passes my comprehension how a person can be said to be debarred from setting up a title in a suit, when that title had no existence at the time at which any other litigation took place concerning the property to which the title relates. To my mind the present suit could hardly be said to be barred even if the present Plaintiff No. 1 had himself been the Plaintiff in place of Durga Prasad. The requirements of 'litigating under the same title,' would be wanting for constituting the bar of *res judicata*."

The reference at the end of the passage quoted to Act III of 1910 appears futile, for the cause of action and the charge respecting the genuineness of Narindra Bahadur's Will are the same as in the previous case.

On this reasoning he refused to be bound by the decision of the Board in *Venkatanarayana Pillai v. Subbammal* (2).

Regarding the genuineness of Narindra Bahadur's Will, the authenticity of which was declared by the Judicial Committee in 1913, the Subordinate Judge expressed himself as follows :—

"I have never entertained any doubt on the question and I have no hesitation in holding upon this issue that the trial of the genuineness of the Will of Narindra Bahadur is not barred by the judgment in the case between Durga Prasad and Jagrani."

And again :—

"The conclusion at which the learned Subordinate Judge and their Lordships of the Privy Council arrived on the evidence in that case is not warranted by the evidence in this case which besides exposing the position of Khuda Bakhsh and Ganga Prasad, is con-

(2) 42 I. A. 125 (a); I. L. R. 38 Mad. 406; 19 C. W. N. 641 (1915).

fined to the actual execution of the Will and fall far short of the evidence produced in that case of the intention."

He held accordingly that the Plaintiff's claim was not affected by the bar of *res judicata*, either as to the representative character of Durga Prasad's suit, or by the Board's decision on the issue of fact relating to the genuineness of the Will of Narindra Bahadur, and that he had established his title to the Kheri estate.

He held, however, that, as the Will of Fateh Chand was inoperative as regards the Hardoi estate, not having been registered under the provisions of sec. 13 of Act I of 1869, and sec. 13 (a) of Act III of 1910 was not retrospective, the estate was not brought back under the Act of 1869, as the Plaintiff contended. He held, therefore, that Mata Prasad failed to establish any title to the same. He accordingly decreed the Plaintiff's claim in respect of the Kheri estate and dismissed his suit with regard to the Hardoi property.

Both parties appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of the Appellate Court were of opinion, as their Lordships think rightly, that the Plaintiff's claim was in fact *res judicata*, and therefore liable to be dismissed in respect of the Kheri property. They further held, in agreement with the Subordinate Judge, that the Hardoi estate was never under Act I of 1869 and was not brought back under the Act by anything contained in the later Act. They accordingly dismissed the whole suit.

From this decree the Plaintiffs have appealed to His Majesty in Council. On the arguments before the Board, the first question for determination centres on Defendants' plea of *res judicata*, in other words, whether the proceedings in the suit of Raja Durga Prasad form a bar to the present action by Mata Prasad.

It has been contended before their Lord-

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ships, as it was before the Subordinate Judge who accepted and gave effect to the argument, that the reversioners have each an independent cause of action, and as none of the reversioners derive title from the others, the result of a suit against the widow and her assignees brought by a reversioner, presumptive or otherwise, does not bind the others, nor can the suit be considered as brought in a representative capacity. The same argument, though clothed in other words, was presented to their Lordships in the case of *Venkata-narayana Pillai v. Subbammal* (2), where the governing principle applicable to a suit brought by a reversioner in the life-time of the widow to get rid of a common apprehended danger to the interests of the general body of reversioners, was set out at length. In re-affirming the rule enunciated in that case their Lordships desire to observe that so long ago as 1868 Sir Barnes Peacock, then Chief Justice of Bengal, indicated in the Full Bench case of *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (3), the position of the presumptive reversioner seeking to get rid of any act of the widow during her life-time which jeopardised the common interests of the reversioners. Act VIII of 1859, which was then in force governing procedure, contained no such provision as was embodied in Expl. 5 to sec. 13, Act X of 1877, and afterwards reproduced in Expl. 6, sec. 11 of Act XIV of 1882 and Act V of 1908. The words, "cause of action," therefore, needed judicial interpretation. Sir Barnes Peacock's *dicta* deserve attention. The main question in the case referred to was whether adverse possession as against the widow barred the rights of reversioners. The language of the Chief

Justice in dealing with the point is important. He says first: "Put reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from committing waste."

He then goes on thus:—

"It is said that the reversionary heirs could not sue during the life-time of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred. When, therefore, we construe the words 'cause of action' in the Statute of Limitation, we must consider them as referring, not to a new cause of action accruing to the reversionary heirs personally and individually, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased."

The principle enunciated in *Venkata-narayana Pillai v. Subbammal* (2) which was followed in *Janaki Ammal v. Narayanasami Aiyar* (4) is logically sound and "salutary," to use Lord Blanesburgh's expression in the judgment in *Kesho Prasad Singh v. Sheo Pargash Ojha* (5).

Reversioners possess individually what has been called a *spes successionis*, the bare possibility of succeeding to the estate of the last owner in case the widow dies leaving any one of them surviving entitled to take immediate possession after her, unless, of course, the husband has left the power to her to adopt a son. But the *spes* is common to them all; so is the danger by the widow's act against the interests of the reversioners. The right to sue to set aside that common danger is given for obvious

(2) L. R. 42 I. A. 185; s. c. I. L. R. 38 Mad. 40; 19 C. W. N. 641 (1915).

(3) 6 W. R. 605, 609 (F. B.) (1868).

(4) L. R. 42 I. A. 125; s. c. I. L. R. 38 Mad. 406; 19 C. W. N. 641 (1915).

(5) L. R. 48 I. A. 207; s. c. I. L. R. 39 Mad. 634; 20 C. W. N. 1323 (1916).

(6) L. R. 51 I. A. 331; s. c. I. L. R. 46 All. 331; 29 C. W. N. 606 (1904).

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reasons of policy and convenience to the person, who, if the widow died at the moment, would take the estate. But the result, favourable or otherwise, affects the reversioners as a body.

As pointed out in the case of *Venkatanarayana Pillai v. Subbammal* (2), Ex. 6 to sec. 11 of the Civil Procedure Code covers exactly cases of the kind under consideration and bars fresh litigation on the same cause of action.

The learned Judges of the Judicial Commissioner's Court, in their very able judgment, have set out, in clear terms, the considerations on which the principle is founded.

It has been contended on behalf of the Plaintiff that the suit by Durga Prasad was incompetent inasmuch as he was not at the time the presumptive reversioner to Narindra Bahadur. This contention could only have been advanced on a misconception of the facts. Jagrani Kuar, the Defendant in that suit, appears to have taken the same objection that Durga Prasad had no right to maintain the action. The Subordinate Judge in the suit of Durga Prasad states first the ground of the claim in these terms: "The Plaintiff (Durga Prasad) is one of the reversioners to Narindra Bahadur and Wazir Chand and as such his interest to the said property will suffer if the Will is allowed to stand, and so he has instituted the present suit, seeking (among others) the following declaratory relief, viz., that the Will propounded is a forged document." The learned Judge then proceeds to deal with the objection, viz., Durga Prasad's incompetency. Reference to the pedigree would show that the persons standing nearest in degree to Narindra Bahadur were at the time Chandika Prasad and Durga Prasad. The

learned Subordinate Judge therefore says in his judgment: "The sale deed by Chandika Prasad in favour of the Plaintiff (Durga Prasad) is evidence sufficient to show that he is unable to sue for want of funds, and so the Plaintiff is entitled to sue."

This finding was never, so far as their Lordships can see, impugned in the Judicial Commissioner's Court or before this Board.

Mata Prasad, the Plaintiff in the present suit, is a remote *sapinda* of Narindra Bahadur. He was in existence at the time when Raja Durga Prasad brought his action. He was aware, as his brother Kesho Prasad swears, of the institution of the suit. There is nothing to show that the litigation between Raja Durga Prasad and Jagrani Kuar was collusive or vitiated by fraud or laches on the part of Durga Prasad in conducting the suit or in asserting his reversionary right. Nothing of the kind is proved or even alleged.

The Subordinate Judge dismissed Durga Prasad's "claim for a declaration of the forgery of the Will." But he declared it to be invalid and inoperative in respect of certain bequests in favour of the Defendants other than Jagrani Kuar. On appeal to the Judicial Commissioner's Court, the decree of the Subordinate Judge affirming the due execution of the Will by Narindra Bahadur was reversed, but it was restored by this Board on the 3rd December 1913, which found the Will to have been duly executed by the Defendant's husband with the power of adoption.

On a review of all the facts, their Lordships are of opinion, in concurrence with the learned Judges of the Appellate Court, that the suit by Durga Prasad against Jagrani Kuar for a declaration that the Will of Narindra Bahadur was false and fabricated, was brought by him in his capacity of

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the presumptive reversioner, and as such the decision in that suit binds the Plaintiff, Mata Prasad. His claim as regards the Kheri estate is clearly barred.

Assuming that the claim as to the Bara-gaon estate in the Hardoi District is not so barred, the question of the Plaintiff's title to this property has to be considered from a different point. He contends, in the first place, that, even if the Will of 1869 was invalid for want of proper registration, he could fall back upon the Will of 1860, to which reference is made in the document of 1869. Beyond this there is absolutely no evidence of the fact that Fateh Chand had made any bequest to Wazir Chand in 1860. Reference has been made to a number of documents called *wajib-ul-arz*, but they are not statements by Fateh Chand himself. They contain statements by some of his agents, all of whom speak of the mode of descent customary in the family. The Hardoi estate granted to Fateh Chand was placed in List II. This list includes the taluqdars, whose estates, according to the custom of the family, on or before the 13th February 1866, ordinarily devolved upon a single heir. The purport of the statements contained in the *wajib-ul-arz* simply referred to the fact that the particular estate which was held by Wazir Chand was descendable to a single heir and nothing more. Whether it was descendable to a single heir or not, the bequest, being invalid owing to want of registration, left the property open and out of Act I of 1869. It was conceded in the Appellate Court that unless the Plaintiff could show that the property came back under Act I of 1869 by virtue of the provisions of Act III of 1910, the Plaintiff had no right to the property. Sec. 18 of Act I of 1869 is in these terms :—

"No taluqdar or grantee and no heir or legatee of

a taluqdar or grantee shall have power to give or bequeath his estate or any portion thereof or any interest therein to any person not being either

(1) a person who under the provisions of this Act or under the ordinary law to which persons of the donor or testator's tribe and religion are subject would have succeeded to such estate or to a portion thereof or to an interest therein, if such taluqdar or grantee, heir, or legatee had died intestate, or

(2) a younger son of the taluqdar or grantee, heir or legatee, in case the name of such taluqdar or grantee appears in the third or the fifth of the lists mentioned in section eight, except by an instrument of gift or a Will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift, or Will, as the case may be, and registered within one month from the date of its execution."

The amendment which was made by Act III of 1910, called the Oudh Estates Amendment Act of 1910, sec. 6, runs thus :—

"6. After section 13 of the said Act, the following section shall be inserted, namely :—

13A. No taluqdar or grantee, and no heir or legatee of a taluqdar or grantee, and no transferee referred to in section 14, and no heir or legatee of such transferee, shall have power to bequeath his estate, or any portion thereof or any interest therein

(1) (a) to a person who would have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect,

(b) to his daughter,

(c) to a son of his daughter, or

(d) to a younger son,

except by a Will duly executed and attested ;

(2) to a person who might, in the absence of other heirs, have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect, except by a Will duly executed and attested not less than three months before the death of the testator and presented for registration within one month from the date of its execution and registered ;

(3) to any person other than a person mentioned in clauses (1) and (2), except by a Will duly executed and attested not less than three months before the death of the testator and registered according to the law for the time being in force relating to the registration of assurances, but presented for such registration within one month from the date of its execution."

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As the learned Judges of the Judicial Commissioner's Court point out, that section is not retrospective and does not validate a bequest which had already failed. It would be anomalous, to say the least, to suppose that the legislature intended by Act III of 1910 to revive rights that had disappeared in consequence of the failure of the bequest in 1869 when other rights had been created in the meantime.

Sec. 21 of Act III of 1910 shows clearly that nothing in that Act has the effect which is contended for by the Plaintiff. Sec. 21 says :—

Unless there is something repugnant in the Saving clause, subject or context

(a) section 2, sub-section (1) of this Act, with the exception of (i) clause (b) of the definition of the word "estate"; (ii) the words "or a mother" in the definition of the word "heir"; and

(b) sections 3, 4, 7 and 8 of this Act,

shall operate retrospectively; but nothing contained in the said sections shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to any estate, or any portion thereof, or any interest therein, which is, at the commencement of this Act, vested in any other person who would have been entitled to retain the same if this Act had not been passed; and the right or title of such other person shall not be affected by anything contained in the said sections.

In their Lordships' opinion the contention that on the passing of Act III of 1910 the Baragaon estate became once more subject to Act I of 1869 has no substance. With the failure of the bequest the property passed out of the Act and became subject to the Hindu law.

But it is urged that the compromise between Narindra Bahadur and Chandra Kuar was invalid, inasmuch as the widow had no right to make an assertion that the estate was subject to Act I of 1869 when it was not so. The compromise between Narindra Bahadur and Chandra Kuar bears date the 25th November 1899.

Para. 1 recites :—

"That Chandra Kuar admits that the properties

in dispute are taluqdari properties, and succession to them will be governed by Act I of 1869 and Kuar Narindra Bahadur is entitled to hold the same as lawful heir of Raja Wasir Chand."

By para. 2 Kuar Narindra Bahadur agreed *inter alia* to Rani Chandra Kunwar remaining in possession of the properties in question.

By para. 3 he further agreed that he shall not by any deed or Will alienate the said immoveable property or his rights in it as long as the said Rani Sahiba remains alive, but if he does so, that alienation shall be null and void.

It is contended that Chandra Kuar had no right to enter into the compromise. Their Lordships are of opinion that the learned Judges of the Appellate Court in India are right in regarding it as a family settlement which was "prudent and reasonable" under the circumstances, to use the language of Lord Phillimore in the case of *Ramsumran Prasad v. Shyam Kumari* (6).

Narindra Bahadur's suit had been decided in his favour by the Subordinate Judge. On the appeal the Judicial Commissioners had reversed his judgment and remanded the case for the consideration of the second part of the claim. The matter was still open to another appeal. Under those circumstances, in order to avoid a long litigation and the creation of further burden on the family property, Chandra Kuar entered into a compromise acknowledging Narindra Bahadur's right to the inheritance after her death, he on his side binding himself not to alienate the property during her life-time. As stated already, the settlement arrived at between the parties appears to their Lordships to have been both prudent and reasonable in the circumstances of the case, and the Plaintiff has no right to question it now.

(6) L. R. 49 I. A. 342; s. C. I. L. R. 1 Pat. 741; 27 O. W. N. 289 (1922).

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Narindra Bahadur was, in their Lordships' opinion, the nearest agnate of Wazir Chand, and if the property was subject to the provisions of the Hindu law, as their Lordships find, whether he was joint or separate from Wazir Chand, he was entitled to the property on the death of his widow. The compromise, in fact, gave effect to this rule of the Hindu law. The acknowledgment of the widow that the property was subject to Act I of 1869 would not affect the rights of the parties on the basis of the law governing the succession.

The adoption of Nageshar by Jagrani Kuar, although it took place in 1914, takes effect from the death of the father, to whom he is adopted, and therefore there was no intervening time during which it could be said that the property was not held by any one. It may be noted here that both the Courts in India have negatived the Plaintiff's allegation of the allegation contained in paras. 12 and 13 of his plaint.

In view of the peculiar course adopted by the Subordinate Judge in dealing with this case, and in order to prevent other Courts in India from falling into the same error, their Lordships think it desirable to point out that it is not open to the Courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case. Nor is it open to them, whether on account of "judicial dignity" or otherwise, to question its decision on any particular issue of fact. Any application for review of judgment on grounds permissible by law only lies to the Judicial Committee.

With these remarks their Lordships desire to express their entire concurrence

with the judgment of the Judicial Commissioner's Court. They will accordingly humbly advise His Majesty that the Plaintiffs' appeal should be dismissed with costs.

Solicitor : *Solicitor, India Office*, for the Appellants.

Solicitors : *Messrs. T. L. Wilson & Co.* for the 1st Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 292 OF 1924.

GREAVES, J.
PANTON, J.

1925,

21, December.

RAJA RESHEE CASE
LAW, Appellant,

v.

KEDARNATH MARIE
and ors., Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 108—Application for revision made within 12 months of order revised, but order passed after—Jurisdiction.

To enable a Settlement Officer to revise an order under sec. 108 of the Bengal Tenancy Act, it is sufficient if the application by the party for revision be made within 12 months of the order sought to be revised, even though the passing of the order revising it takes place more than 12 months after the order revised.

This was an appeal preferred on the 13th of August 1924 against the order of P. E. Cammiade, Esq., District Judge of Zillah Midnapur, dated the 21st of July 1924, reversing that of Babu B. N. Roy, Revenue Officer, Midnapur, at Khajraber, dated the 25th of April 1924.

In a record-of-rights which was finally published in October 1916, one Baikantha and one Matangini were recorded as *mokurari* tenants in respect of certain lands. In January 1917 the landlord instituted a suit under sec. 106, Bengal Tenancy Act, for correction of the entry. At first Baikantha alone was made a party,

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and when Baikantha did not appear, one Matangini was made a party, although she was dead at the time. Then her heirs, the Respondents, were made parties. The Assistant Settlement Officer passed orders on the 8th April 1918 in the suit correcting the entry as prayed for by the landlord. Then in December 1922 the heirs of Matangini made an application to set aside the said decree, dated the 8th April 1918, on the ground that notice was not served upon them, and that they did not authorise anybody to appear on their behalf in the suit, that they came to know of the decree on the 18th November 1922. This application was granted on the 16th April 1923. Then on the 25th April another Assistant Settlement Officer reversed the orders of his predecessor as *ultra vires*, inasmuch as they were passed long after the expiry of 12 months. The tenants then appealed to the Special Judge of Midnapur, who held that although the application by the landlord was made within 12 months, the orders were actually passed after the expiry of the period, and therefore orders setting aside the orders of the second officer were bad in law, and allowed the appeal.

Hence the appeal by the landlord.

Mr. Narendra Ch. Bose (with Babu Nalin Chandra Pal) for the Appellant submitted that as the application was made within 12 months, the orders might be passed after the time.

Reads sec. 108, Bengal Tenancy Act. On a fair construction of the section the orders could be passed after the period. The most important point is that the application should be made within 12 months.

It has been held that under sec. 108 the Revenue Officers have very wide powers.

Babu Manmatha Nath Ganguly for the Respondents contended that on a proper

construction of the section the orders could not be passed after the expiry of the time and the learned Judge was quite correct in his view that the orders were *ultra vires*. The section can be divided into two parts, the 1st part contemplates an application and the 2nd part, correction by the officer "of his own motion."

If it was the intention of the legislature that the orders could be passed after the expiry of 12 months, then we would have had such expressions as "application made within 12 months."

Then, again, if the officer passed order of his own motion, he must have to do it within the period, otherwise it would be illegal.

Thus if the other side's contention was correct there would be two rules of limitation, which is absurd.

The JUDGMENT OF THE COURT was as follows:—

GREAVES, J.—The short point that arises in this appeal is with regard to the construction to be put on certain words appearing in sec. 108 of the Bengal Tenancy Act. That section provides that any Revenue Officer specially empowered by the Local Government may, on an application or of his own motion within 12 months from the making of any order or decision under the sections therein mentioned, revise the same, and the point is whether the revision must be within the period of 12 months from the order sought to be revised or it is sufficient if the application at the instance of a party interested is made within 12 months, even if the order is passed subsequent to the expiry of the 12 months from the application. The material facts are as follows:—In October 1916 the record-of-rights was finally published. The suit was commenced, under sec. 108 of the Bengal Ten-

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ancy Act, on the 19th January 1917. On the 8th April 1918 the decree in that suit was passed. On the 3rd December 1922, more than 4 years after the decree, an application for revision was made under sec. 108 of the Bengal Tenancy Act. It purported to have been made under Or. 9, r. 13, but in fact it must have been made under sec. 108. On the 16th April 1923 the application was granted and a re-trial was ordered. On the 14th March 1924, that is to say, within 12 months of this previous order, the present Appellant applied under sec. 108 to revise the order of the 16th April 1923 as having been passed without jurisdiction. The matter was heard on that same date and orders were to have been passed on the ensuing 2nd April, but owing to the exigencies of the Court work the passing of the order was deferred until the 25th April 1924, when the application was granted and the order of the 16th April 1923 was set aside as barred as having been made after the prescribed time.

Against this order an appeal was preferred to the Special Judge who reversed the order of the 25th April 1924 as the order had not been passed within one year from the 16th April 1923 which according to the Special Judge was necessary on the wording of sec. 108 of the Bengal Tenancy Act. Here we think he was wrong. We think it is sufficient for the application to be made within 12 months even if the passing of the order takes place more than 12 months after the passing of the order sought to be revised. It is urged by the Respondents that this will create an anomaly, for if the order is revised at the instance of the officer himself it is said that this must be done within 12 months according to the wording of the section and that if the Appellant's contention is correct there will be then two different

periods of limitation, one within 12 months from the date of the order itself and the other possibly extending to a longer period from the order. We think that the decision of the Special Judge on the wording of sec. 108 was not correct and that it is sufficient if the application was made within the period of 12 months even if the order was not passed until more than 12 months had expired from the date of the order sought to be revised and we think that upon the true reading of sec. 108 this is the correct construction of the words of that section.

The result is that the appeal is allowed with costs in all Courts, hearing-fee in this Court being assessed at one gold mohur.

PANTON, J.—I agree.

M. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1290 of 1923.

GREAVES, J.
B. B. GHOSH, J.
1925,
9, June.

HEMANTA KUMAR ROY
and ors., Plaintiffs,
Appellants,
".
MERER BIBI,
Defendant, Respondent.

*Bengal Tenancy Act (VIII of 1885), sec. 52—
Claim for additional rent for additional area—
Kabuliyat, construction of—Intention of parties.*

Where it was stipulated in the kabuliyat that the rent would be payable at certain rates with regard to a certain quality of land which would be found on measurement by a certain unit under a survey at which the tenant bound himself to be present:

Held—That it might be inferred from that stipulation that the lands as described within the boundaries were not let out at the fixed jama mentioned in the kabuliyat but it was the intention of the parties that the rent should be assessed upon a survey

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of the lands within the boundaries having regard to each class of land and area of each plot.

This was an appeal against the decree of M. C. Ghosh, Esq., Special Judge of Zillah Jessore, dated the 10th of January 1923, affirming the decree of Moulavi S. Ahmed, Assistant Settlement Officer of that District, dated the 9th of May 1921.

The facts of the case material to this report are as follows :—

Plaintiffs applied under sec. 105 of the Bengal Tenancy Act for settlement of fair and equitable rent and for assessment of additional rent for additional area found on measurement in the finally published record-of-rights in respect of a *jama* settled with the Defendant under a *kabuliyat*, dated the 21st Chaitra 1318 B. S.

The following portions of this *kabuliyat* will be found material :—

“ I having prayed for taking settlement of a *jama* of Rs. 72-14-6 in respect of 68 bighas 15½ cottahs of land, bounded as follows, and you having granted my prayer I do execute this *kabuliyat*

1. That I shall pay year by year, according to the under-mentioned *kists*, from the commencement of the present year, the annual rent of Rs. 72-14-6 in respect of the aforesaid 68 bighas 15½ cottahs of land.

8. That whenever you shall cause a survey to be made of the said village or of the mahal settled with me, I shall be present at that time and shall cause to be made according to different classes of land a survey of all the lands of the mahal. If I be not present, then I shall be fully bound by the survey that you would cause to be made in my absence.

9. That in the aforesaid survey, in respect of the land that would be ascertained, measured by a *rashi* of 80 cubits, I shall pay rent according to the *jamabandi* that

would be settled at Rs. 2-10-8 per bigha of *bastu* and *udbastu* land, at Rs. 2 per bigha of *palan* land, at Rs. 2-8 per bigha of paddy *bagat*, at Rs. 3-8 per bigha of high *bagat*, at Rs. 5 per bigha of sugarcane, at Rs. 5 per bigha of *baroj*, at Rs. 1-5-4 per bigha of paddy and culturable waste land or at a higher rate of rent that may be prevalent for contiguous lands at that time or that may be fixed for any other cause.”

Plaintiffs' case was that the present area of the land, as found by measurement in the record-of-rights, was 102½ bighas, and they were entitled to rent upon that area.

Both the Assistant Settlement Officer and the Special Judge disallowed the Plaintiffs' claim for additional rent for additional area. They held that the area of land stated in the *kabuliyat* was by way of description and the rent was not in reference to the area but was fixed for the lands which were comprised within the boundaries.

The following portion of the judgment of the Special Judge will be found material : two appeals were heard together and governed by the same judgment.

“ The learned pleader for the landlord argues that upon the two *kabuliyats* which have been proved the Defendant tenants agreed to pay rent upon prescribed rates whenever the landlord thought fit to measure the land. It is urged that the rents were fixed with reference to the area which was determined by measurement at the time of the settlement.

Upon perusal of the evidence I am clearly of opinion that at the time of the settlement in 1911 there was no measurement whatever by the landlord. He had obtained the holding from a previous tenant by a rent sale and settled ten annas of that holding with one of the Defendants and six annas of the holding with the other

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Defendant and in the *kabuliyats* which he took from them the rent of the old holding was kept fixed and the same was divided in the proportion of 10 to 6. The *kabuliyats* clearly show that the rents were fixed for the lands which are described by their boundaries. It appears to me that the figure showing the area of each plot is a mere description and the rent was not fixed with reference to the area nor is it shown that the tenants have made any encroachment on the *khas* land of the landlord.

The appeals are dismissed. There will be no costs as the tenants did not appear."

Against this decision of the Special Judge Plaintiffs preferred this second appeal.

Babus Hemendra Chandra Sen (for *Rai Surendra Chandra Sen Bahadur, Advocate*) and *Surendra Nath Bose (Sr.)* for the Appellants.

No one appeared for the Respondent.

THE JUDGMENT OF THE COURT WAS AS FOLLOWS :—

B. B. GHOSH, J.—This appeal arises out of an application for increase of rent for increase of area presented before the Assistant Settlement Officer of Jessore. Both the Courts below rejected the application on the ground that the *kabuliyats* showed that the rents were fixed for the lands as described within the boundaries. The learned Special Judge observes that the area shown of each plot is a mere description and the rent was not fixed with reference to the area nor is it shown that the tenants have made any encroachment on the *khas* land of the landlord. The question depends upon the construction of the *kabuliyats*. It is true that the lands were let out as being bounded as described in the schedule and the area was described as 60 bighas and 10½ cottas. Ordinarily it

must be held that the area was merely given by guess and the lands as described within the boundaries were let out at the rent arranged and if the landlord failed to prove that the tenant was occupying more lands than he was paying rent for by encroaching upon adjacent lands belonging to the landlord a right to claim excess of rent for excess of area must fail. In this case, however, under cl. 9 of the *kabuliyat* it was stipulated that rent should be payable at certain rates with regard to a certain quality of land which would be found on measurement under a survey at which the tenant bound himself to be present. It may be inferred from that clause that the lands as described within the boundaries were not let out at the fixed *jama* mentioned in the *kabuliyat*. But it was the intention of the parties that the rent should be assessed upon a survey of the lands within the boundaries having regard to the class of land and area of each plot. It does not seem, therefore, the decision of the Court of the Special Judge is correct.

The case must, therefore, be sent back to him for a finding as regards the area and rent payable with regard to each class of land having regard to the rent payable in the locality.

The costs of this appeal will abide the result. Hearing-fee, one gold mohur.

H. C. S.

*Appeal allowed ;
Case remanded*

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 1292 OF 1923.

CUMING, J.

B. B. GHOSE, J.

1925,

25, November.

HEMANTA KUMAR ROY

and ors., Plaintiffs,

Appellants,

v.

BELATALI MUNSHI,

minor, represented by

Deputy Registrar of the

High Court, Defendant,

Respondent.

*Bengal Tenancy Act (VIII of 1885), sec. 52—
Claim for additional rent for additional area—
Kabuliyat, construction of—Intention of parties.*

*Where there was a stipulation in a
kabuliyat as to the standard of measure-
ment and also the rate of rent to be paid
per bigha with regard to each class of land:*

*Held—That the land within the
boundaries was not let out at a fixed rent
but it was the intention of the parties that
there should be a survey and rent should be
assessed upon the measurement of the lands
within the boundaries having regard to the
class of land to which each plot falls and
its area.*

This was an appeal against the decree of
M. C. Ghosh, Esq., Special Judge of
Zillah Jessore, dated the 10th January
1923, affirming the decree of Moulavi S.
Ahamad, Assistant Settlement Officer of
that place, dated the 13th of July 1921.

This appeal and S. A. No. 1290 of 1923*
were heard together by Greaves and B. B.
Ghose, JJ., and disposed of on the 9th
June 1925. It was later discovered that
Defendant-Respondent Belatali Munshi of
this appeal (S. A. No. 1292 of 1923) was
a minor and he was not represented by his
guardian *ad litem* at the time of the hear-
ing of the appeal. Their Lordships
Greaves and B. B. Ghose, JJ., in con-
sequence, by their order, dated the 23rd

July 1925, appointed the Deputy Registrar
of the High Court as guardian *ad litem* of
the minor and withdrew their previous
judgment, dated the 9th June 1925, passed
in this appeal (S. A. No. 1292 of 1923).
This appeal was heard again by Cuming
and B. B. Ghose, JJ., on 25th November
1925. The *kabuliyats* in both the cases out
of which this appeal (S. A. No. 1292 of
1923) and S. A. No. 1290 of 1923 arose
were in similar terms and the ques-
tions for determination in both the cases
were the same. The rent and area stated
in the *kabuliyat* of this appeal were
Rs. 43-11-9 and 41½ bighas respectively.
Plaintiffs' case was that the present area
was 59 bighas according to record-of-
rights.

*Babus Hemendra Chandra Sen and
Surendra Nath Basu (Sr.) for the Appel-
lants.*

*Babu Biraj Mohan Majumdar for the
Respondent.*

The JUDGMENT OF THE COURT was as
follows :—

B. B. GHOSE, J.—This appeal arises out
of an application for settlement of fair
and equitable rent with regard to a *jama*
settled with tenants under a *kabuliyat*,
dated the 31st Chaitra 1318 B. S.

Both the Courts below dismissed the suit
on the ground that the settlement asked for
was of a certain quantity of land within
fixed boundaries, and, therefore, the land-
lords were not entitled to claim additional
rent for any excess area.

An analogous case was decided by
another Bench of this Court of which I was
a member. The *kabuliyats* in both the
cases are in similar terms. That case was
remanded for the fixing of the area and the
rent payable with regard to each class of
land according to the terms of the *kabu-
liyat*.

In cl. 8 of the *kabuliyat* now in question

* Reported at p. 640 of this issue of the C. W. N.

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there is a stipulation for survey being made of the land by the landlords, the tenant undertaking to be present at the survey and assisting in carrying it out. It was also stipulated that if the tenant failed to be present at the survey, he would be bound by the survey made in his absence. Cl. (9) of the *kabuliyat* stipulates as to the standard of measurement and also the rate of rent to be paid per bigha with regard to each class of land, i.e., *bastu*, *udbastu*, *palan* land, *padaiy* land, *bagat* land, etc. It cannot, therefore, be held that the land within the boundaries was let out at a fixed rent, but it was in the contemplation of the parties that there should be a survey and rent should be assessed upon the survey of the lands within the boundaries having regard to the class of land to which each plot falls and its area.

The decision, therefore, of the learned Special Judge does not appear to be correct and must be set aside.

The case must be sent back to him for settling fair and equitable rent payable with regard to each class of land having regard to the rent payable in the locality.

Costs of this appeal will abide the result. Hearing fee one gold mohur.

CUMING, J.—I agree.

H. C. S.

Appeal allowed:

Case remanded.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 105 OF 1925.

<p>SUHRAWARDY, J. PANTON, J. 1925, 7, July.</p>	}	<p>ABDUL (BARI) MALLIK and anr., Accused, Appellants, v. THE KING-EMPEROR, Respondent.</p>
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Criminal Procedure Code (Act V of 1898), sec. 360—Reading over of depositions of witnesses examined on one day at the close of the day, if a sufficient compliance with the section.

Where the deposition of each witness was not read over and explained to him after it was recorded but the depositions of all the witnesses examined were read over and explained at the close of the day:

Held—That this was not a sufficient compliance with the provisions of sec. 360.

This was an appeal preferred on the 16th February 1925, against an order of the 2nd Additional Sessions Judge of 24-Pergannahs, dated the 8th January 1925.

The facts of the case will appear from the judgment.

Babu Debendra Narayan Bhattacharjee for the Appellants.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

SUHRAWARDY, J.—The two Appellants have been convicted by the Additional Sessions Judge of 24-Pergannahs in agreement with the verdict of the majority of the jury under secs. 304 and 326, I. P. C. The first accused was convicted under sec. 304 and sentenced to 10 years' rigorous imprisonment. The second accused was found guilty under sec. 326 and sentenced to undergo the same term of imprisonment. Various objections have been taken on the ground of misdirections in the learned Judge's charge to the jury; but it is not necessary to consider them as we find ourselves constrained to order a re-trial on the ground that the provisions of sec. 360, Cr. P. C., have not been complied with. An affidavit has been filed on behalf of the accused in which it is stated that the deposition of each of the prosecution witnesses was not read over or explained to him after it had been recorded and before the examination of the next

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witness was commenced; but that the depositions of the witnesses examined on any day were read over to them after the close of the day's proceedings. The learned Deputy Legal Remembrancer in order to be sure of the truth or otherwise of this allegation made a reference to the learned Sessions Judge and an affidavit sworn by one Atul Chandra Banerjee, Bench Clerk of the second Additional Sessions Judge of Alipore, has been placed before us. The deponent states as follows:—"I read over and explained the depositions of the witnesses in the presence and hearing of the accused at the end of the day when the examination of all the witnesses for the day was closed." It is therefore clear that the procedure that was followed was that the depositions of all the witnesses were read over to them at the close of the day. This in our opinion is not sufficient compliance with the provisions of sec. 360, Cr. P. C. It has been held in the case of *Hiralal Ghose v. Emperor* (1) that sec. 360 is mandatory and its provision must be strictly complied with. This view is based on the wording of the section itself and on the policy underlying it, namely, to protect the witness and also to safeguard the interest of the accused by affording to the witness as well as to the accused an opportunity of finding any inaccuracy in the record of the deposition. In *Durgahi v. Emperor* (2), the same learned Judges who decided the case of *Hiralal Ghose v. Emperor* (1) had to consider a similar question with regard to the provisions of the section. There the deposition of a witness was read over to him when another witness was being examined in Court. The learned Judges deprecated the procedure and were of opinion that it

was not a strict compliance with the provisions of sec. 360, Cr. P. C.; and in expressing that opinion they made the following observation:—"That clause provides that as the evidence of each witness is completed, it shall be read over before the examination of another witness is commenced." If it is once conceded that sec. 360 is mandatory it follows that its provisions must be strictly complied with. The section says that "as the evidence of each witness taken under sec. 356 or sec. 357 is completed, it shall be read over to him in the presence of the accused, etc." The plain meaning to my mind is that the deposition of a witness must be read over to him as it is completed. The practice of reading over the depositions of all the witnesses examined on one day at the end of the day may commend itself as intended to save public time; but it is not in strict conformity with the requirements of the law; and experience gained in this case shows that more public time will be wasted in the re-trial of the case than what was saved by the procedure adopted. The practice of reading over depositions of several witnesses at one time may also defeat the object of the section as laid down in the case of *Hiralal Ghose v. Emperor* (1). The accused or his lawyer may not remember the exact words used or the form of the answer given. It is therefore desirable that the provisions of sec. 360, Cr. P. C., should be strictly observed and the evidence of each witness read over to him after it is completed before the evidence of another witness commences; and the reading over should not be postponed till all the witnesses are examined.

In this view the trial before the Additional Sessions Judge must be held to be vitiated by this defect in the procedure.

(1) I. L. R. 52 Cal. 159; s. c. 28 C. W. N. 968 (1924).

(2) I. L. R. 52 Cal. 499 (1924).

(1) I. L. R. 52 Cal. 159; s. c. 28 C. W. N. 968 (1924).

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The appeal accordingly succeeds, the conviction of and the sentences passed on the Appellants are set aside and we direct that they be re-tried according to law. The Appellants will remain in jail until further order by the trying Court.

PANTON, J.—I agree that the conviction and sentence of the Appellants must be set aside as they appear to me to be the inevitable result of the earlier decisions of this Court just quoted by my learned brother.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REF. NO. 172 OF 1924.

<p>NEWBOULD, J. MUKERJI, J. 1924, 3, December.</p>	}	<p>JITENDRA NATH SEN and ors., 2nd party, Petitioners, v. KUTISWAR MONDAL and ors., 1st party, Opposite Party.</p>
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Criminal Procedure Code (Act V of 1898), sec. 146—Attachment, when can be released—Entry in record-of-rights, if an adjudication of a competent Court as to the rights of the parties—Sec. 438—Form in which reference is to be made to High Court.

An order of attachment made under sec. 146, Cr. P. C., can only come to an end under one of two circumstances, viz., where the Magistrate withdraws the order because there is no likelihood of a breach of the peace or where a competent Court has determined the rights of the parties to the proceeding or the person entitled to possession of the subject-matter of dispute.

When after the order of attachment was made there were series of litigations between the parties, and the Magistrate vacated his order relying solely on an entry in the finally published record-of-rights.

Held—That the entry in the record-of-rights could at best be treated as presumptive evidence of the relation of landlord and tenant existing between the parties but could not be regarded as constituting the final adjudication of a competent Court within the meaning of sec. 146 (1).

The High Court set aside the order and directed the land to be re-attached.

A reference under sec. 438 should be made in the form prescribed by High Court Circular Orders, Criminal Appellate Side, Chap. I, r. 139.

This was a Reference under sec. 438, Cr. P. C., made by the District Magistrate of Jessore for consideration by this Court of an order, dated the 5th June 1924, passed by the Sub-Divisional Magistrate of Narail, directing the lands under attachment to be released in favour of the 1st party.

The facts of the case will appear from the judgment.

Babus Narendra Kumar Bose (Advocate) and Debendra Narain Bhattacharya for the Petitioners.

Babu Mukunda Behary Mullik for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is a Reference made by the District Magistrate of Jessore in connection with an order passed by the Sub-Divisional Magistrate of Narail, dated the 5th June 1924, whereby the learned Sub-Divisional Magistrate ordered certain lands which had been under attachment under an order passed under sec. 146, Cr. P. C., to be released in favour of the first party. At the outset we should like to point out to the learned District Magistrate that the Reference is not quite in order. It is not in the form prescribed for such References by the

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General Rules and Circular Orders of this Court, Criminal Appellate Side, Chap. I, r. 189, and it does not appear from the order which the learned Magistrate passed as to what is the recommendation that he makes in connection with the order. References under sec. 488, Cr. P. C., should always be made in that form. Inasmuch, however, as the order is before us we propose to deal with it and pass necessary orders.

It appears that an order under sec. 146, Cr. P. C., was passed in respect of these lands by the Sub-Divisional Magistrate on the 27th September 1915. Thereafter there were series of litigations between the parties which have been set out in very great detail in the order passed by the learned Sub-Divisional Magistrate as well as in the order passed by the learned District Magistrate, and after these litigations and being moved by the two parties to the proceeding under sec. 145 which led up to the order under sec. 146, Cr. P. C., the learned Sub-Divisional Magistrate on the 5th June 1924 passed an order that the lands which have since then been under attachment be released in favour of the first party.

Once an order under sec. 146, Cr. P. C., has been passed by a Court, it can come to an end only under one of two circumstances, the first being that there is no longer any likelihood of a breach of the peace in regard to the subject-matter of the dispute, in which case the Magistrate would be competent to withdraw the order of attachment, and he can do so at any time at which there is no such likelihood; and secondly, it is competent for a Magistrate to release the subject-matter of the dispute from attachment if a competent Court has determined the rights of the parties to the proceedings or the person entitled to possession of the subject-matter of

the dispute. In the present case the learned Sub-Divisional Magistrate does not find that as a matter of fact there is no longer any likelihood of a breach of the peace and he does not base his order on that ground. He has referred to a series of litigations which there was between the parties since the order of attachment and he does not rely even upon the results of those litigations, and in point of fact having regard to the orders that were passed in those cases it cannot be said that in any of them there was any determination by a competent Court of the rights of the parties or as to the persons who is entitled to possession of these lands. What has been relied upon by the learned Magistrate is an entry in the finally published record-of-rights to the effect that the lands appertain to the *jama* of the first party and that they are held by them under the second party. This entry in the record-of-rights can at best be treated as presumptive evidence of the relation of landlord and tenant existing between the first party and the second party to the proceedings, and cannot be regarded as constituting the final adjudication of a competent Court within the meaning of sec. 146 (1), Cr. P. C. There is therefore no valid basis for the order which the learned Magistrate has passed in this case.

We accordingly think that that order should be set aside and the lands re-attached under the provisions of sec. 146, Cr. P. C., and we order accordingly.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 775 OF 1924.

SUBRAWADY, J. MUKERJI, J. 1924, 7, November.	}	RAHANADDY PATWARY and ors., Petitioners, v. HASAN ALI JAMADAR, Opposite Party.
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Criminal Procedure Code (Act V of 1898), secs. 133, 139A—Denial of the existence of public right in answer to proceeding under sec. 133—Procedure to be followed by Magistrate.

Where there is a denial of the existence of the public right it is the duty of the Magistrate to inquire into this matter and come to a conclusion under the provisions of sec. 139A, and on the result of this conclusion would depend the question whether he should stay proceedings or should proceed under sec. 137 or 138, Cr. P. C.

This was a Rule granted on the 2nd of September 1924 against an order of the Deputy Magistrate of Noakhali (Babu Chandra Sekhar Mukerjee), dated the 27th June 1924, directing that the *halat* should remain open and free for public use and that the Petitioner No. 1 should remove the obstruction, an application for referring the matter to the High Court having been disallowed by the Sessions Judge of Noakhali (Mr. Probodh Chandra Basu) on the 28th August 1924.

The facts are as follows:—

There is a Local Board road along the village Ulupara and the complainant made an opening into the road and kept it open for some days but later filled it up. This matter having come to the knowledge of the Local Board of Noakhali, an enquiry was instituted and on the report of such enquiry the Local Board ordered for the prosecution of the complainant Hasan Ali who obtained permission to place a bridge over the opening.

The complainant Opposite Party filed a petition under sec. 133, Cr. P. C., on 24th January 1924 on the allegations that 2nd

party unlawfully obstructed a boat passage, by throwing earth on the passage near Local Board road, before the Sub-Divisional Officer who, on receipt of the report from a Local Board member, who was deputed to make an enquiry, passed the following order:—"Seen report. This is not a matter which calls for action under sec. 133, Cr. P. C."

The District Magistrate, when moved by the complainant Opposite Party to refer the matter to the High Court, heard pleaders on both sides and himself drew up proceedings under sec. 133, Cr. P. C., against Petitioners directing them to remove the obstruction within 7 days or to appear before Babu Chandra Sekhar Mukerjee, Deputy Magistrate, to show cause why the order should not be enforced. The Petitioner denied the existence of any public right alleging that no boat passage in the disputed land ever existed, and that the *gopats* are not public roads. The Deputy Magistrate made no enquiry into the matter, nor adopted any other proceedings as contemplated in sec. 139A, Cr. P. C. None of the depositions were read over to the witnesses.

The Magistrate, however, on 27th June 1924 passed the order that the *halat* should remain open for public use and directed the Petitioners to remove the alleged obstruction.

The Sessions Judge was moved but he disallowed the petition.

The Petitioner moved the High Court and Rule was issued on grounds Nos. 2 and 3 of the petition, namely—

"2. That the order of the learned Magistrate was bad in law inasmuch as the District Magistrate had no jurisdiction to order proceedings to be drawn up under sec. 133, Cr. P. C., in his Revisional Jurisdiction against an order of the Sub-Divisional Officer and the whole proceed-

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ings based on the illegal order of the District Magistrate were bad in law.

3. That the order of the learned Magistrate was illegal, irregular and improper in view of the fact that the procedure adopted by the Magistrate was in direct contravention of the provisions of sec. 139A, Cr. P. C."

Babus Suresh Chandra Talukdar and Mohendra Kumar Ghose for the Petitioners.

Babus Gunada Charan Sen and Pro-santa Bhusan Gupta for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule has been issued upon grounds Nos. 2 and 3 of the petition. So far as ground No. 2 is concerned, there is no substance in it, as the learned District Magistrate did not pass the order instituting proceedings in the exercise of his Revisional Jurisdiction. He has made it perfectly plain that the order was passed after he took cognizance of the matter as a Court of Original Jurisdiction and that he did not revise the order of the other Magistrate but ordered the drawing up of proceedings under sec. 133, Cr. P. C., as a Court of Original Jurisdiction.

The other ground is clearly well-founded. The procedure adopted in this case was not in conformity with what is laid down in sec. 139A, Cr. P. C., and secs. 137 and 138, Cr. P. C. It is quite clear that when there is a denial of the existence of the public right, it is the duty of the Magistrate to inquire into this matter and come to a conclusion under the provisions of sec. 139A and on the result of this conclusion would depend the question whether he should stay proceedings or should proceed under sec. 137 or 138, Cr. P. C. This procedure has not been followed in

this case. We think therefore that the order passed by the Magistrate should be set aside and we do set it aside and direct that the proceedings be re-opened. The order passed by the Magistrate will be treated as one under the last part of sec. 139A (2), Cr. P. C., and he will now proceed as laid down either under sec. 137 or sec. 138 as the Petitioners desire him to do.

The Rule is made absolute.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

Full Bench Reference

No. 2 OF 1925

IN

M. A. No. 192 OF 1924.

CHATTERJEA, A. C. J.

WALM-LEY, J.

CUMING, J.

PAGE, J.

CHAKRAVARTI, J.

1926,

Heard, 21, 28, January.

Judgment, 23, February.

KAILASH CHAN-
DRA TARAFDAR,
Judgment-debtor,
Appellant

v.

GOPAL CHANDRA
PODAR, Decree-
holder, Respond-
ent.

Civil Procedure Code (Act V of 1908), sec. 47 (1), Or. 21, r. 95—Order passed on an application under Or. 21, r. 95, by an auction-purchaser who was a decree-holder, if an order under sec. 47 (1) of the Civil Procedure Code and as such, if appealable.

Per CURIAM (CUMING, J., contra)—Where a decree-holder as an auction-purchaser applies for the possession of property under Or. 21, r. 95, he comes under sec. 47 of the Civil Procedure Code, as it is a question arising between the parties and it is a proceeding relating to execution, discharge or satisfaction of the decree. Order passed in such a proceeding is appealable.

This was a Reference to a Full Bench made on the 7th December 1925 by Cuming and B. B. Ghose, JJ., in an appeal against the judgment of the Sub-

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ordinate Judge of Sylhet, passed on 31st March 1921 in Misc. Appeal No. 6 of 1923, directing the Respondent to be put into possession of certain properties.

The Respondent Gopal Chandra Poddar filed a mortgage suit against the Appellant Kailash Chandra Tarafdar and obtained a decree. The Plaintiff attached the property in execution of the decree and purchased the property at the execution sale. The Plaintiff (being auction purchaser and decree-holder) applied for possession under Or. 21, r. 95, of the Civil Procedure Code. The Court held that he was only entitled to possession under Or. 21, r. 96, through the tenant in possession of the property. Against this order the Plaintiff appealed. The lower Appellate Court allowed the appeal and ordered the Plaintiff to be put into possession under Or. 21, r. 95. The Defendant (judgment-debtor) appealed to the High Court, his main contention being that no appeal lay to the District Court. The Lordships, Cuming and B. B. Ghose, JJ., who heard the appeal, referred the matter to the Full Bench.

The ORDER OF REFERENCE was as follows:—

CUMING, J.—This appeal arose out of an application for execution of a certain decree in a mortgage suit.

Certain properties belonging to the judgment-debtor were attached including a certain *basha*. On 18th December 1916, one Mohim Chandra Chaudhuri filed a claim alleging that the *basha* in dispute belonged not to the judgment-debtor but to him and his brother Girish. Girish also filed a separate claim. Both these claims were dismissed and the *basha* sold and purchased by the decree-holder. Girish and Mohim filed a suit asking for a declaration that the judgment-debtor had no saleable interest in

the property and the Plaintiff had a *putni* right.

The suit was decreed in full but modified on appeal, the Plaintiff's *putni* right being declared but no further relief being given.

The auction-purchaser who happens also to be the decree-holder applied for delivery of possession under Or. 21, r. 95. The executing Court held he was only entitled to possession under r. 96, that is, through the tenant in possession. Against this order the decree-holder auction-purchaser appealed. The main contention was that there was no appeal. The lower Appellate Court allowed the appeal and ordered the auction-purchaser decree-holder to be put into possession under r. 95. In other words that he should get *khas* possession.

The judgment-debtor has appealed to the Court and his first and main contention is that no appeal lay to the District Court.

Were the matter *res integra*, I should have no hesitation in holding that no appeal lay to the District Court for these reasons.

Admittedly unless the matter comes within sec. 17 there is no appeal.

In my opinion it does not come within sec. 17.

(1) Because it is not a question arising between the parties to the suit. The auction-purchaser is not a party to the suit. No doubt the auction-purchaser in this case is also the decree-holder but so far as this application is concerned he is the auction-purchaser and the mere fact that he is also the decree-holder does not make him, so far as the present application is concerned, a party to the suit. The distinct personalities of decree-holder and auction-purchaser must be kept distinct. The case of *Prosanna Sanyal v. Kali Das*

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Sengal (1), a decision of the Privy Council, does not support the proposition that the auction-purchaser can maintain a petition under sec. 47. What was held there was that the fact that the auction-purchaser although not a party to the suit was interested in the result was not a bar to an application under sec. 244 (sec. 47). But this is not the same as saying that the auction-purchaser could maintain such an application.

(2) It is not a matter relating to the execution, discharge or satisfaction of the decree.

So far as the satisfaction or discharge of the decree is concerned it is immaterial whether the auction-purchaser is or is not put into possession. The decree is satisfied when the property is sold and the money paid. The question turns on whether an application by the auction-purchaser for possession falls within sec. 17. If it does there is an appeal. If not there is no appeal. In the case of *Mahomed Masraf v. Habil Mia* (2), the decree-holder who was the auction-purchaser applied for possession and an order was passed directing that possession should be given. Held, no appeal lay as the application could not be considered as one under sec. 244 (sec. 47).

This decision followed *Bhimlal Das v. Ganesha Koer* (3). In the case of *Sasi Bhushan Mookerjee v. Radha Nath Bose* (4) it was held that an order for possession (sec. 95) was not an order relating to the execution, etc., of the decree even though the auction-purchaser was the decree-holder and so did not fall within sec. 47.

In the case of *Aduram Halder v. Naruleshiwar Rai* (5) this decision was followed. The contrary view has been taken in the case of *Madhusudan Das v. Gobinda* (6), where it was held that proceedings for the delivery of possession to the auction-purchaser are proceedings in execution of the decree and when the application is resisted by the legal representative of the judgment-debtor, the question raised comes under sec. 244 (sec. 47).

In *Ram Narain Sahoo v. Bandi Prasad* (7) it was held that proceedings for the delivery of possession to an auction-purchaser who is also a decree-holder are proceedings in execution of the decree and come under sec. 244 (sec. 47). It will thus be seen that there are directly conflicting decisions in this Court and the question must be referred to a Full Bench.

The question to be referred is : Whether an order passed on an application under Or. 21, r. 95 by an auction-purchaser, who was the decree-holder, is an order under sec. 17 of the Civil Procedure Code, and appealable as such.

B. B. GHOSH, J.—I agree that the question should be referred to the Full Bench on account of conflict of decisions in this Court.

Babu Brajajal Chakravarti (with him *Babu Parash Lall Shome*) for the Appellant argued that all orders in execution proceedings are not appealable. In order to be appealable they must come under sec. 47, C. P. C. On a sale in execution, after the money is realised, the execution is complete and the decree is satisfied. After the satisfaction of the decree, no other question can arise. Sec. 47, C. P. C., has a narrower scope than Or. 21,

(1) L. R. 19 T. A. 466; s. c. I. L. R. 19 Cal. 683 (1899).

(2) 6 C. L. J. 740 (1904).

(3) 1 C. W. N. 658 (1897).

(4) 19 C. W. N. 835; s. c. 20 C. L. J. 433 (1914).

(5) 29 C. L. J. 48 (1918).

(6) 1 L. R. 27 Cal. 84; s. c. 4 C. W. N. 417 (1899).

(7) I. L. R. 31 Cal. 787 (1904).

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and all proceedings after the realization of the purchase-money are not proceedings in execution. They are summary methods of putting the auction-purchaser in possession, which are quite independent of execution of the decree and irrespective of the rights of the parties to the decree. There are other methods of his getting possession, e.g., by a separate suit. These subsequent proceedings cannot affect the decree as the enforcement of the decree is at an end. After the sale is confirmed there is no other question relating to the execution. After the confirmation of the sale the decree-holder goes and no question of execution can arise between the judgment-debtor and a stranger. A stranger auction-purchaser need not apply under sec. 318 (old Code), he can directly sue [*Kishori Mohan v. Chandra Nath* (26)].

Refers to cases in support of his contention—*Bhimlal Das v. Ganesha Koer* (3), *Jagarnath v. Kartick* (15), *Mahomed Masraf v. Habil Mia* (2), *Sasi Bhusan v. Radha Nath* (4), *Aduram v. Nakuleshwar* (5), *Bhagwati v. Banwari Lal* (9) and *Abdal Gani v. Raja Ram* (16).

Referring to the cases against him, submits that the principle to be established is that orders in execution deciding rights as between parties are questions under sec. 47 and appealable, and in that view, the cases cited against him are distinguishable. Only when the sale is sought

to be disturbed, then the question comes under sec. 47. When a question impugning the sale arises, that takes it out of r. 95, Or. 21 and brings it under sec. 47.

Refers to *Krishnan v. Arunachalam* (25) and *Bhiram Ali v. Gopi Kanth* (36).

In *Madhusudan v. Gobindapriya* (6), the question really was about the validity of the decree, and whether it was binding on the objectors. That was clearly a question under sec. 47.

In *Ram Narain v. Bandi Prasad* (7), the question was whether the 2nd mortgagee could dispossess the first mortgagee without redeeming him, which was clearly a question relating to the validity of the decree and a question arising between the parties.

In *Kashinatha v. Uthumansa* (28), the conflict was between the 1st mortgagee and the 2nd mortgagee.

In *Harri Charan v. Monmohan* (18), the question was one of adjustment of decree, and as such one of satisfaction, discharge or execution.

Muthia v. Appasami (19) was also a case of agreement and adjustment.

In *Sariatoolah v. Raj Kumar* (17), the question was whether a previous proceeding was a step in aid of execution. It was a different point altogether—a point of limitation, and it is well-known, in questions of limitation, words should be liberally construed. The same view was

(6) I. L. R. 27 Cal. 34; s. c. 4 O. W. N. 417 (1899).

(7) I. L. R. 3 Cal. 737 (1904).

(17) I. L. R. 27 Cal. 709; s. c. 4 O. W. N. 691 (1900).

(18) 18 O. W. N. 27 (1913).

(19) I. L. R. 13 Mad. 504 (1890).

(28) I. L. R. 25 Mad. 529 (1901).

(36) I. L. R. 16 Mad. 417; 3 Mad. L. J. 612 (1892).

(36) I. L. R. 24 Cal. 355; s. c. 1 O. W. N. 396 (1897).

(2) 6 G. L. J. 749 (1904).

(3) 1 G. W. N. 1158 (1897).

(4) 19 O. W. N. 835; s. c. 20 O. L. J. 433 (1914).

(5) 29 O. L. J. 48 (1918).

(9) I. L. R. 31 All. 82 (F. B.) (1908).

(15) 7 O. L. J. 436 (1900).

(16) 20 O. W. N. 829; s. c. 1 P. L. J. 232 (1916).

(25) I. L. R. 14 Cal. 644 (1897).

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taken in *Motilal v. Makund Singh* (24) and *Lakshman v. Kannamimal* (37).

In *Kattayat v. Raman* (20) the reasons given are in my favour, but they merely follow the previous decisions. In this case, though the question was what the purchaser got, whether the proprietary right or the subsidiary right, the question did not affect the sale. The sale stands and whatever the purchaser gets the sale remains valid, and the rights of the parties under the decree are not affected, as such question was not one relating to execution. The purchaser gets his title not under the decree, but under the sale.

Sandhu v. Hussain (21)—the views of the Judges were in my favour, but they felt bound to follow the previous decisions.

Refers to *Sadashiv v. Narayana* (22) and *Bhagwati v. Banwari Lal* (9).

Under Or. 21, C. P. C., the provisions for sales in execution begin with r. 82. On sale, a deposit is made under r. 84 and on the deposit of the balance of the purchase money, under r. 92, sale becomes absolute, and that is the title of the purchaser.

Nothing that comes afterwards affects the sale or affects the title of the purchaser. It has been held that even the grant of a sale certificate is not necessary. The moment sale becomes absolute, the purchaser's title becomes complete. Sale certificate is an evidence of title. Questions under r. 94 are not questions under sec. 47. Therefore all proceedings after r. 92 are not proceedings under sec. 47.

Refers to *Bhujia Ray v. Ram Kumar*

(38), *Jagarnath v. Kartick* (15), *Saddo v. Bangsidhar* (39) and *Mahmod v. Locke* (40).

If the view against me prevails, the decree-holder execution-purchaser would be in a worse position than a stranger execution-purchaser, because whereas a stranger auction-purchaser will have 12 years to bring a suit for possession, the decree-holder purchaser will be bound by the 3 years' rule. There should not be any difference between one purchaser and the other.

Under Art. 136, Limitation Act, a purchaser by private treaty gets 12 years and under Art. 138 an execution-purchaser gets 12 years from the sale becoming absolute.

It is to be noted that time runs not from the delivery of possession, but from sale becoming absolute.

This point was considered by Banerji, J., in *Bhagwati v. Banwari* (9).

As to the question of parties:—As soon as the decree has been satisfied, the decree-holder is no longer a party, so this question is practically dependent on the determination of the first question.

If the decision of the first question be against the Appellant, there are other questions, which were not considered by the lower Appellate Court and will require further investigation on remand.

Babu Hemendra Kumar Das for the Respondent.—The question referred to the Full Bench depends on two matters:—

(1) Whether the question relates to the execution, discharge or satisfaction of the decree:

(9) I. L. R. 31 All. 82 (F. B.) (1908).

(20) I. L. R. 26 Mad. 740 (1902).

(31) I. L. R. 28 Mad. 87 (1904).

(32) I. L. R. 35 Bom. 452 (1911).

(24) I. L. R. 19 All. 477 (1897).

(37) I. L. R. 24 Mad. 185 (1900).

(9) I. L. R. 31 All. 82 (F. B.) (1908).

(15) 7 C. L. J. 436 (1900).

(38) I. L. R. 26 Cal. 529; s. c. 3 C. W. N. 374 (1899).

(39) I. L. R. 23 All. 436 (1901).

(40) I. L. R. 20 Mad. 487 (1897).

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(2) Whether the decree-holder auction-purchaser is a party to the suit within the meaning of sec. 47.

Sec. 47 should receive the most liberal interpretation. As pointed out by the Judicial Committee in *Prosaanno Kumar v. Kali Das* (1), it is of the utmost importance that all objections to execution should be disposed of as cheaply and as speedily as possible. In *Ishan Chandra v. Benimadhab* (12), Petheram, C. J., said the same thing. In *Set Umed Mal v. Srinath Ray* (11), Maclean, C. J., observed the same thing and added that parties should not be driven to an independent suit unless the case be clearly outside the scope of the section. That is the point of view from which the question will have to be looked into. The language "relating to execution, discharge and satisfaction" is very wide.

In the first place Or. 21 and rr. 95-96 come within Chap. XXI, the heading being "execution of decree and orders."

Under the old Code the sub-heading was "sale and delivery of property." But under the new Code the sub-heading is "sale of immoveable property."

Therefore *prima facie* the legislature intended this matter to be one which relates to execution of decrees.

Refers to secs. 51 and 74, C. P. C. Holder of a decree for possession and purchaser of immoveable property sold in execution is placed on the same footing—in either case the Court has the power to direct the decree-holder or purchaser to be put into possession.

All applications for delivery of possession under Or. 21, rr. 95-96 must

(1) L. R. 19 I. A. 106; s. c. I. L. R. 19 Cal. 483 (1892).

(11) I. L. R. 27 Cal. 810 (813); s. c. 4 C. W. N. 692 (1900).

(12) I. L. R. 24 Cal. 62 (74); s. c. I. C. W. N. 26 (F. B.) (1898).

therefore relate to execution of the decree. This is sufficient to bring the case within sec. 47 in the present case. I also submit that where the decree-holder is the auction-purchaser the application also relates to satisfaction or discharge of the decree. When decree-holder is the auction-purchaser he does not pay money but his claim is set off against the purchase money.

Refers to Or. 21, r. 72, C. P. C.

Therefore when sale takes place and is confirmed he does not really get the fruits of his litigation until and unless he gets possession of the property purchased which represents money in his case.

A sale of property is not complete until the vendor has delivered to the purchaser such possession as he is able to give. Sec. 55, Transfer of Property Act.

Here also delivery of possession was necessary to render the sale ordered by the Court final and complete.

When decree-holder purchases he does so to satisfy his debt and so long as the land remains in the possession of the judgment-debtor the debt to the extent of the price cannot be said to have been satisfied.

Then where decree is not fully satisfied by the sale the proceeding must be continued if the decree is to be wholly satisfied.

Then applications by decree-holder auction-purchaser for delivery of possession has always been held to be a step in aid of execution. Refers to *Saniatoolah v. Raj Kumar* (17).

With regard to the question whether the decree-holder auction-purchaser is a party within the meaning of sec. 47, C. P. C., I submit the point is now concluded by the decision of the Judicial Committee in *Ganapathy v. Krishnamo*

(17) I. L. R. 27 Cal. 708; s. c. 4 C. W. N. 681 (1900).

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chaser (8) which follows the earlier decision in *Prosanoo Kumar v. Kali Das* (1).

Then on principle I submit the decree-holder who purchases at the sale does not cease to be a party to the suit. He cannot lay down his legal obligations as a party to the suit while he retains his rights and privileges in other respects. It cannot be said that when sale is confirmed the decree-holder entirely drops the character of decree-holder and assumes that of a purchaser.

Then for some purposes at least the capacities of decree-holder and auction-purchaser are not kept distinct.

Although auction-purchaser still he is treated in the same way as if he is a party to the suit and is not placed in the same position as stranger auction-purchaser.

When property is sold in execution of a decree and the decree is afterwards set aside—if the auction-purchaser is the decree-holder the property cannot be retained and the sale goes, but if the purchase is by stranger purchaser the sale stands.

Refers to *Zainulabdin v. Mahommed Ishaq* (13), *Satish v. Rameshwari* (41), *Abdul v. Sarafat Ali* (42) and *Narendra v. Jogendra* (43).

Then also under sec. 153, Bengal Tenancy Act, in case of a decree-holder auction-purchaser in a rent sale the auction-purchaser is held to be a party to the suit within the meaning of sec. 153, Bengal Tenancy Act and appeal lies if a question is decided within the meaning of sec. 153 of the Act.

(1) L. R. 19 I. A. 100; s. c. I. L. R. 19 Cal. 683 (1892).

(8) L. R. 45 I. A. 54; s. c. I. L. R. 41 M. d. 409; 29 C. W. N. 558; 27 C. L. J. 367 (1917).

(13) I. L. R. 10 All. 166 (P. C.) (1897).

(41) 22 C. L. J. 409 (1914).

(42) 23 C. L. J. 412 (1915).

(43) 30 C. L. J. 409 (1914).

Refers to *Kali Mondal v. Ramsarbeswar* (14).

I rely on the observations of Stanley, C. J., and Knox, J., in *Bhagwati v. Banwari Lal* (9).

Then as to Art. 128 of the Limitation Act I submit it cannot override the provision of sec. 47, C. P. C.

Babu Brajajal Chakravarti in reply.

[WALMSLEY, J.—The question of representatives does not arise in the case.]

It does not.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA, A. C. J.—The question referred to the Full Bench is—“Whether an order passed on an application under Or. 21, r. 95 by an auction-purchaser, who was the decree-holder, is an order under sec. 47 of the Civil Procedure Code, and appealable as such.”

The decree-holder purchased certain property at a sale in execution of a decree under Or. 31, r. 6, and applied for delivery of *khass* possession under Or. 21, r. 95. The executing Court held that he was entitled to possession under r. 96, that is, through the tenant in possession. The decree-holder auction-purchaser appealed and the Appellate Court allowed the appeal and ordered that he be put in possession under r. 95; in other words, that he should get *khass* possession.

The judgment-debtor appealed to the High Court and the main contention was that no appeal lay against the order of the execution Court.

An appeal would lie if the case comes under sec. 47 of the Civil Procedure Code. The question whether it falls within that section of the Code depends upon—

(9) I. L. R. 31 All. 82 (P. B.) (1908).

(14) I. L. R. 32 Cal. 967; s. c. 9 C. W. N. 721 (P. B.) (1905).

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(i) whether the question arises between the parties to the suit or their representatives, and

(ii) whether it relates to execution, discharge or satisfaction of the decree.

The first question, therefore, is whether the decree-holder auction-purchaser is a party to the suit. The decree-holder is undoubtedly a party to the suit, and the only question is whether he ceases to be a party to the suit after the sale.

Reliance is placed on behalf of the Respondent on the case of *Ganapathy v. Krishnamachariar* (8), where the Judicial Committee observed: "This Board decided in *Prosanna Kumar Sanyal v. Kalb Das Sanyal* (1) that sec. 244 had been rightly held in India to apply in a case in which the question raised concerned the auction-purchaser at an auction sale as well as the parties to the suit. In this case the vakil (the decree-holder) was the auction-purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and if so raised, would have been determined by the Court which was executing the decree of the 15th November 1886." The property was sold in execution of a mortgage decree and purchased by the decree-holder, and after confirmation of the sale the mortgagor brought a suit for redemption. The question, therefore, could have been raised before the confirmation of the sale. But the case is relied upon to show that the decree-holder is referred to by their Lordships as a party to the suit even after the sale.

The question whether the decree-

holder *qua* purchaser is a party to the suit was fully considered by a Full Bench of the Allahabad High Court in the case of *Bhagwati v. Banwari Lal* (9). Banerji, J., Aikman and Griffin, JJ., answered the question in the negative, while Stanley, C. J., and Knox, J., held that he is a party to the suit. Banerji, J., observed that "although the same person may be the decree-holder and the auction-purchaser he fills two different capacities, and it is in the latter capacity that he can obtain possession." Reference was made to the case of *Mahabir Prasad v. Macnaghten* (10) to show that the decree-holder who purchases the mortgaged property at auction with the leave of the Court is in the same position as any independent purchaser. But what was meant by Lord Watson in that case was that the leave to bid puts an end to the disability to purchase, and he is on the same footing (with respect to the right to purchase) as strangers to the suit who may bid at the sale. The view that the decree-holder auction-purchaser fills two different capacities was also taken by Mookerjee and Beachcroft, JJ., in *Sasi Bhusan Mookerjee v. Radha Nath Bose* (4) and the learned Judges relied among other cases on the decision of the majority of the Full Bench of the Allahabad Court referred to above. Stanley, C. J., on the other hand, in the case of *Bhagwati v. Banwari Lal* (9) observed that the recognition of such a dual personality in a decree-holder auction-purchaser would be to introduce a strange and novel legal fiction into our jurisprudence, and that it is difficult to see how the character of decree-holder can be split up into two dis-

(1) L. R. 19 I. A. 166; s. c. I. L. R. 19 Cal. 683 (1892).

(8) L. R. 45 I. A. 54; s. c. I. L. R. 41 Mad 403; 22 O. W. N. 553; 27 C. L. J. 367 (1917).

(4) 19 O. W. N. 835; s. c. 20 C. L. J. 433 (1914).

(9) I. L. R. 31 All. 83 (F. B.) (1903).

(10) I. L. R. 16 Cal. 682 (F. C.) (1886).

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inct characters so as to enable him to override the provisions of sec. 244.

Reference was also made by Banerji, J., in the Allahabad case to Art. 138 of the Limitation Act, under which a suit may be brought by an auction-purchaser for recovery of possession within twelve years from the date of the auction sale, and it was observed that, in that article, no distinction is made between different classes of auction-purchasers, and that there is no reason for holding that if the decree-holder happens to purchase at an auction sale, he has a shorter period of limitation for obtaining possession than any other purchaser, as it is only in the capacity of auction-purchaser that he can obtain possession. But that article regulates the period of limitation, whereas sec. 47 of the Code of Civil Procedure regulates the remedies open to the parties, to the suit in which the decree is passed when any question arises between them relating to the execution, discharge or satisfaction of the decree. Art. 138 of the Limitation Act cannot therefore override the provisions of sec. 47 of the Code.

Then there are good reasons for the difference between an auction-purchaser, who is the decree-holder, and a stranger auction-purchaser. The latter is not expected to go behind the decree, whereas the decree-holder who has obtained the decree knows all that need be known about the property, and in his case there is no hardship in confining his remedy to proceedings in execution.

It has been repeatedly held that the provisions of sec. 244 should be liberally construed. The Judicial Committee in the case of *Prosanna Kumar Sanyal v. Kali Das Sanyal* (1), referred to above, observed, "It is of the utmost importance

(1) L. R. 16 I. A. 166; s. c. 1, L. R. 19 Cal. 685 (1902).

that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of sec. 244." That a wide and liberal construction should be placed on the section was also recognised in *Set Umed Mal v. Srinath Ray* (11) and *Ishan Chandra v. Benimadhab* (12).

The decree-holder, for certain purposes at any rate, is treated as a party to the suit even after the sale, and stands on a different footing from an ordinary purchaser. For instance, when a sale takes place in execution of a decree and the decree is afterwards set aside, it does not affect an auction-purchaser who is a stranger to the suit; whereas in the case of the decree-holder himself who has purchased at the sale, the sale must be set aside. In the case of *Zainulabdin v. Mahommed Ishaq* (13), Sir Barnes Peacock in delivering the judgment of the Judicial Committee observed:—"It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order. A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves."

(11) I. L. R. 27 Cal. 810 (818); s. c. 4 C. W. N. 692 (1900).

(12) I. L. R. 24 Cal. 62 (74); s. c. 1 C. W. N. 86 (F. B.) (1898).

(13) I. L. R. 10 A. 1, 166 (F. C.) (1897).

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The decree-holder is treated as a party to the suit even after the sale in cases coming under the proviso to sec. 153, Bengal Tenancy Act. See *Kali Mandal v. Ramsarbeswar* (14).

Then again it was held in cases coming under sec. 311 of the Code (of 1882) that no second appeal lay unless the decree-holder was the purchaser or unless there was fraud in the sale.

With regard to the second question, the view taken in some cases is that proceedings for delivery of possession cannot in any way affect the decree or the sale, and do not relate to execution, discharge or satisfaction of the decree as the decree is executed and discharged by the sale. See *Bhimlal Das v. Musst. Ganesha* (3), *Mahomed Masraf v. Habil Mia* (2), *Jagarnath Marwari v. Kartick Nath* (15), *Sasi Bhusan Mookerjee v. Radha Nain Bose* (4), *Aduram v. Nakuleshwar* (5) and *Bhagwati v. Banwari Lal* (9) (majority of the Full Bench in the Allahabad High Court), *Hazi Abdul Gani v. Raja Ram* (16) (Patna High Court).

On the other hand it has been held in a large number of cases that such proceedings relate to execution of decree when the decree-holder is the purchaser. See *Madhusudan Das v. Gobindapriya* (6), *Ram Narain v. Bandi Prasad* (7), *Saria-*

toollah Molla v. Raj Kumar (17), *Hari Charan v. Monmohan* (18): in the Madras High Court—*Muthia v. Appasami* (19), *Kattiyat v. Raman* (20) and *Sandhu v. Hussain* (21): in the Bombay High Court—*Sadashio v. Narayana* (22), and the dissentient judgment of Stanley, C. J. and Knox, J., in the Full Bench—*Bhagwati v. Banwari* (9).

The learned pleader on either side has attempted to distinguish the cases against him. It will not be profitable to discuss the cases, though some of the cases on either side may be distinguished on the facts. The main ground upon which the decision in the first set of cases proceeds is that as soon as the sale is confirmed and becomes absolute the execution of the decree is at an end, and the decree is not affected by further proceedings such as those relating to delivery of possession.

It is true that when the sale is confirmed, the title of the purchaser becomes absolute. That means that the title of the purchaser cannot be challenged by the judgment-debtor. But the sale cannot be said to be complete without delivery of possession of the property sold.

The property purchased represents the money for which he obtained his decree. It is to be observed that the decree-holder has to purchase with the permission of the Court, and under Or. 21, r. 72, the purchase money and the amount due on the decree may be set off against one another. But the decree-holder does not actually get the benefit of the money due

(2) 6 O. L. J. 749 (1904).

(3) 1 O. W. N. 658 (1897).

(4) 19 O. W. N. 835; s. c. 20 O. L. J. 433 (1914).

(5) 29 O. L. J. 48 (1918).

(6) I. L. R. 27 Cal. 34; s. c. 4 O. W. N. 417 (1899).

(7) I. L. R. 31 Cal. 737 (1904).

(8) I. L. R. 31 All. 82 (F. B.) (1908).

(14) I. L. R. 32 Cal. 957; s. c. 9 O. W. N. 731 (F. B.) (1905).

(15) 7 O. L. J. 436 (1900).

(16) 20 O. W. N. 529; s. c. 1 P. L. J. 232 (1910).

(9) I. L. R. 31 All. 82 (F. B.) (1908).

(17) I. L. R. 27 Cal. 709; s. c. 4 O. W. N. 681 (1900).

(18) 18 O. W. N. 27 (1913).

(19) I. L. R. 18 Mad. 504 (1890).

(20) I. L. R. 26 Mad. 740 (1903).

(21) I. L. R. 26 Mad. 87 (1904).

(22) I. L. R. 25 Bom. 452 (1911).

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under his decree until he gets possession of the property of the judgment-debtor purchased by him. He is entitled to ask the Court to put him in possession of the property purchased, and the Court is bound to give him possession.

The arrangement of the provisions of the Code relating to execution indicates that proceedings for delivery of possession are proceedings relating to execution of the decree. The general heading of Or. 21 is "execution of decrees and orders." Then there are several sub-headings. Rr. 82 and 96 deal with sales of immoveable property. Rr. 95 and 96 relating to delivery of property sold in execution are under the same sub-heading as rr. 82 to 94 which deal with sales (and it cannot be disputed that the provisions relating to sales relate to execution of decree) and the whole, as already stated, appear under the same general heading "execution of decrees and orders."

It may also be pointed out that sec. 74 and Or. 21, rr. 97 to 101 of the Code make the same provision for the purchaser of immoveable property as for the holder of a decree for possession of immoveable property in connection with "resistance to execution," which indicates that the legislature regards the delivery of possession to the purchaser as a proceeding in execution of the decree.

It appears, therefore, that the Court, in delivering possession of the property sold, does so under the provisions relating to execution of decree, and it is difficult to see how else it can deliver such possession. It is said that such delivery is made under the summary powers given by the Code, that it is merely incidental to the sale, and the contest arises as the result of the sale. Even if it is so, it relates to execution of the decree. Such proceedings may not affect the decree,

nor impeach the sale, but when the question arises as to the kind of possession to be delivered it is a question relating to the execution of the decree.

Then it has been held that an application by a decree-holder to be put in possession of the property which he purchased in execution of his decree is a step in aid of execution of the decree. See *Sariatoolah Molla v. Raj Kumar Roy* (17).

The question is merely one relating to procedure, and the weight of authority I think is in favour of the view that where the auction-purchaser is the decree-holder any question relating to delivery of possession comes under sec. 47 of the Code. I am of opinion that the question referred should be answered in the affirmative.

The result is that the appeal is dismissed with costs, hearing-fee, two gold mohurs in the Full Bench Reference and one gold mohur for the hearing before the Division Bench.

WALMSLEY, J.—I have had the advantage of reading the judgment which my learned brother Page is about to deliver, and for the reasons which he gives I agree with him as to the answer to the question.

CUMING, J.—The question that has been referred to the Full Bench is whether an order passed on an application under Or. 21, r. 95 by an auction-purchaser who was the decree-holder is an order under sec. 47 of the Civil Procedure Code and appealable as such.

I am of opinion that it is not for two reasons :—

(1) The auction-purchaser even though he is also the decree-holder is not a party to the suit.

(2) An application under Or. 21, r. 95

(17) I. L. R. 27 Cal. 709; s. c. 4 C. W. N. 681 (1900).

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is not a matter relating to the execution, discharge or satisfaction of the decree.

I do not propose to deal with any of the numerous authorities which have been cited before us except those of the Privy Council. As a Full Bench none of the authorities except those of the Privy Council or the decision of a Full Bench of our own Court are binding on us. The various decisions are clearly in direct conflict, otherwise the reference would be unnecessary and we are in the fortunate position that we have only to consider the plain words of the Code and the decisions of the Privy Council or Full Bench of this Court so far as they interpret the sections we are now considering.

I take up the first point which is whether the auction-purchaser even though he is the decree-holder is a party to the suit or his representative in interest. I am of opinion that he is not. The parties to the suit are the persons who actually contest the suit as Plaintiff or Defendant up to the time of the passing of the decree. The auction-purchaser has nothing to do with the suit and quite possibly does not know of its existence. If the auction-purchaser is also the decree-holder that makes no difference. A person may have a dual capacity. As a decree-holder he is a party and can maintain an application under sec. 47. But in his capacity of auction-purchaser he is not a party and cannot maintain an application under sec. 47. He applies to be put into possession in his capacity of auction-purchaser and not of decree-holder. It is the failure to keep separate the two capacities which has led to much of the confusion and conflicting decisions in the different Courts. Such dual capacities are well-known, i.e., a person may be on the record in his personal capacity and at the same time as the guardian of a minor or

executor. They are quite separate and distinct. My attention has been drawn to two decisions of the Privy Council, the case of *Prosanna Kumar Sanyal v. Kali Das Sanyal* (1) and the case of *Ganapathy Mudaliar v. Krishnamachariar* (8), from which decisions it is sought to establish the proposition that where the auction-purchaser is also the decree-holder, he becomes as auction-purchaser a party to the suit. I am unable to discover after a very careful consideration of these decisions that they establish anything of the sort. What the first case, *Prosanna Kumar Sanyal v. Kali Das Sanyal* (1), decided was that when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section. Their Lordships do not say even that in such circumstances the auction-purchaser is to be made a party to the proceedings. If I read the decision correctly it is this that the fact that there may be a third party not a party to the suit but interested in the result is no bar to the parties to the suit having a question between them relating to the execution, discharge or satisfaction of the decree decided under sec. 244 (sec. 47). The facts in that case were that it had been held that sec. 244, Civil Procedure Code, was a bar to the suit and learned Counsel argued that the suit was not barred because the auction-purchaser being interested it could not be described properly as a question arising between the parties to the suit in which

(1) L. R. 19 I. A. 166; s. c. I. L. R. 19 Cal. 683 (1892).

(8) L. R. 45 I. A. 54; s. c. I. L. R. 41 Mad. 403; 22 O. W. N. 653; 27 O. L. J. 367 (1917).

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the decree was passed. The Privy Council held that the fact that the auction-purchaser was interested was no bar to the application of the section, or, in other words, to the decision of the question between the parties to the suit. It certainly cannot be held on the strength of this decision that the auction-purchaser can even or should be made a party to the proceedings.

With regard to the second case, *Ganapathy Mudaliar v. Krishnama-chariar* (8), learned Counsel to support his contention would rely on the following words in the judgment :—

“ This Board decided in *Prosanna Kumar Sanyal v. Kali Das Sanyal* (1) (the case I have first referred to) that sec. 244 (sec. 47) had been rightly held in India to apply to a case in which the question raised concerned the auction-purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction-purchaser and was also a party to the suit. The question raised in the present suit could have been raised before the sale was confirmed and if so raised would have been determined by the Court which was executing the decree.”

I hardly see how this decision supports the contention of the learned vakil.

The report of the case is somewhat meagre so far as the facts are concerned but the facts would seem to be as follows :—

The suit was brought to redeem three mortgages. The Plaintiff was the son of the mortgagor and the Defendant was the son of the mortgagee. It would appear

that in 1886 the mortgagee had brought a suit on the mortgage bond which was decreed.

The Plaintiffs in this present suit were then minors and represented by their fathers. The suit was decreed, the property sold and purchased by the decree-holder. There were various objections to the execution of the decree which were all disallowed. The present suit was instituted in 1907 and what seems to have been held was that sec. 244 was a bar to the suit because all the questions raised in the present suit of 1907 could have been raised before the sale was confirmed. Their Lordships relied on the principle laid down in *Prosanna Kumar's* case (1) that such question could be raised between the parties to the suit under sec. 244 even though the auction-purchaser was concerned as well as the parties to the suit. Their Lordships simply stated as a fact that in that particular case the auction-purchaser was the same person as the decree-holder who was admittedly a party.

But this decision is no authority for the contention that if the auction-purchaser is also the decree-holder he becomes as auction-purchaser a party to the suit. In my opinion these two decisions are authority only for the proposition that even though third parties who are not parties to the suit are interested or concerned that is no bar to the question between the parties being decided under sec. 244 (sec. 47). They are not even authorities for the proposition that the auction-purchaser should be made a party to such proceedings nor for the proposition that if the auction-purchaser is the same person as the decree-holder he is as auction-purchaser a party to the suit.

(1) L. R. 19 I. A. 166; s. c. I. L. R. 19 Cal. 683 (1892).

(8) L. R. 45 I. A. 54; s. c. I. L. R. 41 Mad. 408; 23 C. W. N. 553; 27 C. L. J. 367 (1917).

(1) L. R. 19 I. A. 166; s. c. I. L. R. 19 Cal. 683 (1892).

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There is yet a further point which has to be considered. If the auction-purchaser who happens to be a decree-holder must proceed under sec. 47 his period of limitation is restricted to 3 years. A stranger is allowed 12 years to bring his suit. Is there any good reason for thinking that there is a different period of limitation for the decree-holder auction-purchaser and the stranger auction-purchaser?

Neither can it be said that the auction-purchaser is a representative in interest of either the judgment-debtor or decree-holder. If he were, we should get the extraordinary position of a person making an application against himself.

To sum up the point :—

The auction-purchaser *qua* auction-purchaser is not a party to the suit and the fact that he is also the decree-holder does not alter his position in any way or make him in a matter in which he is concerned in the capacity of auction-purchaser a party to the suit. Neither of the decisions of the Privy Council to which I have been referred would justify the contention that an auction-purchaser even though he is also the decree-holder is in any way in a different position to a stranger auction-purchaser. He is therefore not a party to the suit and any question decided between him and any other person whether a party or not to the suit is not a question decided under sec. 47.

On this ground alone, therefore, the Reference should be decided in the negative. The next question is whether an order passed on an application under Or. 21, r. 95 is a question relating to the execution, discharge or satisfaction of the decree. I am of opinion that it is not. When the property is sold, money paid and sale confirmed, so far as the decree and the decree-holder are concerned nothing more is to be done. So far

as the execution of the decree is concerned and by that I presume is meant the realization by the decree-holder of the fruits of his litigation, it makes no difference whatever whether the purchaser does or does not obtain possession. The decree is satisfied by the sale of the property and the payment to the decree-holder of the money so realized. The auction sale is complete when confirmed. It may be set aside for various reasons but failure to get possession by the auction-purchaser is not one of them and the validity of the sale does not depend on the purchaser getting possession. The purchaser does not get possession by virtue of the decree. He gets possession by virtue of the sale. The application for delivery of possession is one of the results of the execution of the decree after it has been executed but it does not relate to the execution of the decree.

The expression "which relates to the execution of the decree" means, I think, questions which arise up to and concern the actual execution which terminates with the confirmation of the sale and the paying of the money to the decree-holder, not questions which may arise after execution is complete and are really results of the execution. The further argument has been put forward that the decree-holder purchaser gets the property in lieu of the money he is entitled to under the decree and hence until he is put in possession the decree has not been satisfied.

This argument is obviously a fallacious one. If it had any substance, then on the failure of the decree-holder purchaser to get possession after his purchase he would be entitled to again execute the decree for the amount he had paid for the purchased property, for his decree would then have to be considered as unsatisfied to that extent.

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I need hardly say that he cannot, at least, I have never heard it even suggested that he could.

He does not get the property as an equivalent to the amount of his decree for which the property was sold. As purchaser, he has to pay the purchase money which he does either in cash or by setting it off against the amount of his decree.

Both the points on which this Reference depends have been dealt with by Banerji, J., in the case of *Bhagwati v. Banwari* (9). His judgment may be referred to, for it would be difficult to improve on his reasoning and argument.

A further argument has been put forward that rr. 95 and 96, the rules relating to the delivery of possession, find a place under Or. 21—which order is headed “execution of decree”—and hence thus must relate to the execution of the decree.

I may point out that the order is headed “execution of decree and orders” and not of decree only.

On applications under r. 95 and r. 96 the Court orders delivery of possession to be made and this order the Court executes. If it were part of the execution of the decree no further order would be necessary. Hence the Court in putting a party in possession under rr. 95, 96, 97, 98 is not executing the decree.

I am of opinion that an application by the auction-purchaser to be put in possession does not relate to the execution, discharge or satisfaction of the decree and hence does not fall under sec. 47.

PAGE, J.—In this case the holder of a personal decree for money due under a mortgage having purchased certain immoveable property of the judgment-debtor at an auction sale held in execution of the decree applied for delivery of possession

under Or. 21, r. 95. The first Court ordered that symbolical possession of the property should be given to the applicant under Or. 21, r. 96 on the ground that only the *maliki* right in the said property passed on the sale. On appeal the Court held that the applicant was entitled to delivery of *khas* possession, and an order was passed under Or. 21, r. 95.

On a further appeal to the High Court a Division Bench (Cuming and B. B. Ghose, JJ.) has referred to the Full Court the following question: “Whether an order passed on an application under Or. 21, r. 95 by an auction-purchaser who was the decree-holder is an order under sec. 47 of the Civil Procedure Code, and appealable as such.”

Now, it is highly desirable that questions of practice and procedure should be settled, and that this matter which has been allowed to remain in a state of flux for more than 20 years should now finally be determined. The High Courts in India have given inconsistent answers to the question propounded, and whereas the Madras High Court in *Sandhu Tarraganor v. Hussain Sahib* (21) has expressed the opinion that it is definitely settled that from such an order an appeal will lie, the Patna High Court, on the contrary, is equally emphatic that an appeal does not lie, and that the Courts in India ought so to hold “as if it were a settled *cursus curiæ*.” [*Gani v. Ram* (16)].

Thus the oracle has spoken both at Delphi and at Dodona, and it remains for this Court to determine to which voice it ought to harken. In Bombay the High Court has held that the answer to the question should be given in the

(9) I. L. R. 31 All. 62 at pp. 98 to 100 (F. B.) (1904).

(16) [20 C. W. N. 829; a. c. 1 F. L. J. 282 (1916)].

(21) I. L. R. 28 Mad. 87 (1904).

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affirmative [*Sadashio v. Narayana* (22)], while in Allahabad by a majority of three Judges to two, a Full Bench of the High Court has given an answer in the negative. Thus, the views of other High Courts on the subject are sharply divided.

In the Calcutta High Court also there has been a marked diversity of opinion [*Bhimal Das v. Ganesha Koer* (3), *Md. Masraf v. Habil Mia* (2), *Sasi Bhusan v. Radha Nath* (4) : contra : *Madhusudan v. Gobindapriya* (6), *Ram Narain v. Bandi Prasad* (7) and *Hari Charan v. Monmohan* (18)], and the problem remains unsolved. Indeed, two learned Judges (Brett and Stevens, JJ.) appear to have decided the question both ways. With such assistance as may be derived from opinions so diverse it is incumbent upon us therefore to put our own construction upon sec. 47 and Or. 21 of the Civil Procedure Code.

From the terms of the section it is apparent that in order that an appeal should lie under sec. 47, it is necessary that the application should involve the determination of a question "relating to the execution, discharge or satisfaction of the decree," and that the question should be one "arising between the parties to the suit in which the decree was passed, or their representatives."

Now "it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible" [*Prosanna Kumar*

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v. Kali Das (1) and *Sardharilal v. Ambika Prasad* (23)], and I think it is clear that the legislature by enacting sec. 47 and Or. 21 intended that when persons had entered upon litigation the decree, so far as possible, should be worked out in the proceedings in which it was passed. It is to be observed that Or. 21, which is headed "execution of decrees and orders," includes not only rr. 95 and 96, which provide for delivery of possession of the property sold under the decree, but also rr. 97-103, which relate to and are headed "resistance to delivery of possession to decree-holder or purchaser." It would appear, therefore, that the legislature intended that the matters for which provision was made in rr. 95-103 should be regarded as an integral part of the proceedings in execution of the decree.

It is urged, however, on behalf of the Appellant, that after the sale has become absolute under r. 92, the sale is complete, and inasmuch as an order for delivery of possession under r. 95 necessarily must be passed after the sale has become absolute and a certificate has been granted under r. 94, such an order cannot relate to the execution of the decree, for such an order in the language to be found in some of the cases could not in any way "affect the decree." *Bhimal Das's* case (3) and *Masraf's* case (2). This contention is concisely put by Mookerjee, J., in *Sasi Bhusan's* case (4) where his Lordship observed that "if the application was granted, it could not give greater

(2) 6 C. L. J. 749 (1904).

(3) 1 C. W. N. 658 (1897).

(4) 19 C. W. N. 835; s. c. 20 C. L. J. 438 (1914).

(6) I. L. R. 27 Cal. 34; s. c. 4 C. W. N. 417 (1899).

(7) I. L. R. 31 Cal. 797 (1904).

(18) 18 C. W. N. 27 (1912).

(23) I. L. R. 35 Bom. 489 (1911).

(1) L. R. 19 I. A. 166; s. c. I. L. R. 19 Cal. 683 (1892).

(2) 6 C. L. J. 749 (1904).

(3) 110 W. N. 658 (1897).

(4) 19 C. W. N. 835; s. c. 20 C. L. J. 438 (1914).

(23) L. R. 15 I. A. 123; s. c. I. L. R. 15 Cal. 581 (1887).

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validity to the order for confirmation of sale than it possessed. On the other hand, if the application for delivery of possession was refused, it could not invalidate the sale."

With all due deference, however, in my opinion, this contention is not well-founded. The validity of the sale is one thing, its completion is quite another, and I respectfully agree with Stanley, C. J., when he expressed the view that, "so long as the land remain in the possession of the mortgagors, the debt to the extent of the price cannot be said to have been satisfied."

The fallacy of the argument advanced on behalf of the Appellant lies, as it appears to me, in the assumption that on the grant of the certificate of sale the decree was completely "executed and satisfied," and the decree was not, I think, satisfied so long as possession was withheld by the mortgagor from the decree-holder. *Bhagwati v. Banwari Lal* (9), *Madhusadan v. Gobindapriya* (6) and *Sariatoolah v. Raj Kumar* (17). But even if it were held that the sale was complete without delivery of possession it would not avail the Appellant, for in order to bring an application under r. 95 within the ambit of sec. 47 it is not essential that delivery of possession should form an integral part of the sale; it is enough that the question arising on such an application should relate to "the execution, discharge or satisfaction of the decree." That such questions do relate to the execution of the decree appears to me to be free from doubt for the two following, among other, sufficient reasons: (1) Because the

benefit which a decree-holder who is also the purchaser at the execution sale will derive from executing the decree largely depends upon the nature and extent of the possession which he can obtain of the property that he has purchased.

Until he has been given possession of the property that he has purchased at the execution sale he has not fully secured the fruits of the decree, and, therefore, "a proceeding in execution cannot be said to be completed (at least, so far as a decree-holder is concerned) in a case of sale until he has obtained the proceeds and benefit of the sale held in execution of his decree, and the execution of his decree cannot be said to be satisfied until in the one case he has received the purchase money paid into Court, and in the other until he has been put into possession of the property of the judgment-debtor which he has purchased;" *per* Edge, C. J., and Blair, J., in *Motilal Lal v. Makund* (24).

(2) Because it is not every purchaser of property who is entitled to take advantage of the provisions of Or. 21, rr. 95-98, but only those purchasers who have bought immoveable property at a sale held in execution of a decree. The Court would have no jurisdiction to entertain an application under rr. 95-98 by a person who has purchased property by private treaty or at a sale unconnected with execution proceedings, for unless the sale was held in the course of or pursuant to execution proceedings, it is clear from the terms of the rules that the purchaser would have no *locus standi* to prefer an application under rr. 95-98.

For these reasons, therefore, I have no hesitation in holding that questions arising in an application under r. 95 for the delivery of possession are questions "re-

(6) I. L. R. 27 Cal. 34 at p. 37; s. c. 4 C. W. N. 417 (1899).

(9) I. L. R. 31 All. 82 at p. 92 (F. B.) (1908).

(17) I. L. R. 37 Cal. 709; s. c. 4 C. W. N. 681 (1909).

(24) I. L. R. 19 All. 477 (1897).

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lating to the execution, discharge or satisfaction of the decree." I am also of opinion that questions arising in an application under r. 95 by a decree-holder or his representatives in interest against the judgment-debtor or his representatives in interest are questions "arising between the parties to the suit in which the decree was passed or their representatives."

Now, it is common ground that a person who purchases the property sold in execution of a decree derives his title to the property from the sale and not from the decree, whether the purchaser is the decree-holder or a transferee of the decree-holder's interest in the decree, or a stranger to the suit. Upon that footing the Appellant contends that questions which fall for determination in an application under r. 95 and the following rules do not arise between the parties to the suit or their representatives, for such an application can only be made by a purchaser, the decree-holder or a transferee of a decree-holder's interest in the decree *as such* having no *locus standi* to prefer an application under these rules [see *per* Banerji, J., in *Ghulam Shabbir v. Dwarka Prosad* (25) and *Bhagwati v. Banwari* (9), *per* Mookerjee, J., in *Sasi Bhusan Mookerjee's case* (4)]. It is urged that in respect of such an application a decree-holder must be taken to have shed his status as a party to the suit, and can be regarded only in the capacity of the purchaser of the property.

I agree with Stanley, C. J., that "the recognition of such a dual personality in a decree-holder purchaser would be to introduce a strange and novel legal fiction

into our jurisprudence." [*Bhagwati v. Banwari* (9)]. Indeed, such a contention appears to me to run counter to the object and effect of the sections and orders of the Code relating to execution. As I read the Code the object of sec. 47 was "to provide for the speedy determination of any question between the decree-holder and the judgment-debtor, should any still be left at such a late stage of the litigation between them."

"A decree-holder, who has fought out his case, won his decree and carried it possibly into several Courts of Appeal, and who elects to buy the property of his judgment-debtor which he has put up to auction, ought to be in a position to know all that need be known about the property. He had ample means in the suit and under the procedure which regulates execution to find out all that need be known. It is to the interest of all that the litigation should be put to an end" [*per* Knox, J., in *Bhagwati's case* (9)]. The legislature in sec. 47 has placed the representatives of the parties in the same position as the parties themselves, and the term "representatives" in sec. 47 must, in my opinion, be held to include persons who by assignment from a party or by operation of law have succeeded to the interests of that party in the decree and *quoad* that interests are bound by the decree.

The intention of the legislature was that the parties and their representatives should be compelled to work out the decree in the proceedings in which it was passed and ought not to be permitted to re-agitate such matters by launching forth into fresh litigation.

It is urged if such a view were to be upheld a decree-holder purchaser would suffer hardship, for whereas a stranger to

(4) 19 C. W. N. 835 at p. 838; s. c. 20 C. L. J. 423 (1914)

(5) I. L. R. 31 All. 82 at p. 90 (F. B.) (1908).

(25) I. L. R. 18 All. 85 (1905).

(9) I. L. R. 31 All. 82 at p. 89 (F. B.) (1908)

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the suit who has purchased property that has been sold at an execution sale is not confined to an application under r. 95, but may bring a suit for possession within 12 years [Art. 130 of Sch. I of the Limitation Act, 1908; *Kishori Mohan v. Chandra Nath* (26)], a decree-holder who has purchased at such a sale, and whose title is derived from the same source as that of the stranger purchaser, must needs proceed under Or. 21, r. 95 if he desires to obtain delivery of possession, and only has 3 years within which he can make the application (Limitation Act, Sch. I, Art. 81). But the plea of hardship in the circumstances cannot, I think, be sustained, for the decree-holder obtains ample compensation for this restriction upon his rights as a purchaser in the speedy and summary methods by which he is enabled to secure possession of the property under Or. 21, rr. 95-103. On the other hand, a stranger to the suit who has purchased property at the execution sale is not, and ought not to be, placed in *pari conditione* with the parties to the suit or their representatives. He is not a party to the litigation and has no control over it; he is not bound by the decree; and if the decree is varied or reversed after the sale, what is that to him? His rights are not affected by a subsequent alteration in the decree, for "*bonâ fide* purchasers who were no parties to the decree which was then valid and in force have nothing to do further than to look to the decree and to the order for sale" [*Zainulabdin v. Ishaq* (13)]. It is because a purchaser who is not a party to the suit is not concerned with the litigation in the course of which the sale has taken place that his action in relation to the purchase is not within the

purview of the Court, and has not been brought within sec. 47.

The object of the legislature in enacting sec. 47 and the rules in Or. 21 relating to the execution, discharge and satisfaction of the decree was to provide a ready and inexpensive method by which a decree should be worked out, and to restrict the power of the parties unduly to prolong the litigation. With such matters a stranger purchaser has no concern.

Now, it is not contended that, after the execution sale has become absolute, the decree-holder ceases to be a party to the suit, and I can find no justification for refusing to recognize his real position as a party to the suit merely because he has himself purchased property sold in execution of a decree which he has obtained, for whether he purchases the property at the execution sale or does not do so, in either case he remains in law and in fact a party to the suit and bound by the decree which has been passed.

In my opinion, both upon a true construction of sec. 47 and Or. 21, and in accordance with the better opinion to be collected from the authorities, the contention of the Appellant must be rejected. *Prosanna Kumar Sanyal's* case (1), *Ganapathy's* case (8), *Dwar Buksh Sirkar v. Fatik Joli* (27), *Madhusudan v. Gobindapriya* (6), *Sariatoolah Molla v. Raj Kumar Roy* (17), *Motilal v. Makund Singh* (24), *Kashinatha Ayyar v. Uthu-*

(1) L. R. 19 I. A. 166: s. c. I. L. R. 19 Cal. 643 (1892).

(6) I. L. R. 27 Cal. 34: s. c. 4 C. W. N. 417 (1899).

(8) L. R. 45 I. A. 54: s. c. I. L. R. 41 Mad. 408; 22 C. W. N. 563; 27 C. L. J. 397 (1917).

(17) I. L. R. 27 Cal. 709: s. c. 4 C. W. N. 681 (1900).

(24) I. L. R. 19 All. 477 (1897).

(27) I. L. R. 26 Cal. 250 (1898).

(13) I. L. R. 10 All. 166 (P. O.) (1887).

(26) I. L. R. 14 Cal. 644 (1887).

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manisa Rowtham (28) and *Sadashivbin Madapa v. Narayana Vital* (22).

For these reasons I would answer the question propounded in the affirmative.

CHAKRAVARTI, J.—The question referred to the Full Bench is as follows :—“ Whether an order passed on an application under Or. 21, r. 95, C. P. C., by an auction-purchaser, who was also the decree-holder, is an order under sec. 47 of the Civil Procedure Code, and appealable as such.”

The facts are stated in the Order of Reference and need not be re-stated.

Sec. 47 of the Code of Civil Procedure runs as follows :—“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”

In order to arrive at a conclusion in this matter two questions arise :

1st. Is a proceeding under Or. 21, r. 95, C. P. C., a proceeding “ relating to execution of the decree?”

After a property is sold in execution, the Court occupying the position of the vendor has to deliver possession of the property sold by it to the purchaser. This duty Court undertakes in order to complete the sale by which the money due to the decree-holder has been realised. These proceedings may not be strictly a part of the execution before realisation of the money due under the decree, but they certainly arise out of the execution of the decree and is therefore related to it. R. 95 is in Or. 21 which is comprised under the general heading in the Code as “ execution of decrees and orders.” When an application under r. 95 is made

in execution of a decree for possession of specific immoveable property, the proceedings then not only relate to the decree but may also affect the decree itself.

The divergence of views on this question is not only confined to this Court but there is a singular concurrence in that divergence amongst the various High Courts in India. The question really is a question of procedure and does not affect substantive rights. Strong and cogent arguments may be adduced on either side of the question. The case of *Bhagwati v. Banwari* (9) is an illustration of this view. Reading the elaborate and learned judgments of Sir J. Stanley and of Mr. Justice Banerji maintaining the different views of the question, there are cogent reasons in support of the conclusions of both these learned Judges. But the question being a question of procedure, I think we should not lightly disturb the view taken by this Court and followed for a long time, unless such a view is inconsistent either with the language of the Code or of any authoritative judgment of the Judicial Committee of the Privy Council.

The Judicial Committee have strongly insisted upon all questions relating to execution being speedily disposed of under sec. 47, Code of Civil Procedure [see *Prasanna v. Kali Das* (1)].

It would be an unprofitable task to discuss all the cases on the point. I shall refer to two typical cases on each side so far as our Court is concerned. The view I take is supported by the case of *Ram Narain Sahu v. Bandi Prasad* (7) and the case of *Madhusudan Das v. Gobinda-*

(28) I. L. R. 35 Bom. 452 (1911).

(22) I. L. R. 25 Mad. 519 (1901).

(1) L. R. 19 L. A. 166 : s. c. I. L. R. 20 Cal. 683 (1902).

(7) I. L. R. 31 Cal. 737 (1904).

(9) I. L. R. 31 All. 82 (F. B.) (1903).

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prize (6). I agree with the reasons given by the learned Judges in those cases. The contrary view was taken in the case of *Sasi Bhusan Mookerjee v. Radha Nath Bose* (4). This case is important as it deals with both the points on which the answer to this Reference depends. The other case is that of *Bhimlal Das v. Ganesha Koer* (3). Some of the later cases simply followed this case.

In deciding the case of *Sasi Bhusan v. Radha Nath* (4), the learned Judges refer to five cases, namely, *Umakant v. Dino Nath* (29), *Kokil Singh v. Edul Singh* (30), *Bhuban Mohan v. Nanda Lal* (31), *Hira Lal v. Chunder Kant* (32), *Nemai Chand v. Dino Nath* (33) and *Rajoni Kanta v. Hossain Uddin* (34) which have taken a contrary view and they refer to three cases, *Bhimlal Das v. Ganesha* (3), *Mahomed Masraf v. Habil Mia* (2) and *Jagarnath v. Kartick Nath* (15) which support the view they took. It is quite clear, however, from the judgment that the learned Judges really followed the judgment of Mr. Justice Banerji in *Bhagwati v. Banwari Lal* (9). I think there is a preponderance of authority in this Court and I do not think that the acceptance of the decision of Mr.

Justice Banerji of the Allahabad High Court in any way satisfactorily settled the divergence of views in this Court which we are now called upon to settle.

The main argument, relied on by the learned Judges in deciding as to why a decision in proceedings for delivery of possession cannot be held to decide a question relating to execution, is that "it does not affect the decree in the least." It seems to me that a decision may well relate to execution of a decree although it might not affect the decree itself. The learned Judges, however, do not seem to be quite so strong in this view when they say—"But let us assume that by some stretch of language the order for delivery of possession to the purchaser may be deemed an order relating to execution of the decree." In these circumstances I think we ought to follow the other decisions of the Court which hold that a decision in proceedings for delivery of possession is a decision of a question relating to execution of the decree.

Then as to the second question, that is, as to "whether the question raised is between the parties to the suit." There is no doubt that an auction-purchaser at an auction sale has a character of his own distinct from that of either a decree-holder or a judgment-debtor. When therefore a question arises under r. 95 of Or. 21 of the Code, then it may be well said that the auction-purchaser who is an outsider is not a party to the suit. The third party auction-purchaser was not connected with the decree in any way before his purchase and therefore stands on a different footing from either the decree-holder or the judgment-debtor. But in the present case the decree-holder is the auction-purchaser, and the simple question is, does he cease to be a party to the suit after he has made his purchase

(3) 6 C. L. J. 749 (1904).

(3) 1 C. W. N. 658 (1897).

(4) 19 C. W. N. 835; s. c. 20 C. L. J. 433 (1914).

(6) I. L. R. 37 Cal. 34; s. c. 4 C. W. N. 417 (1899).

(9) I. L. R. 31 All. 83 (F. B.) (1908).

(15) 7 C. L. J. 436 (1900).

(29) I. L. R. 28 Cal. 4 s. c. 5 C. W. N. 124 (1900).

(30) I. L. R. 31 Cal. 385 (1904).

(31) I. L. R. 26 Cal. 324 (1899).

(32) I. L. R. 26 Cal. 539; s. c. 3 C. W. N. 403 (1899).

(33) 2 C. W. N. 691 (1898).

(34) 4 C. W. N. 538 (1899).

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at the sale held in execution of his decree? So far as this question is concerned, I think there is a long series of decisions of this Court in which the distinction between the decree-holder auction-purchaser and a third party auction-purchaser has been well-maintained. Bearing in mind the principle that all questions between the parties to the suit should be decided as speedily as possible, it appears to me that all questions as to the nature and extent of the property sold and the mode of delivery of possession of such property, when they arise between the decree-holder auction-purchaser and the judgment-debtor, should be disposed of by the executing Court. When the decree-holder is the auction-purchaser no question of any inconvenience arises, for he is a party to the suit, and being the decree-holder who brought the property to sale, he was well aware of the circumstances of the debtors and of the nature of the property which he put up for sale. A third party auction-purchaser is at a disadvantage in that respect and it may not be possible or convenient for him to fight out the judgment-debtor in a summary proceeding before the executing Court. A long series of cases of this Court have recognised the distinction between a decree-holder auction-purchaser and a third party purchaser.

This view finds some support from the judgment of the Judicial Committee in the case of *Ganapathy v. Krishnamachariar* (8).

I would therefore answer the question in the affirmative.

. P. D.

(8) L. R. 45 I. A. 54; S. C. I. L. R. 41 Mad. 408; 22 O. W. N. 558; 27 C. L. J. 307 (1917)

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES.

Nos. 1072 AND 1073 OF 1925.

SUBRAWARDY, J.
D. VAL, J.

1925, .
27, May.

NOGENDRA NATH ADITY
and ors., Plaintiffs,
Appellants,

v.

THE COMMISSIONER OF
THE PRESIDENCY DIVI-
SION and ors., Defend-
ants, Respondents

Bengal Municipal Act (III, B. C., of 1884)—Election rules framed by Local Government under the Act for Mofussil Municipalities—Candidates for election, if can withdraw at any time before closing of poll.

Under the rules framed by the Local Government under the Bengal Municipal Act for elections in the Mofussil Municipalities of Bengal (excluding Howrah) a candidate is entitled to withdraw at any time before the closing of the poll.

These were appeals preferred on the 14th May 1925 against the decree of the Officiating District Judge of Murshidabad (Mr. B. Mukerji), dated the 14th April 1925, confirming that of the Munsif at Berhampur (Babu Amulya Charan Chakravarti), dated the 9th February 1925.

The facts of the case will appear from the judgment.

Mr. N. Sarkar, Mr. S. C. Roy, Counsel, and Babu Amulya Chandra Sen for the Appellants.

Babu Surendra Nath Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

These two appeals arise out of two suits brought by certain persons who claim that they are the duly elected Municipal Commissioners for the Berhampur

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and Khagra Wards of the Berhampur Municipality. In one suit the Plaintiffs claim to have been locally elected to represent the Berhampur Ward and in the other suit the Plaintiffs made a similar claim in respect of the Khagra Ward. It appears that the elections took place on the 3rd September 1924. There were 11 candidates standing for the 5 vacancies in the Berhampur Ward and 14 candidates for the 4 vacancies in the Khagra Ward. After the polling commenced, 4 candidates from the Khagra Ward withdrew during the hours within which voters were admitted into the polling station. The time at which the doors were closed against every voter entering into the place for voting was 6 o'clock and under r. 17A the polling had to go on until all the voters in the polling station had recorded their votes. Shortly after 6 o'clock, apparently by some arrangement amongst the candidates, 6 out of the 11 candidates of the Berhampur Ward withdrew their candidature leaving 5 only, whom the polling officer then declared to be duly elected. Similarly in the Khagra election 6 candidates withdrew after 6 o'clock and this left, as the four had withdrawn previously, only 4 candidates who were also declared to be duly elected. Certain rate-payers approached the District Magistrate on the ground that these withdrawals were illegal. The District Magistrate held that they were illegal and in consequence the Commissioner of the Division has ordered a fresh election in respect of the two Wards. The present suits were thus brought against the Magistrate and Commissioner and the Petitioners before the Magistrate and have been decided against the Plaintiffs in both the lower Courts.

In the appeals before us there is no dispute with regard to the facts and it is now

clear that all the withdrawals took place before the poll was finally closed, though the majority of the withdrawals was made after the doors of the polling stations were closed against new voters coming in. The only question therefore before us is whether there is anything in the rules to prevent a candidate withdrawing after the voting has commenced and before it is concluded. Now it has to be admitted that the rules are silent on this point. The rules framed by the Local Government under the Bengal Municipal Act (as amended up to date for this Municipality) provide that if the number of candidates is not greater than the number of vacancies all the candidates shall be deemed to be elected. R. 21 (2) lays down generally that the name of any candidate who may have withdrawn his candidature shall be removed by the polling officer on receipt of information of withdrawal in writing. We understand these candidates all withdrew in writing. Thus there is nothing in these rules which at all fixes the time within which withdrawal before the closing of the polls will be allowed and after which it will be forbidden. The District Judge's point appears to have been that in the rules which the Government has recently made for elections for the Howrah Municipality under this Act, provision is made permitting withdrawal only up to a certain time, and reading these new rules with other election rules he thinks that the Howrah rule must be of universal application among the Municipalities of Bengal. His argument appears to be that as in the rules relating to Howrah there is such an arrangement and as in the rules for election to the Imperial Legislative Assembly and Provincial Legislative Councils (both sets of rules being of very recent date)—there

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are similar restrictions on withdrawal, a general principle forbidding any one to withdraw after the polling has commenced should be implied in these old local Municipal election rules (made in 1896) also. This argument appears to us to be fallacious. The fact that in recent years the Howrah Municipality has found it necessary to have its rules amended to prevent withdrawals after a certain time but that the ordinary rules which apply to the Berhampur Municipality continue as before seems to us to be an equally good argument that the framers of the Howrah amendments thought the time for withdrawal under the old rules lasted right up to the time of the closing of the poll. We are not, however, concerned with what modern draftsmen have thought about the old rules. It is our duty to interpret the existing rule as it applies to this and other Mofussil Municipalities in Bengal (excluding Howrah) and the fact that recent drafting has limited the right to withdraw is no argument, one way or another, as to the interpretation of the rules of 1896. We must therefore decide the case on the rules of 1896 and no other. In this connection we are fortified in the order which we consider is the only possible one by the decision of the Chief Justice, Allahabad High Court, in the case of *Sultan Bakhsh v. Abdul Hamid* (1) where exactly the same state of affairs arose. The suggestion of the learned Government pleader that a dispute between two persons for election is not the same as one where several dispute does not appeal to us. There were two candidates for two vacancies and during the course of the day one candidate withdrew. The High Court held interpreting the rules under which Muni-

cipal elections in that province are held that a candidate for election could withdraw his candidature at any time before the election was concluded. The rules in force in the Province of Agra are not word for word the same as the rules obtaining in Bengal but their purport is the same and in both there is no provision dealing with the time up to which withdrawals are valid. We must hold, in the absence of any restriction in the Bengal rules as to the time of withdrawal, that candidates are, under the existing rules, entitled to withdraw at any time before the closing of the poll and as it is admitted that the polling had not closed when these candidates withdrew, their withdrawal was lawful and the remaining candidates thereby were in consequence duly elected.

The appeals must therefore be allowed; but in the circumstances of the cases and as the Appellants do not press for them, we make no order as to costs.

S. C. M.

(1) E. L. R. 45 All. 645 (1926).

PRIVY COUNCIL

[APPEAL FROM ALLAHABAD.]

LORD DUNEDIN.
LORD ATKINSON.
MR. AMEEB ALI.
LORD SALVESSEN.
1924,
11, D cember.

MUSST. MAINA BIBI,
since deceased (now
represented by Chau-
dhri Khalilul Rahman
and ors.), and ors.,
Appellants,
v.
CHAUDHRI VAKIL
AHMAD and ors.,
Respondents.

Mahomedan law - Dower—Widow's right to retain possession till debt paid, nature of—Right, if like that of mortgagee—Decree, directing heirs to recover on payment of widow's dues for dower—Failure to pay by date fixed, effect of—Widow, if becomes absolute owner—Subsequent suit for recovery on payment of amount then due, if lies—Res judicata—Civil Procedure Code (Act V of 1908), sec. 11—Limitation—Widow, if may assign debt and possession—Parting with possession to vendee, effect of.

The possession of her husband's property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by Mahomedan law. The widow has no estate or interest in the property as has a mortgagee under a mortgage, ordinary or usufructuary, and the principles applicable to mortgages cannot be safely applied by analogy to such a case.

In a suit by the other heirs of the deceased husband to recover immediate possession of their shares of the estate on their paying to the widow such amount as should after proper deductions be found due to her on account of dower, the decree was that on paying the amount found due by a fixed date, the Plaintiffs would be put in possession of the shares in question. The payment was never made and more than 12 years after the date fixed for payment in the decree a fresh suit was instituted for recovery of possession on the ground that the dower-debt had been

wiped out from the usufruct or if any portion of it was still undischarged on condition of the Plaintiffs paying the amount that might be found due upon accounts being taken:

Held—That upon failure of the Plaintiffs in the previous suit to make the payment as directed in the decree, the widow did not become absolute owner of the property, but that the parties were relegated to the position in which they were before the suit; the res in the previous suit being different from that of the later suit, the trial of the later suit was not barred by res judicata.

That the suit was not barred by limitation.

That when the widow transferred possession of the properties to certain vendees, she lost her right to retain possession.

Quære.—Whether the widow could assign the dower-debt and her right to hold possession.

This was an appeal (No. 79 of 1922) by special leave from a decree, dated the 12th March 1919, of the High Court at Allahabad, affirming a decree, dated the 18th March 1916, of the Court of the Subordinate Judge at Allahabad.

The Plaintiffs, Respondents to the present appeal, filed the suit for possession of lands which were the property of a Mahomedan named Muin-ud-din who died on the 6th May 1890 leaving him surviving his widow Maina Bibi, and his cousin Barkat-un-Nissa who was the mother of the Plaintiffs.

On the death of her husband, Maina Bibi took possession of the said lands and obtained the entry of her name in the land registry.

In 1902 the present Plaintiffs-Respondents instituted a suit against Maina Bibi claiming seven-twelfths of Muin-un-din's estate. The said suit having come on for

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trial it was found that Maina Bibi's dower amounting to Rs. 51,000 had not been paid by her husband and that Rs. 25,387 was still due in respect thereof. On the 20th November 1903 it was decreed that the Plaintiffs should have possession "on condition that they pay to Defendant No. 1 (Maina Bibi) Rs. 25,387 within 6 months from the date of the decree; in case of non-payment of the said amount within the said time the Plaintiffs' claim be dismissed with costs."

This decree was affirmed on appeal in July 1906.

No payment having been made by the Plaintiffs within the period allowed, the suit stood dismissed with costs, and the widow remained in possession.

In 1907 Maina Bibi executed two deeds of gift (*hiba miltamlik*) of her husband's estate in favour of the Defendants-Appellants, and parted with her possession of the property in favour of the donees.

The Plaintiffs-Respondents filed the present suit in 1915 against the widow and her donees. They alleged that Maina Bibi had no right under the Mahomedan law to transfer the properties and claimed immediate possession of them unconditionally or alternatively on payment of the remaining proportionate amount of the dower-debt.

The Defendants pleaded that the previous decree affirmed on appeal in 1906 operated as *res judicata* against the Plaintiffs, and further that the Plaintiffs' claim was barred by limitation.

The trial Judge held that the Plaintiffs' claim was not barred by *res judicata*, that Maina Bibi had transferred the properties and not her unpaid dower-debt and made a decree in favour of the Plaintiffs adding that if her right to recover her unpaid dower-debt still exists, the widow may bring a separate suit for it.

The High Court on appeal affirmed the decision of the trial Judge holding that a Mahomedan widow in possession of her husband's estate in lieu of unsatisfied dower is not entitled to alienate that estate.

In regard to the plea of *res judicata* they said :—

"In the litigation of 1902 the Plaintiffs were held to be entitled to secure possession on the payment of Rs. 25,000 odd. Since then the situation has considerably altered. Musammat Maina Bibi was a party to the present suit, but she was not in possession of the estate of her deceased husband in lieu of her unsatisfied dower. She had parted with possession to her donees about eight years prior to the institution of the suit. The heirs seek possession of the property, and that can only be obtained from the donees of Musammat Maina. The right to retain possession has not been transferred (according to the contention of the Plaintiffs) to the donees, but the property itself has been transferred, and this, according to the Mahomedan law and the case-law, the lady could not do. The cause of action, therefore, is distinctly different from that in the former suit and the principle of *res judicata* does not apply."

Messrs. DeGruyther, K. C. and Kenworthy Brown for the Appellants.—The heirs must institute their suit for possession against the widow within 12 years. Throughout the period during which she was in possession the widow claimed an absolute title to the property and the heirs were contending that the dower-debt had been discharged.

She was in possession for nearly 12 years before the suit of 1902 and her adverse possession continued in spite of the decree in 1903.

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Subbaiya v. Maracayar (4).

Limitation Act, IX of 1908, Arts. 123 and 144.

Even if there is no period within which the heirs must bring their action for possession, having once brought an action, they cannot bring another without performing the condition laid down by the Court in the first action.

In 1903 the Court made a decree for possession conditional on the payment of the dower-debt by the heirs. That was a final decree, and failure by the heirs to pay the debt extinguished their right to possession.

The Court in 1903 made a decree on certain conditions; the penalty for not performing those conditions was dismissal of the suit. If the Plaintiffs are entitled to bring another suit now, the condition laid down by the Court is a nullity and there is no penalty.

Moreover, the Plaintiffs might have asked for a declaration of their title in the former suit. Having failed to do so, they are not entitled to it now.

Code of Civil Procedure, 1908, Or. 2, r. 2.

The second suit is for the same relief as the previous one and is barred by the operation of *res judicata*.

The position of a Mahomedan widow in possession in lieu of dower is analogous to that of a mortgagee.

After a failure to execute a decree for redemption a second suit for redemption will not lie.

Vedapuzatti v. Vellabha Valiya (5) and *Sita Ram v. Madho Lall* (6).

Secs. 58 (b), 92, 93, Transfer of Property Act, 1882.

Having got a decree the only method of obtaining relief was by execution, not by a fresh suit.

Code of Civil Procedure, 1908, sec. 47.

King v. Hoare (7).

The proper suit for the Plaintiffs to bring was an administration suit within 6 years of the widow's taking possession.

Ameer-don-Nissa v. Moorad-don-Nissa (3), *Bachun v. Hamid Husain* (1) and *Mirza Mahomed Sharapat v. Shahzadi Wahida* (8).

Sir G. Lowndes, K. C. and Mr. Dubé for the Respondents.—The plea of limitation was not raised in the High Court.

The decree of 1903 decided that the Plaintiffs were entitled to possession but not to immediate possession. The widow's possession after that date was not adverse to the Plaintiffs. By the deeds of gift the widow had set up an adverse title to the Plaintiffs and they were bound to bring the present suit.

(They were stopped.)

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal from a judgment and decree, dated the 12th March 1919, of the High Court of Judicature at Allahabad affirming the decree of the Subordinate Judge of Allahabad, dated about three years earlier, namely, the 18th March 1916. The main, if not indeed the determining, question for decision by the Board in this case is the proper construction and effect of a certain decree of the Subordinate Judge of Allahabad, dated the 28th November 1903, duly affirmed on the 3rd July 1906, by the aforesaid High

(4) L. R. 50 I. A. 295, 299; a. c. I. L. R. 40 Mad. 751; 28 O. W. N. 493 (1922).
(5) I. L. R. 25 Mad. 300 (F. B.) (1902).
(6) I. L. R. 24 All. 44 (1901).

(1) 14 M. I. A. 377, 383 (1871).
(3) 8 M. I. A. 211, 230 (1855).
(7) 13 M. & W. 424, 504 (1844).
(8) 19 O. W. N. 503 (1914).

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Court on appeal thereto. This latter decree was made in a suit brought by the present Respondents and others against the widow of the deceased owner of certain lands and premises described in the plaint in which she was then in lawful possession under a claim to hold the same until the dower-debt to which she was admittedly entitled should have been paid to her.

After the death, on the 6th May 1890, of this owner named Shaikh Muin-ud-din, a considerable amount of litigation was set on foot between several persons claiming to be interested in or have claims upon his property. This litigation has been fully dealt with in the clear and admirable judgments delivered in this case by the Subordinate Judge and by the High Court respectively. It is only necessary, however, in this appeal to refer to such of the suits as bear directly upon the questions requiring decision by the Board.

In addition, all these learned Judges have in their judgments cited and criticised with acuteness a great many authorities, analysed the evidence, and dealt fully with the relevant facts proved. As their Lordships agree with them in the conclusions of law and fact at which they have arrived, it is scarcely necessary for the third time, to cite and criticise more than one of these authorities, or to deal with the established facts in great detail. In their view the application of some few well-established principles of the Mahomedan law to the salient facts of the case will enable the appeal to be satisfactorily disposed of.

The widow of the above-mentioned owner of the property in suit, immediately on the death of her husband, admittedly took possession of his immoveable property, including the property in suit, and

procured her name to be entered on the registry as its possessor instead of his.

It appears to their Lordships that it will suffice to refer to only one of the authorities cited as to the rules of the Mahomedan law touching the rights and liabilities of Mahomedan ladies in relation to their claim for dower. That is the case [*Musammât Bibi Bachun v. Shaikh Hamid Husain* (1)], decided by this Board over fifty years ago, and accepted as a sound as well as a binding authority.

In that case a Mahomedan widow whose husband had died without issue was put into possession of her husband's estate as a co-heir and to secure her dower. The point in controversy was whether, having been so put into possession, she was entitled to retain it until her dower-debt was paid, to the exclusion of the other heirs of the deceased. It was held that she was so entitled. Sir Mortagu Smith in delivering judgment said, "The claim of *Musammât Bibi Bachun* to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower, for such a right does not arise by Mahomedan law as the consequence of any gift of dower, nor was there any agreement entered into on the part of the husband to pledge his estate for the dower. But the Appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and the Respondents cannot recover possession unless that satisfaction has taken place. It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although

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the right is so stated in a judgment of the High Court in a case of *Ahmed Hossein v. Musammatt Khadija* (2). Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained the possession until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This seems to be the ground upon which the claim of the widow to retain the possession of the property was put in the case of *Amcer-oon-Nissa v. Moorad-oon-Nissa* (3). This decision is well-supported by many authorities. In the first-quoted sentences of his judgment Sir Montagu Smith alluded to a feature of the case with which he was dealing which distinguishes it from the case of mortgage, usufructuary or other. In the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor. Any rights the mortgagee may get are conferred upon him by the mortgagor. In the present case, as well as in that dealt with by Sir Montagu Smith, neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or the bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower-debt is paid is conferred upon her by the Mahomedan law. The husband, when he grants dower to his wife, cannot, according to Sir Montagu Smith, by any original hypothecation of his property, secure to her the payment of it. But the

original and intentional hypothecation of the mortgaged property to secure the repayment of the mortgage debt is the very essence of every mortgage, usufructuary or other. The difference between a usufructuary mortgage and an ordinary mortgage is not so much a difference in the kind of security created as in the method of enjoying it. In each case the property of the mortgagor is pledged to secure the debt, and when the amount secured is paid, the property pledged must be returned to the owner. The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgage debt; while in the case of an ordinary mortgage of the usual sort it is in general not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately or at all, although he is empowered to do so if the interest on the mortgage money be not paid. Should he go into possession, he must account for the receipts just as must the usufructuary mortgagee. The widow who holds possession of her husband's property until she has been paid her dower has no estate or interest in the property as has a mortgagee under an ordinary mortgage. Mr. DeGruyther called the attention of the Board to the provision of the 58th and following sections of the Transfer of Property Act, and urged their Lordships to apply, by analogy, the principles embodied in those sections, at least in the case of usufructuary mortgages, to this case; but there are essential differences between the position of a Mahomedan widow entitled to

(2) 10 W. R. 309 (1865).

(3) 6 M. J. A. 211 (1855).

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..

dower, who, like the widow in the present case, enters upon her deceased husband's property lawfully and peaceably, and only claims to retain that possession till her dower-debt is satisfied, and the position and right of a mortgagee, usufructuary or other, to whom an owner pledges his property to secure the re-payment of a debt. There is no real or true analogy between the two. It has been well said that there is nothing more misleading than a false analogy. Their Lordships are therefore of opinion that in a case such as the present it would be on their part rash, if, indeed, not unwise, to attempt to apply either the provisions of those sections of the Transfer of Property Act or the principles these sections embody to the widows.

It is now necessary to turn to the examination of the pleadings filed in the suit of 1902, and the issues raised by them, with the view of ascertaining what was the *res* adjudicated upon in that case, and what was the effect upon the properties or other interests of the parties of the dismissal of that suit, or the non-payment by the Plaintiff to the widow of the sum found to be due to her.

In the plaint in that suit the Plaintiffs claimed, amongst other things, that it should be held that the Defendant No. 1, Maina Bibi, the widow, was in possession of her late husband's estate in lieu of her dower-debt, and that if any portion of that debt still remained to be recovered from the said estate, then a decree for the possession of the said estate might be passed in her favour upon the condition of the payment of such a proportionate amount of that debt as might properly be chargeable against their share of the property. Musammat Maina Bibi, in answer to this claim, filed her written statement on the 22nd May 1902. She alleg-

ed, amongst other things: (1) that her dower-debt, still unpaid, amounted to the sum of Rs. 51,000; (2) that her deceased husband had during his life-time given to her his entire immovable property in lieu of her dower-debt and put her into possession and enjoyment of the same; and (3) that since she had been so put into this possession of the said property she had, without any objection from the Plaintiffs or others, continued to hold that possession, as she was by every means entitled to do until the amount of her dower-debt had been fully paid. On these pleadings, issues were framed by the Subordinate Judge. The second of those issues ran thus: Was the property in suit given by the deceased Muin-ud-din by way of gift to the Defendant No. 1 in satisfaction of her dower, and, if so, is the gift binding on the Plaintiffs? His finding on this issue is to the effect that no evidence was offered by the Defendant No. 1 on the point, although she had raised the plea in her written statement; and that at the hearing the widow's pleaders accepted the finding arrived at in an earlier suit, in which she was Defendant, that, she was, with the acquiescence of the heirs of her deceased husband, in possession of the property in suit in lieu of her dower.

On the first issue the Subordinate Judge found that the amount of the widow's dower was, in fact, Rs. 51,000, and that the Plaintiffs in the suit had accepted that amount as accurate. These findings were not questioned on the appeal taken to the High Court; but in subsequent litigation the widow persisted in putting forward the defence, thus practically abandoned and never proved, that a gift had been made to her by her deceased husband of all his property in lieu of her dower. No satisfactory evidence has ever been given

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to support it. In addition to the claims for relief already mentioned, the Plaintiffs put forward the following :—

That—

"(b) If it be held that Defendant No. 1 is in possession (of the estate) in lieu of her dower-debt and that any portion of it is still to be recovered from the estate of Shaiikh Moin-ud-din mentioned in lists 'A,' 'B' and 'C,' then a decree for possession may be passed on condition of payment of that proportionate amount of dower which may be charged against the Plaintiffs' share.

"(c) A decree for mesne profits from November 1890 to April 1902 or for any amount which may be found due by the Court against Defendant No. 1 may be passed in favour of the Plaintiffs. It has presently been laid at Rs. 1,232 for payment of court-fee, but in case the amount exceeds the above a further court-fee will be duly paid.

"(d) *Mesne profits*—*pendente lite* and future till the date of possession together with interest and the costs of this suit and interest may be awarded to the Plaintiffs against Defendant No. 1.

"(e) Other necessary directions which may be deemed essential for justice to the Plaintiffs may be given."

Upon these claims the Subordinate Judge arrived at the following findings :—

"25. If it be held that Defendant No. 1 should render an account, then she is entitled to charge in that account interest at the rate of Re. 1 per cent. per mensem on the entire amount of the dower-debt, other debts, funeral expenses, cost of new construction and the amount spent on the repairs of the house.

"26. The claim for moveable property is time-barred.

"27. The claim for mesne profits is time-barred.

"28. The Plaintiffs are not entitled to receive any mesne profits and the amount is excessive."

He took an account between the parties and came to the conclusion that the amount then due to Maina Bibi in respect of her dowers amounted, after making all just and proper deductions, to Rs. 25,387-6-5, and on the 23rd November 1903, made a decree, the curial part of which runs as follows :—

"It is ordered and decreed that the Plaintiffs be put in possession of a seven-twelfth share of the property specified in lists 'A,' 'B' and 'C,' mentioned above on condition that they pay to Defendant No. 1 Rs. 25,387 within six months from the date of the

decree, in case of non-payment of the said amount within the said time, the Plaintiffs' claim be dismissed with costs.

"It is further ordered that Defendants Nos. 1 and 4 do pay to the Plaintiffs Rs. 650-8-0 on account of costs of this suit, which has been charged against them. And it is further ordered that in case the claim be dismissed the Plaintiffs do pay Rs. 240-12-0 to Defendant No. 1 on account of the costs of this suit which has been charged against them."

From this decree the Plaintiffs appealed to the High Court of Allahabad. The appeal is numbered 6 of 1904. The grounds of appeal are stated to be—(1) that the Subordinate Judge should not have awarded interest to the first Defendant as he did; (2) that the profits of the property in suit up to the time fixed for payment should have been set off against the amount due; (3) that the six months allowed for payment should have been directed to commence from the date of the decree becoming final. The appeal did not come on for hearing till the 3rd July 1906. It was on that day dismissed with costs. The decree of the Subordinate Judge was confirmed, but modified by the provision that the time for payment of the amount found to be due should be extended to the 3rd December 1906. No payment has, in fact, ever been made by the Plaintiffs or any of them in discharge of the sum awarded to the widow by this decree of the 28th November 1903, and the suit in which it was made accordingly stood dismissed.

It is a suit in which the Plaintiffs claimed to be entitled to proprietary possession of a 7/12th share in the property mentioned in the two lists attached to the plaint, they also claimed, in effect, to have been entitled to that possession, not only at the date of the plaint, but for the 18 months previous, because they claimed a decree for mesne profits from November 1890 to April 1892, which they would not otherwise have been entitled to, and

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also claimed mesne profits *pendente lite* and in the future till the date of possession. Their claim, therefore, is for immediate possession of this property. Their suit is a suit to recover that immediate possession, based upon the facts alleged in the 5th and 6th paragraphs of the plaint, namely, (1) that the only dower the widow was entitled to was *Fatimi* dower amounting to Rs. 107, and (2) that the dower-debt had long previously been paid from the properties mentioned in the lists A, B and C.

It is this claim to get immediate possession of the property in suit and this claim alone which has been dismissed, and yet it has been strenuously and ingeniously argued by Mr. DeGruyther that the right of the Plaintiff to recover possession of this land at any time subsequent to the decree, or under any circumstances, however changed, is absolutely barred—in fact, that the right is lost for ever.

The Plaintiffs themselves are willing that in the circumstances mentioned in the plaint a condition for payment should be attached to any claim that may be made. That, however, does not alter the matter. The condition actually attached to the decree might have been performed at any time up to the 3rd December 1906. It is the dismissal, which comes into effective operation on that day, not before, that, it is urged, has barred for ever the claim of the Plaintiffs to recover possession.

The Subordinate Judge has, in their Lordships' opinion, stated with perfect accuracy in the following passage of his judgment what was the legal effect upon the rights of the parties of the non-payment of the sum directed to be paid on the 3rd December 1906:—He said:—

“It is contended on behalf of the answering De-

fendants that as the decrees in the previous suit provided that the suit shall stand dismissed in the event of non-payment by the Plaintiffs within the time fixed and that as the Plaintiffs did not comply with that decree their proprietary right to the property claimed was extinguished and Musammut Maina Bibi became the absolute owner from the expiration of the period fixed for payment and that Plaintiffs' claim is barred by the rule of *res judicata*. Having given my best consideration to that contention and to the various authorities cited on each side, I am unable to accept it as sound. The only interpretation which I can reasonably put on that decree is that it simply declared that if the Plaintiffs wanted to have immediate possession of the property claimed, which Maina Bibi was entitled to hold till her dower-debt was satisfied, and discharged out of the usufruct or otherwise, they must pay the amount found due to her by a certain date and that if they did not pay that sum they would not be entitled to immediate possession. The order of dismissal in the event of non-payment did not, I think, mean that if the Plaintiffs failed to make the payment within the time fixed they would be deprived of their proprietary right to the property and of their right to recover the property when the dower-debt due to Maina Bibi should be discharged either out of the usufruct or by the Plaintiffs at some future date. The effect of dismissal on the Plaintiffs' failure to comply with the previous decree was simply that the parties were relegated to the position in which they were before that suit was brought.”

The defence of *res judicata* is dealt with in sec. 11 of the Code of Civil Procedure of 1908.

That section runs as follows:—

“11. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

One asks oneself what was the *res* that was adjudicated upon, either on the 25th November 1903, or in the Court of Appeal on the 3rd July 1906? The things in dispute in the first case were (1) the right of the Plaintiffs to recover immediate possession of the land in suit, (2) the amount of dower, and (3) the rate of interest.

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he two latter matters have been decided that suit and cannot be re-opened. he suit out of which this appeal arises ly asks for an adjudication as to the count since 1903. The right to get immediate possession of land at the date hen a suit to recover it is, in fact, instituted, is a wholly different thing, a wholly different *res*, from the right to recover it ; some future time, and possibly under wholly altered circumstances. The non-fulfilment of the condition attached to the decree in the earlier suit only extinguished the right to recover immediate possession actually claimed, and could not and did not, in their Lordships' opinion, extinguish the right of the Plaintiffs to the inheritance of, or their rights to recover possession of, the lands at some future time. That fact prevents this section from applying. The matter in issue in the first suit was not directly and substantially raised in issue in the second, even if the provision as to the identity of the parties was satisfied.

In the deed of gift executed by Maina Bibi, dated the 18th March 1907, the decree of the 3rd July 1906 is recited. The non-payment by Plaintiffs in the suit of 1902 of the sum found in that suit to be due, namely, Rs. 25,387-5-0, is also recited, and it is alleged that these Plaintiffs have no longer any right to the estate of her husband, deceased, that the donees in that deed and the Plaintiff in the last-mentioned suit were parties to the partition suit mentioned in the deed, and made no objections to it. Then follows a statement, purporting to be made on her behalf, running thus :—

"As they (i.e., the Plaintiffs) have not yet deposited the amount in the Court, they have no longer any right whatever to the property, and I, the executant, have in every way become an absolute owner of the property specified below, and I have up to this day been in proprietary possession and enjoyment thereof

without the participation and interference on the part of anyone else. Hence I, the executant, while in a sound state of mind and body, and while competent to exercise all necessary and lawful appropriations, have, of my own free will and accord, without compulsion, coercion and inducement on the part of anyone else, voluntarily made a 'hiba biltamlik' of the entire zamindari property specified below."

She bases her claim to absolute ownership of her husband's property, not as formerly on a gift from him *inter vivos*, but on the default of the Plaintiffs in the suit of 1902 to pay the money directed to be paid by them to her. This is a wholly absurd claim. The deed of the 12th June 1907 is as to this point substantially to the same effect as the former, and both are ineffective for the purposes apparently designed by those who framed them.

The present suit was commenced on the 22nd July 1915, 9 years and 19 days after the date of the decree in the High Court in the first suit, namely, the 3rd July 1906.

It was instituted by the three sons of Musammat Barkat-un-Nisa, who was a cousin german of the deceased owner Shaikh Muin-ud-din (and were therefore the latter's right heirs according to the Mahomedan law), against Maina Bibi, the donees in the two deeds of 1907, and others.

The plaint contains a very lengthy and detailed statement of all the previous litigation between the party litigants, its results; and what the Plaintiffs contend are their rights. The relief they now pray for runs as follows :—

That—

"The Plaintiffs may, without paying any amount, be put in proprietary possession of the zamindari property specified in list (C) the share in suit of the houses specified in list (D) left by Muin-ud-din as against Defendants Nos. 2 to 6.

"If the Court hold that the Plaintiffs are not entitled to obtain possession without paying the remaining proportionate amount of dower-debt they may, as against Defendants Nos. 2 to 6, be put in possession

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of the zamindari property specified in list (C) and the share in suit of the houses specified in list (D) conditional on their paying the amount which may, after deducting the profit of the property, be found under account to be payable by the Plaintiffs.

"Costs of this suit may be awarded against contesting Defendants."

One written statement in answer to this plaint was filed by Defendants Nos. 1 to 5 and another by Chaudhri Muhammad Isa, one of the donees in the deed of 1907. In both of these statements it is admitted that his lady was, as an heir of her husband, entitled to one quarter of his immoveable estate, and alleged that she was, and still continued to be, in possession of the entire of this estate in lieu of her dower-debt of Rs. 51,000. It is also admitted that the Plaintiffs in the suit of 1902 failed to pay the sum awarded to the widow on or before the 3rd December 1906, or, indeed, at all. Several of the pleas put forward were found by the Sub-ordinate Judge to be quite unsustainable. The only pleas of any importance relied upon were (1) that the suit instituted in July 1915 was barred by sec. 11 of the Code of Civil Procedure, and that the claim of the Plaintiffs was barred under the provision of that statute by a lapse of 12 years between the date of the decree in the first suit and the commencement of the second suit.

These pleas have been already dealt with. They are, in their Lordships' view, quite unsustainable. It was contended, as their Lordships understood, that Musammat Maina Bibi had by the deeds of 1907 assigned both her dower-debt and her right to hold possession of her husband's estate until that debt was paid. It is doubtful whether she could have done either of these things, but however that may be, it is clear she, in fact, never purported or attempted to do either of them. On the contrary, in those deeds she des-

cribes herself as the absolute owner of the property of her deceased husband, and purports to convey that absolute ownership to her donees. There is no ground for the contention, if it has been really put forward, that because these deeds fail to effect a transfer of the absolute interest with which they purport to deal, they operate to transfer the widow's dower-debt and her right to hold possession of the lands till that debt is paid. By giving up the possession of the lands, as in her deeds she alleges she has done, she has undoubtedly lost her right to hold the possession of them. Their Lordships express no opinion on the point whether her representatives may not be entitled to recover the unsatisfied balance of the dower-debt. If she has that right this judgment does not alter or interfere with its exercise in any way.

She and her advisers have, in their Lordships' opinion, taken an entirely erroneous view of the effect of the non-payment by the Plaintiff in the suit of 1902 of the sum decreed to be due to her. That failure did not convert her into the absolute owner of the immoveable property of her deceased husband, of which she had been in possession, nor did it confer upon her any proprietary interest in it or any right to dispose of it. The judgment appealed from was, in their Lordships' opinion, for the above-mentioned reasons right, and should be affirmed, and this appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]**APPEAL FROM ORIGINAL CIVIL JURISDICTION****NO. 35 OF 1926.**

SANDERSON, C. J. | SUKUMARI DEBI
RANKIN, J. | v.
1926, | MUGNERAM BHANGAR
20, April. | & Co.

Civil Procedure Code (Act V of 1908), sec. 145, scope of—Security given by stranger, enforcement of—Suit or application in execution—Or. 34, r. 14 scope of, much more limited than of sec. 99 of the Transfer of Property Act (IV of 1882).

In a suit brought by M against G, G was allowed an adjournment of trial of the suit, on his creating a charge to secure M's claim, in favour of the Registrar, on certain immoveable properties, in which G's wife, the Appellant, had certain interests. In the trial a consent decree was passed on certain terms and the Defendant undertook through his Counsel to obtain consent of the Appellant to the terms. The terms, inter alia, were that the decretal amount would be paid in certain instalments and the security would continue until fresh security was furnished instead, and on failure to pay three consecutive instalments, the whole of the decretal amount would be payable. "Decree-holders in such case may execute the decree irrespective of their rights against the security and may execute against the security." The Appellant by a letter agreed to the terms of the consent decree. Default was made and the decree-holders applied for execution, inter alia, by sale of the properties secured to the Registrar:

Held—On the facts of the case, that G as also the Appellant agreed to the terms of the consent decree and as such the security might be realised by means of execution and no separate suit to enforce the charge was necessary.

Held further—That sec. 145 of the Civil Procedure Code did not (the surety

not having made herself personally liable) apply to the matter.

BETI MAHALAKSHEN BAI v. RADAN SINGH (1) dissented from.

RAJ RAGHUBAR SINGH v. JAI INDRA BAHADUR SINGH (2) relied on.

Per RANKIN, J.—The true construction of sec. 145 is that which has been laid down in the case of **AMIR v. MAHADEO PRASAD (4)**, but where the security is given to the Court itself, a fresh suit is not necessary, irrespective of sec. 145.

In view of the fact that sec. 47, C. P. C., makes it difficult as regards a judgment-debtor to insist upon or permit a separate suit for the enforcement of the security, it seems that it is open to a person giving security to waive the necessity for a suit subject at least to the remarks made by Lord Davey in the case of **KHARAJ MAL v. DIAM (7)**.

SADASIVA v. RAMALINGA (5) and SUBRAMANIAN CHETTIAR v. RAJA OF RAMNAD (6) referred to.

Or. 34, r. 14, C. P. C., is of much more limited application than what had been sec. 99 of the Transfer of Property Act.

TOKHAN SINGH v. GIRWAR SINGH (3) explained.

INDRAPAL v. MEWA LAL (8) referred to.

This was an appeal against the judgment of Mr. Justice Buckland, dated the 27th January 1926, delivered in the exercise of Ordinary Original Civil Jurisdiction.

(1) I. L. R. 45 All. 649 (1923).

(2) L. R. 46 I. A. 228; s. c. I. L. R. 42 All. 158 (1919).

(3) I. L. R. 32 Cal. 494; s. c. 9 C. W. N. 372 (1905).

(4) I. L. R. 39 All. 225 (1916).

(5) L. R. 2 I. A. 219; s. c. 24 W. R. 193 (1875).

(6) I. L. R. 41 Mad. 327 (1917).

(7) I. L. R. 32 Cal. 296; s. c. 9 C. W. N. 201 (P. C.) (1904).

(8) I. L. R. 36 All. 264 (1914).

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The facts material to the report are clearly set out in the judgment.

Messrs. Langford James and B. C. Ghose for the Appellant.

Messrs. N. Sircar and B. K. Ghosh for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Sukumari Debi against a judgment of my learned brother Mr. Justice Buckland delivered on the 27th January 1926.

There was a suit which was brought by Mugneeram Bhangar & Co., who carried on business as stock and share brokers, against the Defendant Guru Pada Hal-dar. The Appellant Sukumari is the wife of the Defendant. An adjournment of the trial of the suit was obtained on or about the 15th August 1924, upon condition that the Defendant should give security by depositing with the Registrar documents of title of properties to the extent of one lac of rupees for securing the Plaintiff's claim to that extent. The case was adjourned until after the vacation.

It appears that the Defendant and his wife deposited the title deeds of certain properties with the Registrar. The properties are set out in the decree which was made by my learned brother on the 27th January 1926. The Defendant was the owner of most of the properties, but the Appellant, the Defendant's wife, was the owner of one plot and had a leasehold interest in the other plots mentioned in the decree. The case came on for hearing in November 1924 and then a consent decree was made. The material parts of the decree which was dated the 14th November 1924 are as follows :—“ The parties having agreed to the terms of settlement set forth in the schedule hereto annexed and marked ‘ A ’ and the De-

fendant through his Counsel undertaking to obtain the consent of his wife to the said terms, it is declared with the consent of the parties by their respective Counsel that the said terms ought to be carried out and the same are ordered and decreed accordingly.”

The terms of the settlement in Sch. A, referred to in the decree, dated the 14th November 1924, are as follows :—“ There will be a decree for Rs. 1,37,000 with interest at 6 per cent. in full payment of all claims and costs including all existing orders for costs payable by 22 monthly instalments commencing from the 2nd January 1925, the first 21 instalments to be at the rate of Rs. 6,000 each and the final instalment for the balance. Interest is payable on the amount outstanding at 6 per cent. to be paid on the 1st January 1926, and on the date fixed for payment of final instalment of decretal amount.

“ Security is to be furnished in the shape of immoveable property or war bonds to the extent of Rs. 1,60,000 on the certificate of Mr. C. K. Sarkar on or before the 1st January 1925 : until such security is given the present security to remain. The Defendant undertakes to obtain his wife's consent to these provisions.

“ On failure to pay three consecutive instalments, the whole amount of the decree to become payable. Decree-holders in such case may execute the decree irrespective of their rights against the security and may also execute against the security.

“ Neither party has any claim against the other in suits Nos. 2750 and 2619 of 1922 and no order is made in those suits which will therefore stand dismissed save that in all those suits there is a direction for taxation of costs as between attorney

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and client, including the fees actually paid to Counsel."

The Appellant wrote a letter addressed to the Plaintiffs Mugneeram Bhangar & Co. on the same day. The letter runs thus:—"With reference to the consent decree made in the suit to-day in which you have allowed my husband Guru Pada Haldar to pay the decretal amount by 21 monthly instalments of Rs. 6,000 each and the balance together with interest on same at 6 per cent. payable on the 1st January 1926 and at the time when the last instalment is payable and with reference to the security bond executed by me in the above suit, I agree to the decretal security continuing until the decretal amount is paid off in full or other security for Rs. 1,60,000 in war bonds or immoveable property is furnished by my husband in substitution of such security."

Default was made in the payment of the instalments and on the 16th of December 1925 an application was made for execution of the consent decree and the mode in which the assistance of the Court was required was by the appointment of a Receiver of the plots which I have already mentioned. A Receiver was appointed on the 16th December 1925. It may be mentioned at this stage that that order of the 16th December 1925 appointing the Receiver was subsequently set aside, certain objections having been taken to it: but the appointment of the Receiver was made effective by the order of my learned brother on the 27th January 1926.

On the 22nd December 1925 the Defendant and the Appellant executed a bond which recited that they were held and firmly bound unto the Registrar of this Court to the extent of one lac of rupees, for which payment they bound themselves jointly and severally. It recited the order of the 15th August 1924, and that

they had deposited the title deeds by way of security for the Plaintiffs' claim and that the Registrar had accepted the same and had also accepted the Defendant and the Appellant as sureties sufficient for the sum of rupees one lac. The condition of the bond was that if the Defendant should duly pay the amount that might be decreed in favour of the Plaintiffs or if the suits were dismissed, then the bond should be void and of no effect.

It was stated during the course of the argument that the intention was that the bond should be signed at the time when the title deeds were deposited with the Registrar. For some reason, which has not been made apparent to me, the execution of the bond did not take place until the 22nd of December 1925.

The matter came before my learned brother on notice calling upon the Defendant and the Appellant to show cause why a Receiver should not be appointed and why the decree should not be executed by sale of the property to which I have referred. The learned Judge stated in his judgment that the only point which was argued before him was whether the decree-holder could realise the security in execution or whether it was necessary for the decree-holder to file a suit for that purpose.

Several cases were cited before the learned Judge to which reference is made in his judgment. I am not quite clear upon what principle the learned Judge purported to act. I think that the learned Judge regarded (in fact he so stated) the matter as simply one of form and that it did not present any difficulty in the way of the applicant's obtaining the order asked for.

Accordingly he appointed a Receiver and directed that the Receiver should sell the property, to which I have referred, by

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public auction to the best purchaser that could be got, provided that he considered that a sufficient sum had been offered. There was a further direction as regards the disposition of the sale proceeds.

In this Court reference was made to the authorities, which were mentioned in the learned Judge's judgment, and an argument was presented with reference to sec. 145 of the Civil Procedure Code.

It was argued on behalf of the Appellant that sec. 145 would not authorise the order which the learned Judge made in this case.

I do not think it necessary to refer to any of the cases cited in this Court except one, which I will presently mention, because in my judgment the facts of this case are such as to differentiate it from any of the authorities cited.

The position, in my judgment, is clear. The Defendant agreed that a decree should be made against him for Rs. 1,37,000 with interest, and that it should be paid by instalments therein mentioned, that security should be furnished by the 1st January 1925 and that until such security was furnished, the "present security" should remain, that is to say, the title deeds which had been deposited in August 1924 by the Defendant and his wife, the Appellant, with the Registrar of this Court.

The Defendant further agreed that if he failed to pay three consecutive instalments, the whole amount of the decree should become payable and the decree-holder in such case might execute the decree irrespective of his right against the security and might also execute against the security.

The security, against which the decree-holder was entitled to execute, was the property, the title deeds of which had been deposited by the Defendant and his

wife and which were to remain as security upon the terms of the consent decree until further security was given or the money paid. That is what the Defendant agreed to: and it is clear from the terms of the decree which I have already mentioned that the Defendant through his Counsel undertook to obtain the consent of his wife to the said terms.

In my opinion the consent of the Appellant to the terms of the consent decree was in fact obtained as appears from the Appellant's letter of the 14th November 1924 to which I have referred.

I am of opinion upon the terms of that letter, reading it by itself, that the Appellant agreed to the terms of settlement which are contained in the decree. When, however, it is remembered that the Defendant through his Counsel undertook to obtain the consent of his wife to the terms of the consent decree, there cannot be any doubt that the intention of the parties was that the properties, the title deeds of which had been deposited with the Registrar by the Defendant and his wife, the Appellant, should remain as security for the performance of the terms of the consent decree.

In that event not only the Defendant but also the Appellant agreed that if three consecutive instalments remained unpaid, the whole amount of the decree should become payable and the security should be realised by means of execution.

The instalments were not paid as they became due, and no other security was furnished and in view of the terms of the consent decree I see no answer to the application for execution which was made on behalf of the Respondents.

I am therefore of opinion that the conclusion, at which my learned brother arrived, was right, although I am not able

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to agree with the grounds on which he relied.

Before I conclude my judgment I desire to refer to one case which was cited in the course of the argument, viz., *Beti Mahalakshen Bai v. Badan Singh* (1). The head-note runs thus:—"Where a person stands surety for the due performance of a decree and by way of security hypothecates immovable property, without undertaking any personal liability thereunder, then so long as the surety still retains the equity of redemption of the hypothecated property, the security bond can under sec. 145 of the Code of Civil Procedure be enforced against the property directly by execution, and there is no necessity for the filing of a separate suit on the bond."

With great respect to the learned Judge, who decided that case, I am unable to say that, as at present advised, I should be prepared to adopt the conclusion which was therein made. It seems to me that the decision is inconsistent with the judgment of the Judicial Committee in the case of *Raj Raghobar Singh v. Jai Indra Bahadur Singh* (2).

In that case Lord Phillimore is reported to have said: "In the course of the judgments in India sec. 145 was referred to; but whatever might have been its effect if the sureties had been personally liable it has no application now that their Lordships have construed the instrument as giving only a charge upon property."

In the Allahabad case to which I have referred the learned Judge came to the conclusion that the surety had not undertaken a personal liability, but that, there was a clear "indication that the money which might be found due on the decree

passed in appeal would be realisable in the first instance from the judgment-debtor, and that if the judgment-debtor did not pay the same, it would be realisable from the property hypothecated by the surety."

It seems to me, as at present advised, that in the circumstances stated in that case and having regard to the decisions of the Judicial Committee, to which I have referred, sec. 145 would not be applicable.

The learned Judge's order will stand, but by consent between the parties the property will not be sold until the 20th June 1926. Either party may apply to the Court for such directions as may be necessary in connection with the sale. When the property is sold, the sale proceeds will be paid into Court. Each party will then be at liberty to apply for such directions as may be necessary.

The appeal is dismissed with costs. It has been agreed by the parties that the Receiver should not take possession of the property for a fortnight from this date.

RANKIN, J.—I agree. In this case there was a consent decree of the 14th November 1924 and, apart altogether from the terms of settlement which are scheduled to the decree, the consent decree itself says that the Defendant through his Counsel undertook to obtain the consent of his wife to the said terms; and it was ordered that the Defendant on the 1st of January 1925 should furnish security to the extent of Rs. 1,60,000 in immovable property or in war bonds to take the place of the security already furnished which was security for the sum of Rs. 1,00,000 only. The terms of settlement need not be read again. They contain a provision that the decree-holders might execute against the security, and though it is arguable that this does not refer to the present security, I think it difficult to maintain this. The letter of the 14th November 1924 refers to

(1) J. L. R. 45 All. 649 (1923).

(2) L. R. 40 I. A. 225; a. c. I. L. R. 42 All. 158 (1919).

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the terms of the consent decree and, in my opinion, it is to be regarded as a consent on behalf of the lady to the whole arrangement made by her husband. The points which had to be made specially clear were, first, that there should be no question whether the surety had been released by giving time to the principal debtor, and, secondly, that there should be no question that the sums of money to be recovered under the consent decree were in truth and in substance a *bond fide* adjustment of the Plaintiffs' claim for which the lady had given security. In these circumstances, the question whether it is necessary to bring a new suit so far as the lady is concerned raises considerable difficulty.

Apart from cases where the security has been given to the Court itself and not to any person who can be regarded as a mortgagee, the main case that requires to be considered is the decision of Mr. Justice Harrington and Mr. Justice Mookerjee in 1905 in the case of *Tokhan Singh v. Girwar Singh* (3). That case was not dissented from in any way by the Privy Council in 1919 by the judgment delivered by Lord Phillimore in the case of *Raj Raghubar Singh v. Jai Indra Bahadur Singh* (2). On the other hand, it was sufficient for their Lordships' purpose that there was no mortgagee who could institute a suit. There are three points which have to be carefully considered in connection with *Tokhan Singh's* case (3).

The first point is that since that case was decided the Code of 1908 has clarified and limited the provisions of what is now sec. 145. I think the true construction of sec. 145 is that which was laid down by

Sir Prinoda Charan Banerji in the case of *Amir v. Mahadeo Prasad* (4) decided in 1916. The case itself ultimately turned out to be erroneous in this respect that, as we now know from the judgment of Lord Phillimore, it does not follow, because sec. 145 does not apply, that a separate suit is necessary or possible. This is not so if the security is given to the Court itself and not to a mortgagee.

The second point about the decision in *Tokhan Singh v. Girwar Singh* (3) that requires attention to-day is that the terms of sec. 99 of the Transfer of Property Act have been abolished and in place thereof there is the very different and much more limited provision of r. 14 of Or. 34 of the Code. The claim in that case was held to be one which did not arise under the mortgage as is the claim against the Defendant here and it is doubtful whether the Appellant can say that the case as against her is within the words of Or. 34, r. 14.

The third thing which has to be observed about that decision is that although in that case the Plaintiff had taken an assignment of the security from the Registrar the learned Judges do not appear to have directed their attention to the provisions of what is now sec. 47 of the Code. The security in that case was given by the judgment-debtor himself and the cases of *Sadasiva v. Ramalinga* (5) and *Subramanian Chettiar v. Raja of Ramnad* (6) show that sec. 47 makes it difficult as regards a judgment-debtor to insist upon or permit a separate suit for the enforcement of the security. It seems that it is open to a person giving security to

(3) I. L. R. 32 Cal. 494; s. c. 9 C. W. N. 272 (1905).

(4) I. L. R. 39 All. 225 (1916).

(5) I. L. R. 2 I. A. 219, 223; s. c. 24 W. B. 102 (1875).

(6) I. L. R. 41 Mad. 327 (1917).

(2) I. L. R. 46 I. A. 228; s. c. I. L. R. 42 All. 158 (1919).

(3) I. L. R. 32 Cal. 494; s. c. 9 C. W. N. 272 (1905).

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waive the necessity for a suit subject at least to what was said by Lord Davey in the case of *Khiaraj Mal v. Diam* (7).

I am not prepared to say that such an order as this could be obtained under sec. 145. If this case is regarded as a purely monetary decree available against a surety, then execution under that decree must, it seems to me, be on one or other of two principles—either it is execution against the bare equity of redemption for the mortgage debt, a thing which this Court will not allow and which would be directly contrary to what was laid down by Lord Davey in the case already mentioned, or it must be an execution on the basis that the rights under the mortgage have been waived entirely. I would like to point out that under the Transfer of Property Act, under sec. 99, there was a very respectable body of authority in the case-law to the effect that a mortgagee could not execute upon the mortgaged subject and get out of the restrictions of sec. 99 even by waiving the mortgage rights. One instance of such a case is *Indrapal v. Mewa Lal* (8). The same principle would seem to apply where r. 14 of Or. 34 is applicable and I am, therefore, not prepared to commit myself to the proposition that this order could be upheld by the Plaintiffs endeavouring to take their stand upon sec. 145.

However in this case the two parties concerned in this joint bond, viz., the Defendant and his wife, charged different interests in the same property which it would be inconvenient and wasteful to realise separately by sales in different Courts and at different times. I see great difficulty in realising the Defendant's interests save by proceedings under sec. 47

(7) I. L. R. 32 Cal. 296, 310 : s. c. 9 C. W. N. 201 (P. C.) (1904).

(8) I. L. R. 36 All. 964 (1914),

and as I think that both intended to agree that the matter should be thrashed out in execution, I think the judgment of the learned Judge should be supported.

It was suggested before us for the first time that the letter of the 14th November 1924 was void for want of registration. I am not prepared to say that independently of any enquiry or investigation into the facts it is plain that that letter was intended as a complete re-statement of the contract for security by way of equitable deposit so as to constitute the bargain. As the letter does not even mention the amount of the original security it would be difficult to say that : but in any case I do not think that that point can be taken in this Court for the first time in view of the necessity for investigating into the facts from that point of view.

We are not informed of any third parties whose interests require to be consulted, nor is there any difficulty in providing that a reasonable further time for redemption shall elapse before the sale is held.

Mr. J. N. Mukherji, Solicitor for the Appellant.

Messrs. Dutt & Sen, Solicitors for the Respondents.

S. N. B.

(CIVIL APPELLATE JURISDICTION.)

APPEALS FROM APPELLATE DECREES

Nos. 52 TO 55 OF 1924.

B. B. GHOSE, J.	}	FAZLAR RAHAMAN
GRAHAM, J.		BISWAS and ors.,
1926,		Defendants, Appellants,
Heard, 17 and		v.
18, March		GOLAM KADER MIA and
Judgment,		ors., Plaintiffs,
18, March.		Respondents.

Bengal Tenancy Act (VIII of 1886), secs. 108, 109B, 109, 147B—Indian Evidence Act (I of 1874),

FAZLAR RAHAMAN BISWAS v. GOLAM KADER MIA.

sec. 35 — Whether entry in record-of-rights, presumptive evidence, only in suit between landlord and tenant as such or in all suits.

Sec. 147B of the Bengal Tenancy Act does not in any way limit the operation of sec. 103B of that Act, under which the presumption of correctness of an entry in a finally published record-of-rights arises generally and not merely in suits between landlords and tenants.

The record-of-rights being a public record prepared by public officers appointed under the statutory authority of the Local Government is admissible under sec. 35 of the Evidence Act, and the record being an official act done within the jurisdiction of the public officer, it has a presumptive value of its correctness.

RAI BHAIYA DIRGAJ DEO BAHADUR v. BENI MAITO (1) *relied on.*

RAJA SASI KANTA ACHARJEE BAHADUR v. SANDHYAMONY DASSYA (2) *referred to.*

An entry in the record-of-rights operates in the same way between landlord and tenant as between the landlords of the same or neighbouring estates and between tenant and tenant.

BIBI WAKILAN v. DEO NANDAN PROSAD (3) and MAZHARAL EKBAL v. RAJA GOPAL LAL RAI (4) *approved of.*

SHEIKH BARKAT ALI v. BASANT NUNIA (5) and GAJADHAR PROSAD SINGH v. SHRO NANDAN PROSAD SINGH (6) *referred to.*

These were appeals against three decrees of Babu Mahendra Nath Das, Officiating 1st Subordinate Judge of Zilla Faridpur, dated the 14th of August 1923, reversing those of Babu Srish Chandra Day, Munsif, 2nd Court, Goalando, dated the 31st of January 1923.

(1) 22 C. W. N. 439 (P. C.) (1917).

(2) 26 C. W. N. 423 (1921).

(3) 5 F. L. J. 681 (1920).

(4) [1924] Pat. 213.

(5) 31 C. W. N. 175 (1915).

(6) 23 C. W. N. 304 (1918).

The facts of the case will appear from the judgment.

Dr. Jadunath Kanjilal and Babu Hemendra Chandra Sen for the Appellants.

Babu Profulla Kamal Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

GHOSE, J.—These appeals arise out of three suits brought for recovery of possession of different plots of land. The suits were dismissed by the trial Court. On appeal by the Plaintiffs, the Subordinate Judge has reversed the decision of the Munsif and has decreed the suits. The Defendants appeal before us and the only point argued on their behalf is that the presumption under the record-of-rights under sec. 103B of the Bengal Tenancy Act does not arise in these cases. What happened was this: The Subordinate Judge held that these plots of land according to the Cadastral Survey did not appertain to the Defendants' holding but appertained to the holding of the Plaintiffs. It was contended before him by the Defendants that the Plaintiffs had got other co-sharers who were necessary parties and that the Plaintiffs could not claim the entire interest in the plots in question. With reference to this contention, the learned Subordinate Judge observed as follows:—“The Settlement records fully support the Plaintiffs and the presumption arising from the same in their favour has been supported by the testimony of P. W. 6 Khandkar Altapar Rahaman, one of the alleged co-sharers. It is not improbable that there was an arrangement between the Plaintiffs and their co-sharers by which the Plaintiffs got the three plots in question in their exclusive possession.” Upon that finding, he passed decrees in favour of the Plain-

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tiffs. The argument addressed before us is based upon the provisions of sec. 147B of the Bengal Tenancy Act and it is, first, contended that the entry in the record-of-rights is only evidence in a suit between landlord and tenant as such and cannot be used as evidence in a case between tenant and tenant. This argument is based upon a note in the 5th Edition of Mr. Sen's well-known work on the Bengal Tenancy Act. This argument, in my opinion, has the merit of novelty, because it is well known that the record-of-rights has been used as evidence—and it has been of frequent occurrence—in a case between one tenant and another with regard to possession of property. Nevertheless, when this objection has been raised, it should be properly dealt with. It seems to my mind that sec. 147B of the Bengal Tenancy Act has not the effect which it is urged it has upon the provisions of sec. 103B of the Act. Sec. 147B provides that the Civil Court shall have regard to the entries in the record-of-rights relating to the subject-matter in dispute in all suits between landlord and tenant as such. This provision is certainly not in limitation of the provisions of sec. 103B which enacts that the entry in the record-of-rights shall be presumed to be correct unless it is proved by evidence to be incorrect. Sec. 147B simply says that the Court shall have regard to the entries in such record-of-rights. The expression "shall have regard" ordinarily means shall consider as of value or of importance; but certainly the provision in this section does not mean that the Court will not presume the entries to be correct until the contrary is shown. This section, 147B, was inserted in the Act by the Amending Act I of 1907 and it seems to me that it was inserted as a matter of abundant caution directing the attention of the Court to the

fact that, in all suits between landlord and tenant, the entries in the record-of-rights should be taken into consideration. What the legal effect of such entries is must be held to be provided under sec. 103B of the Bengal Tenancy Act. It might, however, be argued on behalf of the Appellants that the record-of-rights having been prepared under Chap. X of the Bengal Tenancy Act which is an Act according to its preamble to amend and consolidate certain enactments relating to the law of landlord and tenant should not be used as evidence in a case which is not one between landlord and tenant. But it is quite clear that the provisions of that Chapter are of wider application than merely to questions between landlord and tenant and cannot be limited to suits between landlord and tenant only. It may also be pointed out and, in fact, this has been conceded, that it being a public record prepared by public officers appointed under the statutory authority of the Local Government is admissible under sec. 35 of the Evidence Act. It is argued, however, that, although it is admissible under sec. 35 of the Evidence Act, there is no presumption about its correctness. With regard to that contention, the answer seems to be that, where an official act has been done within the jurisdiction of the public officer, the record will have a presumptive value of its correctness. In the case of *Rai Bhaiya Dirgaj Deo Bahadur v. Beni Mahto* (1) Lord Parker of Waddington in delivering the judgment of the Judicial Committee observed with regard to a register of Minhaidari villages as follows: "Now, clearly the register is an official document and, therefore, it is admissible in evidence under sec. 35 of the Indian Evidence Act. It may be possible that, in the case of such a document, if it

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could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part might not be admissible; but no attempt has been made to show this in the present case. The document has been admitted by both the Courts below as proper evidence in the case and their Lordships see no reason to reverse or to vary that decision." In the present case, there is no doubt that under sec. 102, cl. (a) of the Bengal Tenancy Act, it was the duty of the Settlement Officer to record the name of each tenant or occupant. In case of mistake, a suit might have been brought under sec. 106 to correct the record-of-rights where the land had been recorded as part of a particular estate or tenancy. Therefore, it is admissible and there is a presumption as to its correctness. I may also add that the record-of-rights has been admitted as evidence and a presumption has been raised as regards its correctness in the case of *Raja Sasi Kanta Acharjee Bahadur v. Sandhyamany Dassya* (2). In that case, the Bengal Tenancy Act did not apply to the property with regard to which the record-of-rights had been made. The Chief Justice in delivering the judgment of the Court said: "I am not prepared to go so far as to say that in this case no presumption arose from the entry in the record-of-rights; but I am prepared to say that the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights." In the present case, the Subordinate Judge has relied on the presumption in favour of the Plaintiffs and also on the evidence which supports that presumption. It has been held in two cases in the Patna High Court, namely, the cases of *Musstf. Bibi*

(2) 20 C. W. N. 483 (1921).

Wakilan v. Deo Nandan Prosad (3) and *Mazharul Ekbal v. Rajah Gopal Lal Rai* (4) that an entry in the record-of-rights operates in the same way between landlord and tenant as between landlords of the same or neighbouring estates and between tenant and tenant. I do not see any reason to differ from that conclusion. There are several cases of this Court, to some of which our attention was drawn by the learned vakil for the Respondents, namely, the cases of *Sheikh Barkat Ali v. Basant Nunia* (5) and *Gajadhar Prosad Singh v. Sheo Nundan Prosad Singh* (6), in which this presumption of the record-of-rights was applied in cases of disputes between tenant and tenant. This argument of the Appellants, therefore, fails. The result is that the decrees of the Appellate Court are confirmed and these appeals are dismissed with costs.

GRAMHAM, J.—I agree. Sec. 103B, sub-sec. (3) of the Bengal Tenancy Act has, in my opinion, been in no way limited or restricted by sec. 147B of that Act. If the intention of the legislature had been that the operation of that section should be limited to cases between landlord and tenant, that intention would have been clearly expressed. The words of 103B (3), as they stand, are plain and unqualified and I do not think that we ought to read into them a meaning which they do not express. Sec. 147B was an amendment made in 1907 and the circumstances in which that amendment came to be made are explained in the notes on the clauses of the Bill where it was stated as follows:—"The proposed sec. 117B is intended to define more clearly the force to be attached to entries

(3) 5 P. L. J. 681 (1920).

(4) [1924] Pat. 213.

(5) 21 C. W. N. 175 (1915).

(6) 23 C. W. N. 304 (1918).

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in the record-of-rights in proceedings and suits between landlord and tenant as such. Under the present Act, such entries are presumed to be correct until the contrary is proved. But cases have occurred which indicate that it is doubtful whether the Courts pay sufficient attention to this presumption. It is proposed, therefore, to provide that the Courts shall have regard to the entries in the record-of-rights unless such entries have been proved by evidence to be incorrect, and that when a Court passes a decree at variance with such entries, it shall record its reasons for so doing." Clearly therefore the amendment was not intended to qualify in any way the law as it already stood. The object in view was merely to invite the attention of the Courts to the necessity of having regard to the entries in the record-of-rights. I agree accordingly with my learned brother that these appeals must be dismissed with costs.

P. K. D.

(CRIMINAL APPELLATE JURISDICTION.)

GOVT. APP. NO. 1 OF 1926

WITH

APPLICATION NO. 129 OF 1926.

SUBRAWARDY, J.	THE SUPDT. & REMEM-
DOVAL, J.	BRANCER OF LEGAL
1926,	AFFAIRS (ASSAM),
Heard, 22, April.	Appellant,
Judgment,	v.
5, May.	G. C. WILSON,
	Respondent.

Jury trial—Duty of Judge when verdict confused and unintelligible—Duty of Judge to explain law to jury clearly—Impropriety of placing before the jury Codes and legal treatises—Heads of charges must convey sufficient information as to explanation of law and important questions of fact.

Where the verdict of the jury is confused and unintelligible it is the duty of the Judge to obtain from them a proper

and correct verdict before accepting the verdict given.

Under the law of procedure it is the duty of the Judge to explain to the jury the law applicable to the case and it is the duty of the jury to accept the law as laid down by the Judge without any extraneous aid. If the jury is unable to understand the law fully and clearly it is the duty of the Judge to explain it to them afresh, but in doing so he cannot place before them the Code or any legal treatise for the purpose of finding out the law.

Under sec. 367 the Judge is not to write a judgment but to record the heads of the charges to the jury; but as an appeal lies to the High Court in jury trials it is necessary that the charge recorded should be such as to convey sufficient information to the Court as to the explanation of the law by the Judge and about important questions of fact.

This was an appeal preferred on the 2nd February 1926 against the order passed by the Sessions Judge of Sylhet (Mr. A. De. C. Williams), on the 4th December 1925, acquitting, in agreement with and acceptance of the verdict of the jury, the accused of the charge under sec. 304, I. P. C.

The facts of the case will appear from the judgment.

Mr. Khundkar, Deputy Legal Remembrancer and Babu Satyendra Kishore Ghose for the Appellant.

Mr. James, Counsel and Babu Pannalal Chatterjee for the Accused.

The JUDGMENT OF THE COURT was as follows :—

SUBRAWARDY, J.—This is an appeal by the Crown against the order of acquittal of the Respondent in respect of a charge under sec. 304, I. P. C. The prosecution story is that the Respondent, who is the

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manager of a tea estate known as Madhabpur Tea Estate in the District of Sylhet in Assam, went out on a round of inspection of the garden in the forenoon of the 30th June 1925. He was not satisfied with the work of the deceased cooly Dasarath Gowala. He called the cooly to his presence and ordered him to proceed with the work of hoeing, but being dissatisfied with the manner of his work, seized the deceased by the neck and struck him with his clenched fist and the deceased fell down, whereupon the accused kicked him. The deceased expired shortly after the assault. On these allegations the accused was placed before the Committing Magistrate charged with an offence under sec. 304, I. P. C., and was subsequently committed to the Court of Sessions on that charge. In the Court of Sessions the charge framed by the Committing Magistrate under sec. 304, I. P. C., was maintained and the trial proceeded until after the case for the prosecution was closed and the Public Prosecutor had finished his address. During the course of the address by the Respondent's pleader a further charge under sec. 352, I. P. C., was added in these words—"That you slapped Dasarath cooly and thereby used criminal force to him." The jury consisting of three Europeans and two Indians brought in a majority verdict of guilty against the accused under sec. 334, I. P. C., only. The following questions were put by the Judge and the answers given by the jury:—

Q.—Are you unanimous?

A.—No.

Q.—In what proportion you are divided?

A.—3 to 2 on one charge, unanimous on the other.

Q.—What is your verdict?

A.—Not guilty under sec. 304, I. P. C., unanimous verdict.

Q.—And for the rest?

A.—We find the accused guilty under sec. 334, I. P. C., by a majority of 3 to 2, namely, that the accused voluntarily caused hurt on grave and sudden provocation.

On the face of it the verdict of the jury is ambiguous. They acquitted the accused unanimously of the charge under sec. 304, I. P. C., and said nothing about any finding of a charge minor to it. The only other charge that remained against the accused was one under sec. 352, I. P. C., and under that charge he could not be convicted under sec. 334, I. P. C., which is not a minor offence to the offence under sec. 352, I. P. C. The verdict, as it stands, means that the jury found that the accused was not guilty of an offence under sec. 304, I. P. C., as he did not cause such injuries to the deceased as would likely cause death nor did the accused know that they were likely to cause death; but they believed that he caused hurt to the deceased (it is not clear whether by the slap or the kick) and therefore he committed an act which would be an offence under sec. 323, I. P. C., but the hurt having been caused under grave and sudden provocation he was guilty of an offence under sec. 334, I. P. C. Though they had found him not guilty under sec. 304, I. P. C., they could have convicted him under secs. 325, 323 or 334, I. P. C., as a minor offence to one under sec. 304, I. P. C., but they were asked by the Judge to give their verdict in respect of the second charge, namely, the charge under sec. 352, I. P. C. Even if it be conceded that the verdict of guilty under sec. 334, I. P. C., was brought in under the first charge, then there is no verdict in respect of the second charge, namely, the one under sec. 352, I. P. C. The verdict of the jury being thus confused and unintelli-

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gible it was the duty of the learned Judge to obtain from them a proper and correct verdict before accepting the verdict given. *Khirode Kumar Mukherji v. King-Emperor* (1). On this ground alone it cannot be said that there was a proper trial.

There is also another irregularity committed in the trial, which has been the cause of the unsatisfactory verdict of the jury. In his written heads of charges to the jury the learned Judge observes that "when the jury were retiring they were supplied with a copy of the Indian Penal Code." This practice has always been disapproved. *Jaspath Singh v. Queen-Empress* (2) and *Empress v. Bharmia* (3). Under the law of procedure it is the duty of the Judge to explain to the jury the law applicable to the case and it is the duty of the jury to accept the law as laid down by the Judge without any extraneous aid. If the jury is unable to understand the law fully and clearly it is the duty of the Judge to explain it to them afresh, but in doing so he cannot place before them the Code or any legal treatise for the purpose of finding out the law; if he does so he fails in his duty. Under the second charge under which the jury brought in the verdict of guilty against the accused, he could not have been convicted under sec. 334, I. P. C.; but if the jury believed that the offence was committed under grave and sudden provocation the proper section applicable was sec. 358, I. P. C.

I am further of opinion that the summing up of the learned Judge as placed before us has not been satisfactory. The learned Judge merely indicates the points which he must have developed in his

oral address to the jury but they were not given with sufficient fullness to enable us to ascertain that his summing up was proper and free from any misdirection. It is true that under sec. 367, Cr. P. C., the Judge is not to write a judgment, but to record the heads of the charges to the jury, but as an appeal lies to this Court in jury trials, it is necessary that the charge recorded should be such as to convey sufficient information to this Court as to the explanation of the law by the Judge and about important questions of fact. The necessity for this has been consistently insisted upon by this Court; *Panchu Das v. Emperor* (4) and *Abdul Gafur v. The King-Emperor* (5). Certain expressions too in the charge appear to me to verge on politics—expressions much to be regretted.

It will be an evil day for the administration of justice if political considerations are to influence the judicial mind of the Judge which should be free from all taint of bias on political, racial, social or personal grounds.

There are other irregularities in the Judge's charge which need not be dilated upon, as the points which I have mentioned are sufficient to induce me to set aside the trial in the Sessions Court. Then as to what order we should pass: I may mention that the present appeal is under sec. 417 and not under sec. 449, Cr. P. C. Though in the petition the Crown asked for either a conviction under sec. 325 or a re-trial the learned Deputy Legal Remembrancer mainly argued for a re-trial and this course, I think, will be the more satisfactory. I would therefore order that the order of the Sessions Judge appealed against acquitting the accused of an offence under sec. 304, I. P. C., and the

(1) 29 C. W. N. 54; a. c. 40 C. L. J. 555 (1924).

(2) 1 L. R. 14 Cal. 164 (1886).

(3) 9 Bom. L. R. 268 (1905).

(4) 1 L. R. 34 Cal. 698 (1907).

(5) 26 C. W. N. 998 (1922).

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conviction of the accused under sec. 334, I. P. C., be set aside and that he be re-tried with a fresh jury in accordance with law. At the re-trial it will be open to the Sessions Judge to frame fresh charges under proper heads, if necessary. I do not express any opinion on the merits of the case and on the points of fact urged before us. If he so desires the fine, if paid by the Respondent, should be refunded to him. The accused will remain on the same bail until further orders by the Sessions Judge.

A petition in revision has also been filed on behalf of the Crown praying for an enhancement of the sentence passed on the accused if his conviction under sec. 334, I. P. C., is maintained. As we have set aside his conviction under that section and ordered a new trial no order is necessary on the application.

DEVAL, J.—I agree.

S. C. M.

(CRIMINAL APPELLATE JURISDICTION.)

APP. No. 696 OF 1925.

C. C. GHOSE, J.	} Ah Soi, Appellant,
DUVAL, J.	
1926,	
25, February.	} THE KING-EMPEROR,
	Respondent.

Criminal trial—Witness for prosecution acting as interpreter—Impropriety of proceedings vitiating trial.

In a trial on a charge of murder one of the witnesses for the prosecution acted as interpreter and he interpreted the evidence of the witnesses including his own evidence to the accused:

Held—That it was a procedure which was absurd from the very outset and opposed to elementary ideas of justice. That a witness who had taken an active part during investigation, who had given evidence in the Committing Magistrate's Court on behalf of the prosecution and

who was found to be ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man who was charged with very serious offences under secs. 302, 304, I. P. C., should have been chosen to act as interpreter in the case was a procedure which called forth severe condemnation and was highly irregular, the irregularity being of such a nature as to border on illegality.

This was an appeal against the order of Babu D. P. Ghose, Additional Sessions Judge of the 24-Parganas, dated the 22nd July 1925.

The facts of the case will appear from the judgment.

Mr. Barwell (Counsel) and Babu Sachin Banerjee for the Appellant.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

In this case the accused Ah Soi, who is a Chinaman, was tried before the learned 3rd Additional Sessions Judge of the 24-Parganas and a jury on the charges under secs. 302 and 304, I. P. C. The jury found him guilty of an offence punishable under sec. 304, I. P. C., and thereafter the learned Judge sentenced him to transportation for life.

It appears from the record before us that the trial in this case has been conducted in a way which is highly irregular. Indeed, the irregularity is of such a nature as to border on illegality and having regard to the facts stated below we have no further alternative but to set aside the conviction of, and sentence passed on, the accused.

It appears that a Chinaman named Lewis acted as an interpreter in this case. From a very early stage of the investiga-

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tion by the police this Chinaman named Lewis had interested himself on behalf of the prosecution. The charge against the accused was that he had murdered his elder brother. The deceased brother of the accused was the head-joiner in the Clive Jute Mill at Matiabruz and the accused was his assistant. Both the brothers used to live in the cooly lines within the Mill compound. The deceased used to occupy one room and the accused occupied a room just immediately to the north of the deceased's room. It appears that the deceased used to pay the rents for both the rooms to the Mill authorities. On the 20th April last the two brothers quarrelled between themselves over the payment of their wages. The deceased used to draw both his and his brother's wages but the accused did not like this and on the 20th April last which was a pay day he complained to the clerk in charge of the workshop that his brother was extravagant and was not paying him his wages and he asked for the issue of his pay-ticket to him personally. Thereupon an order was made for the issue of pay-tickets to the two brothers separately but at the time of payment the elder brother did not turn up and the accused received the wages on behalf of both the brothers. Some time later the accused came to the clerk and complained to him that his elder brother had taken away all the money from him and he wanted to go away from the place. The two brothers subsequently quarrelled between themselves in the lines where they were living. On the following morning, that is, 21st April 1925, a Chinaman who was working in the old Mill as a carpenter came to the Assistant Manager and reported to him the death of the brother of the accused. Information was then sent to the police and the

Sub-Inspector of the Matiabruz thana came to the Mill and held an inquest on the dead body of the brother of the accused and sent the same to the dead house at Mominpur. The Sub-Inspector came again at about 3 P.M. in the afternoon and examined the accused and the deceased's son and on the son having told the Sub-Inspector that the accused had murdered his father the Sub-Inspector arrested the accused. He then searched the room of the accused, which had been locked up and which was opened in the presence of the Manager of the Mill. Lewis, the Chinaman, referred to above, came with the accused and the deceased's son and was present at the search.

Thereafter the Committing Magistrate held an inquiry and sent the accused up for trial before the Sessions Court. Lewis was one of the witnesses examined for the prosecution before the Committing Magistrate and it appears from the record that he was employed as an interpreter in the Court of the Sessions Judge in this trial. The evidence of the witnesses was interpreted to the accused by Lewis. Lewis himself gave evidence as stated above on behalf of the prosecution in the Sessions Court, being the ninth witness for the prosecution and it appears that he interpreted his own evidence to the accused in his own vernacular.

We regret to have to say that the procedure which was adopted by the learned Sessions Judge has had the effect of placing the accused more or less at the mercy of the interpreter Lewis. It was a procedure which was absurd from the very outset and opposed to elementary ideas of justice. That a witness who had taken an active part during the police investigation, who had given evidence in the Committing Magistrate's Court on behalf of the prosecution, and who was

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found to be ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man who was charged with very serious offences under secs. 302 and 304, I. P. C., should have been chosen to act as an interpreter in this case is a procedure which has only to be stated to call forth our severe condemnation. We trust that a thing like this will never happen again.

We must therefore set aside the conviction of, and the sentence passed on, the accused and direct that he be re-tried by the Second Additional Sessions Judge of the 24-Parganas according to law on such charges as the prosecution may be advised to bring against him. Let the record be returned as soon as possible.

S. C. M.

PRIVY COUNCIL.**[APPEAL FROM ALLAHABAD.]**

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.
1925,
4, December.

JAWAHIR SINGH,
Appellant,
v.
UDAI PARKASH and
ors., Respondents.

Hindu law—Mitakshara family—Antecedent debt, what is—Contract of sale to pay off mortgages frustrated by intervention of pre-emptor—Sale to pre-emptor, if to pay off antecedent debt—Suit to set aside sale by younger sons, after eldest son's claim had become barred through attaining majority earlier, if also barred—Limitation Act (IX of 1908), secs. 7 and 8.

A Mitakshara father entered into negotiations for sale of family property with one U in order to discharge certain debts due to money-lenders upon mortgages and a deed of sale for a consideration of Rs. 13,000 was actually drawn up in favour of U, when D intervened as pre-emptor and obtained a decree for purchasing the property on payment of Rs. 13,000. D accordingly paid the amount and the pro-

perly passed to him. The mortgagees had been paid off pending the suit;

Held—That the sale to D could in no sense be regarded as a sale to pay off the antecedent debt due to the mortgagees.

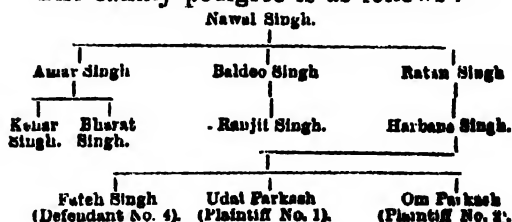
A contract for a loan which never was completed to pay off a previous debt otherwise discharged is not an "antecedent debt" as defined in SAHU RAM CHANDRA v. BHUP SINGH (1).

The fact that one of the sons of the vendor had attained majority so long before this suit to set aside the sale by his younger brothers that, if brought by him, it would have been time-barred, did not affect the undoubted rights of the Plaintiffs to sue within the extended period of limitation to which their minority at the date when the cause of action arose entitled them.

This was an appeal (No. 22 of 1924) from a decree, dated the 3rd July 1922, of the High Court at Allahabad which varied a decree, dated the 6th August 1920, of the Subordinate Judge of Meerut.

The property in suit originally belonged to a Hindu proprietor named Nawal Singh whose descendants are the present Plaintiffs.

The family pedigree is as follows:—



In 1906 Harbans Singh purported to sell the property to Udal Ram and Bhagwana for Rs. 13,000. A suit for pre-emption was, however, brought by Dalip Singh who obtained a decree and was given possession of the property. The

(1) L. R. 44 I. A. 126 at p. 133; s. c. I. L. R. 39 All. 437; 31 O. W. N. 698 (1917).

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present Appellant is a transferee from Dalip Singh and was the principal Defendant in the suit out of which this appeal arises.

The Plaintiffs contended that the sale in 1906 was of ancestral property without legal necessity. The Defendants urged that the sale was in discharge of an antecedent debt and for lawful necessity.

They further contended that the alienation could have been challenged by Fateh Singh, and no such challenge having been made the suit was barred under the provisions of secs. 7 and 8 of the Limitation Act.

The Subordinate Judge decided that the suit was barred by limitation.

He held that the entire purchase money was obtained by Harbans Singh for lawful necessity and for the benefit of the joint family.

The High Court on appeal reversed the finding on the question of limitation. On the question of legal necessity they held that Harbans Singh was not competent to sell the property, and that there was no evidence to show that Dalip Singh made any enquiry as to the purpose for which the purchase money was to be used.

Mr. B. Dubé for the Appellant.

The Respondents were not represented.

Their LORDSHIPS' JUDGMENT was delivered by

MR. AMEER ALI.—This is an *ex parte* appeal from a decree of the High Court at Allahabad, dated the 3rd July 1922, and arises out of a suit brought by the Plaintiffs on the 14th September 1919, for a declaration that a sale effected by their father, Harbans Singh, in 1906, in favour of one Dalip Singh, was not justified by any such necessity as would validate the transaction against the other members of the joint family of which Harbans Singh was the

head. Dalip Singh's interests have been acquired by the present Appellant, Jawahir Singh. The trial Judge held that the Plaintiffs had not made out a sufficient case to invalidate the sale to Dalip Singh. He was also of opinion that the Plaintiffs' claims were barred by the Statute of Limitation (Act IX of 1908) as Fateh Singh, their eldest brother, had attained majority long ago and had not questioned the sale. He accordingly dismissed the Plaintiffs' suit.

On appeal to the High Court the learned Judges overruled the plea of limitation. They relied on the decisions of their own Court and differing from the view taken by the Madras High Court* on which the Subordinate Judge had rested his judgment, they held that the conduct of Fateh Singh, the eldest brother, did not affect the undoubted rights of the Plaintiffs. They also held that, save and except Rs. 1,400, the Defendant-Appellant had failed to establish that the consideration for the transfer of the property to Dalip Singh was for any such necessity as would make the transaction valid against the sons. They accordingly set aside the order of the first Court and made a decree in favour of the Plaintiffs for recovery of the property in suit, subject to their paying into Court within three months from the date of their decree, for the benefit of the Defendant Jawahir Singh, the sum of Rs. 1,400. They further directed that if payment should not be made within the prescribed period the suit should stand dismissed with costs throughout.

From this decree Jawahir Singh has appealed to His Majesty in Council. The same contentions that were urged in the High Court have been advanced before the

* *Vignewara v. Bapayya*, I. L. R. 16 Mad 496 (1893); *Doraishami v. Salwan*, I. L. R. 38 Mad. 118 (1922).

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Board. It becomes necessary, therefore, to set out some of the facts which have either been established or admitted in these proceedings.

Harbans Singh, the father, at the time he sold the property to Dalip Singh, owned a moiety of the village of Shikohpur, in the District of Meerut. The property was admittedly ancestral, in which his sons were jointly entitled. The family consisted of himself and three sons, the eldest of whom, Fateh Singh, is Defendant No. 3.

Sometime in 1900 Harbans Singh became involved in debt, and he appears to have executed a mortgage of the property in favour of three money-lenders, Girwar Singh and two others. In order to discharge this debt Harbans Singh entered into negotiations with one Udai Singh for the sale of the family property. A sale deed was actually drawn up in his favour for a consideration of Rs. 13,000. Thereupon Dalip Singh put forward a claim of pre-emption in respect of the property that was going to be sold. His right of pre-emption was based on the village custom which, being questioned, came before the Court and was judicially affirmed. The price of Rs. 13,000 was fixed for the joint family's moiety. The pre-emption decree in favour of Dalip Singh bears date the 27th of August 1906. Dalip Singh, it is admitted, paid Rs. 13,000 to Harbans Singh, which he unquestionably appropriated to his own use. It further appears that whilst the pre-emption suit was proceeding the debt to Girwar Singh and the two other money-lenders was admittedly paid off. At the time of the pre-emption sale Harbans Singh executed a receipt for Rs. 13,000, dated the 19th of December 1906, in favour of Dalip Singh, stating the particulars of the moneys received by him from Dalip Singh.

As the learned Judges of the High Court

point out, save and except the third item in the receipt relating to a promissory note for Rs. 1,000, dated 30th March 1904, executed by Harbans in favour of Dalip, which, together with interest, amounted to Rs. 1,400, it showed no consideration of an antecedent character so as to make it binding on the sons. With reference to this part of the transaction the learned Judges say as follows:—

"What we are concerned with is the position of Dalip Singh, who deliberately took it upon himself to thrust himself into this matter by asserting his claim to pre-empt the sale. He, therefore, made himself liable for any legal consequences which might result from the fact that he was intermeddling with a sale contracted by a Hindu father who had minor sons living jointly with him. He handed over Rs. 2,000 to Harbans Singh in cash on 10th December 1906. He arranged with certain other persons to pay Harbans Singh Rs. 5,000 more in cash and he gave Harbans Singh a mortgage of property of his own for Rs. 4,000, the consideration of which was set down as forming part of the Rs. 13,000 which he was bound to pay under the decree in the pre-emption suit. There remains only a small sum of Rs. 1,400 which was set off against an antecedent debt, that is to say, against money previously advanced by Dalip Singh to Harbans Singh, not on the security of any alienation of joint family property in the hands of the latter, but on a simple promissory note. The date of this promissory note was more than 2½ years prior to the execution of the receipt of 19th December 1906. There seems no reason to doubt that there was real disassociation in fact as well as in point of time between the two transactions."

It is contended that certain expressions used by their Lordships in the case of *Sahu Ram Chandra v. Bhup Singh* (1) that debts contracted by the father "in order to raise money to pay off an antecedent debt" support the view that in the present case the sale to Dalip Singh was to pay off an "antecedent debt," viz., the money due to Girwar Singh and his associates. In their Lordships' opinion the contention is wholly untenable; as the High Court point out, the debt to Girwar and others had already

(1) L. R. 44 I. A. 120 at p. 133; a. c. L. R. 30 All. 437; 31 C. W. N. 606 (1917)

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been paid off: and no portion of the Rs. 13,000 which Harbans Singh received from Dalip Singh was applied to its discharge.

The doctrine of "antecedent debt" has been carried far enough; if the present contention is acceded to, it would mean that a contract for a loan which never was completed, to pay off a previous debt otherwise discharged, would become "an antecedent debt." The contention is, on the face of it, absurd.

On the question of limitation their Lordships concur with the High Court. They are of opinion that there is no substance in this appeal and that it should be dismissed, but without costs, as there is no appearance on behalf of the Respondents, and their Lordships will humbly advise His Majesty accordingly.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

LORD SUMNER.

LORD BLANESBURGH,

SIR JOHN EDGE

MR. AMER ALI.

LORD SALVESEN.

1925,

Heard, 5, 11 and

12, May.

Judgment,

23, July.

LAL BAHADUR and
ors., Appellants,
v.

AMBIKA PRASAD and
anr., Respondents.

Hindu law—Mitakshara—Mortgage by ancestors for necessity—Subsequent sale of portion to pay off mortgage, if binds descendants—Antecedent debt.

According to SAHU RAM CHANDRA v. BHUP SINGH (1) as explained in BRIJ NABAIN v. MANGLA PRASAD (2), debts secured by mortgages executed by mem-

(1) L. B. 44 I. A. 120; s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).

(2) L. R. 51 I. A. 129; s. c. I. L. R. 46 All. 95; 28 C. W. N. 243 (1933)

bers of a Mitakshara family are antecedent debts which would justify for their liquidation a sale of family property not otherwise improper, so as to make such sale binding upon their descendants.

But there is no necessity to invoke this rule to support such a sale where the mortgages themselves were such as to bind the descendants.

This was an appeal (No. 15 of 1924) from a decree of the Court of the Judicial Commissioner of Oudh, dated the 20th February 1923, reversing a decree, dated the 30th June 1921, of the Court of the Subordinate Judge of Gonda.

The Respondents brought the suit giving rise to this appeal on the 14th May 1919.

They alleged that their grandfather Ram Din and his brother Pateshwari Din were members of a joint Hindu family governed by the Mitakshara; that the family owned as their joint ancestral property a 4 anna share in Tendwa Takya which their grandfather and his brother on the 12th September 1904 purported to sell without family necessity. They therefore contended that the deed of sale was not binding on them and prayed for possession of the property and mesne profits. They stated that the cause of action arose in October 1917 when Ambika Prasad attained his majority.

The defence alleged that the sale deed was binding on the Respondents as having been made for the benefit of the family and for payment of antecedent debts.

The facts are more fully set out in the judgment of the Judicial Committee.

The Subordinate Judge held that the property in question was joint and ancestral, that the major part of the purchase money was spent in the discharge of antecedent debts and the remainder for the benefit of the family. He was also of opi-

LAL BAHADUR P. AMBIKA PRASAD.

nion that the suit was barred by limitation.

The Judicial Commissioners, on appeal, held that there was no bar by limitation and that a sum of Rs. 1,633 alone out of the purchase money was for the payment of antecedent debts. They accordingly set aside the decree of the lower Court and ordered that on the payment by the Plaintiffs of the said sum of Rs. 1,633, a declaration should be made that the joint family of which the Plaintiffs were members were still the owners of the property in suit.

Messrs. A. M. Dunne, K. C., S. Hyam and B. N. Srivastava for the Appellants.—The Judicial Commissioners have based their decision on *Sahu Ram Chandra v. Bhup Singh* (1) which was explained in the subsequent decision of the Board in *Brij Narain v. Mangla Prasad* (2). The debts which were secured by mortgages on joint family properties are antecedent debts and the sale was made to satisfy those debts and is binding on the Respondents. In any event the mortgages cannot be challenged by the Respondents who were not in existence when they were made.

The suit is also barred by limitation under the provisions of Art. 126 of Sch. I of the Indian Limitation Act, IX of 1908. The Plaintiffs who are grandsons of the alleged alienor cannot in any event challenge the sale, for their father, through whom their claim is derived, was alive in 1919 when the suit was brought, but his right of action had been barred in 1916.

Messrs. DeGruyther, K. C. and Parikh for the Respondents.—The theory of a son having a derivative title through his father is unsound.

(1) L. R. 44 I. A. 120; s. c. I. L. R. 39 All. 437; 21 O. W. N. 698 (1917).

(2) L. R. 51 I. A. 129; s. c. I. L. R. 46 All. 95; 23 O. W. N. 253 (1923).

In a Hindu family every person by birth acquires an interest in the joint family property. Mayne's Hindu Law, para. 270. Moreover, the sale deed was executed not by a *karta* but by two brothers.

At the time of the transaction there was no necessity for the sale.

The onus is on the purchaser to prove necessity.

Sham Sunder Lal v. Achhan Kunwar (3), *Jogi Das v. Ganga Ram* (4) and *Banwari Lal v. Mahesh* (5).

Mayne's Hindu Law, paras. 366, 369, 651.

The evidence does not show any necessity for the sale nor does it show that the purchase money was employed in discharging any necessary payment.

Even if necessity is proved, there was other property charged and bearing interest at 12½ per cent. which should have been sold in preference to the property in suit.

The doctrine with regard to antecedent debt set out in *Brij Narain v. Mangla Prasad* (2) was limited to a family consisting of a father and his sons and is not applicable to the case of a family consisting of two brothers, for a nephew is not under obligation to discharge his uncle's debts.

There is evidence that both boys were of an age and the evidence that tends to bar the suit of one boy tends to make it unmaintainable by the other.

Mr. Dunne, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—Two only of the

(2) L. R. 51 I. A. 129, 130; s. c. I. L. R. 46 All. 95; 23 O. W. N. 253 (1923).

(3) L. R. 25 I. A. 183, 191; s. c. I. L. R. 21 All. 71; 2 O. W. N. 729 (1896).

(4) 21 O. W. N. 957, 958 (P. O.) (1917).

(5) L. R. 45 I. A. 284; s. c. I. L. R. 41 All. 69; 22 O. W. N. 577 (1912).

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questions which in this case were dealt with by the trial Judge remain for consideration by their Lordships, and the facts which raise or surround them can be shortly stated.

The Respondents are members of a joint Hindu family governed by the Mitakshara law. Ram Din, their grandfather, and his brother Pateshwari were in 1895 the managers of the joint family property, and on the 6th August in that year they executed in favour of one Chote Lal, a predecessor-in-interest of the present Appellants, two mortgages—the first, a simple mortgage of a portion of the ancestral family property to secure an advance of Rs. 2,000 and interest; the second, a usufructuary mortgage for Rs. 8,000 upon another portion of the family property, namely, a 4-anna share in the village of Tendwa Takya.

Ram Din, one of these joint managers, had two sons, Awadh Behari and Jantri Prasad. In 1895 Awadh Behari was about 13 years old, Jantri Prasad about 3. The Respondents, Plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage deeds have always been binding on the Respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated.

On the 12th September 1904, Pateshwari Din and Ram Din carried out the transaction which it is sought in this suit to impeach, that is to say, a sale by registered deed of the 4-anna share in the village of Tendwa Takya, already the subject of the usufructuary mortgage in favour of Chote Lal and in his possession as such mortgagee. The purchasers under the deed are by name Regho, Bindra and

Asharfi Lal. It would appear, however, that they were one or some or all of them nominees of Chote Lal, whose interest in the purchase was throughout his life dominant. The sale is expressed to be a sale to the purchasers of the property in suit for Rs. 14,000 free from encumbrances. Of the purchase money Rs. 2,105-3-9 are in the deed stated to have been paid to the vendors on its execution, while Rs. 11,894-12-3 are stated to have been left with the purchasers for the purpose of making the payments, of which the following is a compendious statement :—

(1) Rs. 1,633-12-3 in satisfaction of three decretal amounts recovered against the vendors, and as to one for Rs. 290 by Chote Lal.

(2) Rs. 2,261 in payment of interest then accrued on the simple mortgage of the 6th August 1895, held by Chote Lal on other family property.

(3) Rs. 8,000 in satisfaction of the usufructuary mortgage held by Chote Lal on the property sold.

The result, it will be seen, was that of the Rs. 14,000 purchase money, Rs. 10,531 was retained by or paid to Chote Lal, the mortgagee in possession of the property purchased.

It is now common ground that these sums were, in fact, retained or applied in the manner prescribed. As to the sum of Rs. 2,105-5-9 paid in cash to the vendors, it was given in evidence by the Appellants at the trial that it was at the time represented by the vendors to the purchasers, and it was said, truly represented that the money was required by the vendors for payment of Government revenue, underproprietary rent, the purchase of bullocks and household expenses, and that it was, in fact, so applied.

Now, their Lordships are not insensible that this bare statement of the transaction

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suggests possibilities which invite inquiry. If, in fact, it was really one under which a mortgagee and decree-holder in possession had obtained for himself in satisfaction of his decree and mortgage debts a valuable ancestral property in consideration of a relatively trifling sum in cash paid to its joint managers, the transaction would not have belied its appearance as so stated.

But there is no suspicion that the three decrees were not all of them valid and enforceable against the vendors. The Respondents cannot be heard to say that the two mortgages were not valid and subsisting. It is nowhere suggested in the evidence that the sale was disadvantageous in the sense that the purchase price did not represent the full value of the property sold; still less that it was an inadequate price. Their Lordships on the evidence must take it that the price paid was a full price. Indeed, the only ground on which, in evidence, the sale was challenged by the Respondents was that the transaction was induced by no family necessity, and was, for that reason, not binding upon them, and they analysed the manner in which the purchase money was applied for the purpose of making good that position.

Of the answers made by the Appellants to this attack of the Respondents two only, as has been said, remain for consideration by their Lordships. The first answer puts in issue the competency of the Respondents to maintain the action at all. So far as Ambika Prasad is concerned the suit, the Appellants contend, is barred by lapse of time; so far as Adita Prasad is concerned the suit is not maintainable at his instance for the reason, so it is said, that he was not in existence at the date of the sale deed—he had not then been born. The second answer of the Appellants goes to the substance of the matter. The sale deed, they say, was in fact, executed for the benefit

and needs of the family and for the payment of antecedent debts, or, at any rate, so far as these were mortgage debts, for the satisfaction of secured debts by which, as such, the Respondents were bound.

Both of these contentions of the Appellants were upheld by the trial Judge, the Subordinate Judge of Gonda, who, on the 20th June 1921, dismissed the Respondents' suit with costs. On appeal both were rejected by the Court of the Judicial Commissioner of Oudh, which by a decree of the 20th February 1923, set aside the impugned deed on terms which their Lordships need not at the moment pause to particularise. Against that decree the Defendants appeal.

Their Lordships will deal first with the answer of substance which the Appellants make to the suit. If this answer be well-founded, the other issue, more technical in character and one upon which the Courts in India were acutely divided, becomes academic.

Was, then, this deed binding on the Respondents as having been made for the benefit of the family and for payment of antecedent debts? Was it any the less binding upon them even if the mortgages were not antecedent debts, seeing that these mortgages were both of them unchallengeable by the Respondents? The proper answer to these questions, the price obtained for the property sold not being attacked as inadequate, depends upon the propriety of the purposes to which the whole purchase money was here applied. Upon this the points at issue before their Lordships were few. Mr. DeGruyther for the Respondents agreed that the Rs. 1,633-12-3 applied in satisfaction of the decrees against the vendors constituted an item of disbursement to which, in view of concurrent findings against him, he could now take no exception. As to the

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cash sum of Rs. 2,105-3-9 paid to the vendors, if the money was required and applied for the purposes indicated, it was not suggested that a sale so far as necessary therefor was open to objection. It was contended, however, that there was no sufficient evidence that the money had been so applied, and apparently the Appellate Judges so thought. Their Lordships, however, are not disposed on this point to interfere with the finding of fact of the learned Subordinate Judge in the Appellants' favour, more especially because the learned Judges of the Appellate Court, while not prepared to accept the learned Judge's conclusions, did not base their judgment appealed from upon their own view of this part of the case.

Their Lordships agree that the evidence is somewhat vague, perhaps necessarily so after this lapse of time and after the deaths of the parties principally concerned. But the evidence is not, they think, insufficient to support the learned Judge's finding, and it is also, in their judgment, while considering its weight, proper to bear in mind that all the circumstances in connection with the sale were throughout known to the father and uncle of the Respondents, who neither of them at any time, although now supporting the Respondents in these proceedings, themselves took any steps to impeach the sale on this or any other ground—a reserve all the more striking when accompanied, as it is, by the admission made by the Respondents' father in evidence that his inaction was at all events partly attributable to the fact that he could at no time prove that his father, a vendor, had spent the sale consideration after receiving it "in bad company or for illegal purposes."

In the result, if the sale is to be impeached at all by the Respondents it must be on the ground that the payment of

Rs. 2,261 and Rs. 8,000 out of the purchase money, the one sum in discharge of accrued interest on the simple mortgage of the 6th August 1895, and the other in discharge of the principal secured by the usufructuary mortgage of the same date, cannot as against the Respondents be justified, and the learned Judges of the Court of the Judicial Commissioner have so held on the ground that these mortgage debts, incurred as they were by the grandfather of the Respondents, were not "antecedent debts" justifying a subsequent sale of family property for their liquidation. In the language of the judgment in *Sahu Ram Chandra v. Bhup Singh* (1), these debts had not been "incurred irrespective of the credit obtainable from immoveable assets which [did] not personally belong to him, but [were] joint family property." Nor, in the opinion of the learned Judges, was the position affected by the fact that the mortgage debts in question were, both of them, as such, binding on the Respondents. Now their judgment was pronounced on the 20th February 1923, and the learned Judges had not the advantage of having before them, as their Lordships now have, the explanation of the case of *Sahu Ram Chandra v. Bhup Singh* (1) given by the Board on 14th November 1923 in the case of *Brij Narain v. Mangla Prasad* (2). The effect of that explanation, in their Lordships' judgment, is to show that in the circumstances of this case both of the mortgages of 1895 were "antecedent debts" which would justify for their liquidation a sale of family property not otherwise improper. In the present case,

(1) L. R. 44 I. A. 126; s. c. I. L. R. 39 All. 437; 21 C. W. N. 698 (1917).

(2) L. R. 51 I. A. 129; s. c. I. L. R. 45 All. 96; 25 C. W. N. 233 (1923). B

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however, it is not, in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the Respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden *pro tanto* of these encumbrances, cannot be successfully attacked by those so bound. It follows that in their Lordships' judgment the sale in question is valid as against the Respondents.

In these circumstances the other question, so fully dealt with in both of the lower Courts, need not now be discussed at length. The position with reference to it is that if the Respondent Ambika Prasad was 21 years old or more at the commencement of this action, the suit, so far as he is concerned, is barred by lapse of time; and if the Respondent Adita Prasad was not born at the date of the sale deed, that deed is binding upon him, and the suit impeaching it, so far as he is concerned, cannot be maintained. In other words, in order to enable the Respondent Ambika Prasad to maintain this suit he must not have been over, say, 21 at its commencement, and in order to enable the Respondent Adita Prasad to maintain it, he must not at the same date have been under, say, 14½. What, then, were the respective ages of the two Respondents at that date? On this point their Lordships are inclined to agree with the learned Subordinate Judge that it is not proved separately that Ambika Prasad was not over 21; nor is it proved separately that Adita Prasad was over 14½. But there is strong ground for affirming that if Ambika was over 21, then Adita was over 14½, and that if Adita was under 14½, then Ambika

was also under 21. In other words, there was not between the two brothers an interval of so many as 6½ years. While, therefore, it may not be possible to say on the evidence with judicial certainty by which of the Respondents the action is maintainable, the evidence does show that one of them is in that fortunate position.

Their Lordships, however, refrain from pursuing this matter further. They will, in agreement with the judgment appealed from, assume, without deciding, that the suit was maintainable by both Respondents. Even so, for the reasons already given, it fails.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and the judgment of the learned Subordinate Judge restored.

The Respondents must pay to the Appellants their costs here and below; but the costs of adding Asharfi Lal as an Appellant must, in accordance with the order of the 25th July 1924, be paid by the Appellants, and there will be a set-off as regards these costs.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Appellants.

Solicitor: *Mr. F. Delgado* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

**APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 13 OF 1926.**

SANDERSON, C. J.	MEGHJEE MANSING
RANKIN, J.	r.
1926,	KALOORAM LAL MIN-
20, April,	N. RAIN.

Rules of the High Court, Original Side—Chap. XIII—“Swearing positively to the facts of the case,” what is—Order giving leave to defend, if appealable.

An appeal does not lie from an order,

MEGHJEE MANSING v. KALOORAM LACHMINARAIN.

giving leave to defend under Chap. XIII A of the Rules of the High Court (Original Side).

KARAMALL RAMBALLAV v. MANGILAL DALIMCHAND (1) considered.

It is not sufficient compliance with the rules providing for verification of the cause of action to refer in the affidavit to the plaint and say that the statements contained in it are true; but in deciding an application under Chap. XIII A, the whole affidavit ought to be looked to to see whether there has been a proper verification.

This was an appeal against an order of Mr. Justice Buckland, dated the 11th December 1925, made in the exercise of Ordinary Original Civil Jurisdiction.

The facts material to the report appear from the judgment.

Messrs. Langford James and M. N. Kanjilal for the Appellant.

Mr. K. P. Khaitan for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SANDERSON, C. J.—This is an appeal by the Plaintiff against an order of my learned brother, Mr. Justice Buckland, made on the 11th December 1925.

The matter came before the learned Judge by means of a summons under Chap. XIII A of the Rules of this Court on the Original Side. The learned Judge said that "this application must fail for the reason that there is no affidavit of any one who swears positively to the facts of the case. I have but to repeat what I have said often before that it does not suffice to refer to the plaint and say that the statements contained in it are true. The application is dismissed with costs."

On the opening of the appeal the learned
(1) 23 O. W. N. 1017 (1919).

ed Advocate for the Defendant took the point that no appeal would lie from the order of the learned Judge on the ground that it was not a judgment within cl. 15 of the Letters Patent of this Court.

The order which the learned Judge made was in the form of a dismissal of the application for judgment made by the Plaintiff. In effect it was an order giving leave to the Defendant to defend the suit, the consequence of which would be that the suit would be tried in the ordinary manner.

In my judgment no appeal lies from that order. As I have said on several occasions, when the question, whether an order is appealable or not, arises, the Court must have regard to the particular facts of the case and the nature of the order.

When the learned Judge gives unconditional leave to defend, as in this case, on a summons under Chap. XIII A of the Original Side Rules, in my opinion, it is not a judgment within the meaning of cl. 15 of the Letters Patent.

Reliance was placed by the learned Advocate for the Appellant upon a decision of this Court in the case of *Karamall Ramballav v. Mangilal Dalimchand* (1). That is not an authority which covers the facts of this case. As I have already said each case must be decided on its own facts and the nature of the order.

That conclusion is sufficient to dispose of this appeal.

The learned Advocate for the Plaintiff, however, argued strenuously that the learned Judge ought not to have dismissed the application on the ground, on which the learned Judge relied, namely, that the affidavit was not sufficient.

I propose to say a word or two with regard to that, because, the point relating

(1) 23 O. W. N. 1017 (1919).

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to the insufficiency of the affidavit may arise in future with regard to other cases. R. 3 provides that there must be an affidavit by the Plaintiff himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim.

I am of opinion that the learned Judge was right in taking care that the affidavits in relation to summons under Chap. XIII A should be sufficient and in proper form.

There ought to be no difficulty on the part of legal practitioners dealing with this chapter, and the affidavit made on behalf of the Plaintiff ought to be in accordance with the plain provisions of Chap. XIII A, r. 3. The learned Judge, as I have already mentioned, said, "It does not suffice to refer to the plaint and say that the statements contained in it are true."

I agree with him to that extent. But he seems to have overlooked the fact that in this case the affidavit contained considerably more than a mere reference to the plaint. The affidavit was sworn by a member of the Plaintiff's firm. It contains paragraphs setting out what was the cause of action, namely, the difference alleged to have been settled by a contract of the 12th December 1924. It was alleged that the Defendants had no defence to the suit at all and had entered appearance only to delay the hearing of the suit and to gain time.

It was further alleged that the Plaintiff had been desirous of going to arbitration and that the Defendant had taken up the position that there was no ground for arbitration, because there was no dispute between the parties.

A letter from the Defendant to the

Registrar of the Chamber of Commerce, dated the 19th May 1925, was set out in the affidavit in which the Defendant said: "It is a clear settlement contract by which we are to pay to Messrs. Meghjee Mansing a difference of Rs. 2.5 per cent. yards. Messrs. Meghjee Mansing presented us the difference bill every month which we accepted without protest. There is nothing for the arbitrators to arbitrate upon, because there is no dispute. Cl. 12 of the contract provides arbitration by your tribunal if there is a dispute, but when we admit their claim there is no dispute and consequently no ground for arbitration."

It seems to me that there is a great deal more in that affidavit than a mere reference to the statements in the plaint and a further allegation that the statements are true.

With great respect to the learned Judge I think it would have been better if he had considered the question on the merits instead of dismissing the application on the ground that the affidavit was insufficient.

I refer to this matter, so that in future when an application is made under Chap. XIII A, care may be taken to see that the Plaintiff's affidavit is in accordance with the provisions of the rule.

On the ground that there is no right of appeal in this case, I am of opinion that the appeal should be dismissed with costs.

RANKIN, J.—I entirely agree.

Messrs. Nun & Das, Solicitors for the Appellant.

Messrs. Khaitan & Co., Solicitors for the Respondent.

S. N. B.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 650 OF 1921.

<p>B. B. GHOSE, J. GRANAM, J. 1926, 27, April.</p>	}	<p>BIBESWAR MOOKHERJI, Appellant, v. SM. TROILOKHYA DAS, Respondent.</p>
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Landlord and tenant—Tenancy, whether permanent—Land in Municipality let out for dwelling-house, held for generations at unchanged rent, in spite of abnormal rise in value—Inference of permanency, if legal.

In a suit for ejectment of a tenant after notice to quit, the facts found were that there was no lease creating the tenancy, that it had come down to the Defendant by a series of successions, that the rent had not been changed for at least 65 years, that the land was let out for dwelling purposes and was situated within the Howrah Municipality and that the rent had remained unchanged though the value of the land had increased abnormally:

Held—That the Court was right in its conclusion that the tenancy was a permanent tenancy.

This was an appeal preferred on the 6th of March 1924 against the decree of Babu Jitendra Prasad Chatterji, Subordinate Judge, 1st Court of Zillah Howrah, dated the 8th of January 1924, reversing the decree of Babu Jitendra Nath Sen, Munsif, 3rd Court at Howrah, dated the 29th of March 1921.

The facts of the case will appear from the judgment.

Dr. D. N. Mitter and Babu Narain Chandra Kar for the Appellant.

Mr. R. B. Majumdar and Babu Manmatha Nath Sanyal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal by the Plaintiffs arises out

of an action in ejectment on the ground that the Defendant is a tenant on the land and the tenancy has been terminated by proper service of notice to quit. The plea of the Defendant is that she holds a permanent interest and her tenancy is not liable to be terminated by notice. The trial Court passed a decree in favour of the Plaintiffs but did not allow them the rent claimed and costs. The Defendant appealed against that decision and the Plaintiffs also preferred a cross-objection as regards the portion of the claim dismissed. The Subordinate Judge held that the tenancy was a permanent one. He relied upon these facts:—There was no written lease creating the tenancy; the tenancy had come down to the Defendant by a series of successions; the rent had not been changed for at least 65 years; the land was let out for dwelling purposes and it was situated within the Howrah Municipality; the rent remained unchanged, whereas the value of the land had increased abnormally. From these facts, the learned Subordinate Judge presumed that the original grant was of a permanent character. He accordingly dismissed the claim for ejectment and allowed the Plaintiffs the rent claimed. Against that decree, the Plaintiffs have appealed to this Court.

It is contended before us by the learned Advocate for the Plaintiff-Appellant that the mere fact that the rent has not been changed for a series of years cannot give rise to the presumption that the original grant was of a permanent character. But from all the circumstances that the Subordinate Judge has stated in his judgment, we do not think the inference cannot be legitimately drawn that the original grant was of a permanent character. An ordinary tenancy before the passing of the Transfer of Property Act was not heritable. In this case, there

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have been a number of successions. If the land was held on *ticca* tenancy, there is every reason to suppose that when the value of the land increased abnormally the same rent might not have been continued for the long series of years. We do not think, therefore, that the Subordinate Judge was wrong in his conclusion that the tenancy was a permanent tenancy. That being so, this appeal must be dismissed with costs.

N. G.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2640 OF 1923.

WALMSLEY, J.	}	RAM RANJAN ROY and
CHAKRAVARTI, J.		ors., Plaintiffs,
1926,		Appellants,
Heard, 2 and		v.
3, March.		JAYANTI LAL PATRA and
Judgment,		ors., Defendants,
9, March.		Respondents.

Indian Evidence Act (I of 1872), sec. 92—Simultaneous mortgage and prospecting lease—Option to lessee to convert prospecting to mining lease after a term—(Option exercised—Oral evidence to prove that parties agreed that mortgage debt should stand discharged in lieu of payment of selami of lease—Eviction by title paramount—Actual ouster, if must be proved, if not, what. ⚡

Sec. 92 of the Evidence Act which excludes evidence of oral agreement or statement to contradict, vary, add to or subtract from the terms of a written instrument is no bar to such evidence being admitted to prove a discharge of the debt secured by the instrument.

MOHUN CHANDRA DEY v. RAMDAYAL DUTTA (1) referred to.

Actual physical ouster by a title paramount is not necessary to prove eviction, but there must be clear proof of the title of the person claiming paramount title

(1) 35 C. W. N. 371 (1925).

and consequently proof of the absence of the title of the lessor.

This was an appeal preferred on the 12th of November 1923, against the decree of P. E. Cammiado, Esq., District Judge of Zillah Burdwan, dated the 28th of June 1923, affirming the decree of Babu Hem Kumar Neogi, Subordinate Judge, Asansole, dated the 7th of February 1922.

The facts of the case will appear from the judgment.

Babu Nakuleswar Mukerji for the Appellants.

Babus Nagendra Nath Ghose and Gopendra Krishna Banerji for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

CHAKRAVARTI, J.—This is an appeal by the Plaintiffs and arises out of a suit for the enforcement of a registered mortgage bond. The suit was dismissed by both the Courts below and hence this appeal by the Plaintiffs.

The facts shortly stated are these: The Defendant and his two brothers are Khiraji Brahmottardars of a fractional share in mouzahs Kamalpur and Metheni. The first Plaintiff and one Raghunath Laik, the predecessor-in-interest of the other Plaintiffs, took a prospecting lease from the Defendant and his two brothers of their underground rights in the lands of the two mouzahs. Simultaneously, they advanced a sum of Rs. 1,000 to each of the three brothers, taking from each of them a mortgage as security for the loan. The prospecting lease originally executed was not registered for some reason or other, and a fresh one was drawn up on the 12th of Bhadro and was registered. The prospecting lease that was registered admittedly contains the provisions of the one that was not registered, and which

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the Plaintiffs have failed to produce even though cited to do so. One of the provisions of the lease is that the three brothers shall receive a sum of Rs. 3,000 as bonus in the event of the prospecting lease being converted into a mining lease. Other provisions material to the present case are firstly that the term of the prospecting lease shall be three years, and that unless the lessees surrender their rights under the lease within the above period they shall be entitled to obtain from the lessors a duly executed mining lease or treat the prospecting lease as a mining lease.

The Plaintiffs' case is that the money due under the mortgage bond is due and they therefore pray recovery thereof by enforcing the mortgage bond.

The defence of the Defendant No. 1 was that the mortgage bond was executed for the money which was payable as *selami* for the mining lease and that after the expiration of 3 years, the Plaintiffs made their election to treat the *amalnambah* as a lease and gave a discharge for the debt due under the mortgage bond. The Defendants Nos. 2 to 5 were joined as puisne mortgagees, but they claimed to be prior mortgagees.

Both the Courts below have found for the Defendants and dismissed the suit. Hence this appeal by the Plaintiffs.

The following points were urged by the learned *vakil* for the Appellants:—

Firstly, that oral evidence and the evidence furnished by the letter, Ex. A. 3, were inadmissible under the provisions of secs. 91 and 92 of the Evidence Act.

Secondly, that the lease contemplated by the *amalnambah* was not accepted by the Plaintiffs in the exercise of their option provided in the *amalnambah*.

Thirdly, that assuming that there was a lease, it became inoperative, because

the Defendants had no title to the demised land and also because the Plaintiffs were evicted by title paramount.

I propose to deal with all the points together. The mortgage bond and the *amalnambah* formed part of one and the same transaction. The sum of Rs. 3,000 which formed the consideration for the three mortgages was the exact sum which would be payable by the Plaintiffs as *selami* to the Defendant No. 1 and his two brothers. The *amalnambah* gave an option to the lessees to make an election within one year after the expiration of three years which was fixed as the period for prospecting for coal in the land. Until the lessors made their election to treat the transaction as a lease, the *selami* to be paid under the lease did not become payable to the mortgagors. The question which then arises is, did the Plaintiffs either surrender the lease or elect to treat it as a completed transaction? On this point the learned District Judge finds "the Plaintiffs admittedly did not surrender their rights to the Defendants as laid down in the prospecting lease, and the letter, Ex. A. 3, written by Raghunath Laik on behalf of the Plaintiffs, proves that the Plaintiffs elected to treat the prospecting lease as a mining lease according to the terms of the prospecting lease." Under the terms of the *amalnambah* the Plaintiffs had the right to treat the *amalnambah* as a lease and when they elected to do so, the *selami* for the lease became payable to the Defendant and his co-sharers.

The learned *vakil* for the Appellants contended that the Defendant No. 1 was not entitled to claim the *selami*, because he had no rights to the minerals of the *monzahs* and the lease became inoperative on account of the eviction of the lessees by title paramount claimed by the

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Pacheti Raj. On these points the learned District Judge finds as follows :—" As regards the Defendants' lack of title to the minerals the Plaintiffs have nothing to say except that the Defendants' zemindars, the Pacheti estate, have obtained a decree against certain other Khiraji Brahmottardars of certain other mouzahs declaring that the underground rights belong to the Pacheti estate. As the learned Court below has said, that decree does not prove that the Defendant has no mineral rights in his two mouzahs. There has been no ouster by the landlord; and the Plaintiffs, as tenants who were inducted into possession by the Defendant, are estopped from denying the latter's title."

I agree with the findings of the learned District Judge. The Plaintiffs were put in possession of the mouzahs and then after satisfying themselves that there was workable coal in the villages and after three years, deliberately exercised their option given by the *umalnamah*. It is true actual physical ouster by a title paramount is not necessary to prove eviction, but there must be clear proof of title of the person claiming paramount title and consequently proof of absence of title of the lessors. In the circumstances of this case there is nothing which amounts to eviction by title paramount.

Then as to the question of discharge of the mortgage bond, the learned District Judge says as follows :—" The fact that when the mortgage was executed, the parties entered into a simultaneous oral agreement that on the lessees' acquisition of full mining rights the mortgage debt should stand cancelled cannot be doubted. The Defendant has deposed to this; and the facts and circumstances of the case corroborate his statement. To begin with, the amount advanced to the Defen-

dant was exactly the amount of his share of the bonus. The interest stipulated for is so low that one is led to believe that the transaction was not a money-lending transaction. The debt was made repayable by Chaitra 1317, that is to say, after the expiry of over four years, within which period the prospecting lease was to have matured into a full mining lease. Lastly, in Raghunath Taik's letter, Ex. A. 3, we have a clear admission that the debt is satisfied by the lessees' acquisition of full mining rights in the land."

The learned vakil for the Appellants argued that this finding by the learned District Judge was based upon evidence which was not admissible under sec. 92 of the Indian Evidence Act, unless such evidence is admissible under the proviso of that section. His contention was based upon the ground that the oral evidence and the evidence furnished by the letter, Ex. A. 3, on which the finding of the learned District Judge is based, were intended to vary and to add to the terms of the bond.

It is unnecessary to discuss the authorities which lay down that evidence of facts and agreement which go to contradict, vary or add to the terms of an instrument in writing is inadmissible. This cannot be doubted, but here the evidence was adduced to prove a discharge of the debt but not to vary or add to the terms of the bond. Such evidence is not excluded by sec. 92 of the Evidence Act and therefore the saving clauses of sec. 92 need not be invoked. In support of this view I shall content myself by quoting the view expressed by Mr. Justice B. B. Ghose in the recent case of *Mohim Chandra Dey v. Ramdayal Dutta* (1) : " A mortgage is discharged either by payment of the full amount of the debt or by

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release of the debt itself. It has never been doubted that a discharge of the debt by payment may be proved by oral evidence. I do not think that this can be called an agreement . . . Such a transaction does not fall within proviso (4) to sec. 92 of the Evidence Act and I do not think oral evidence of it is excluded by that proviso." In the present case all that the oral evidence and the letters prove is that the Plaintiffs signified their election to treat the *amalnamah* as a lease and also that the *selami* which was then payable to the Defendant No. 1 was accepted in full satisfaction of the mortgage debt. This evidence therefore did not contradict, vary or add to the terms of the mortgage bond but went to establish that the Plaintiffs gave a full discharge of the debt due under the bond. I think therefore that the Courts below were right and this appeal must be dismissed with costs.

WALMSLEY, J.—I agree.

N. G.

[CRIMINAL APPELLATE JURISDICTION.]

APPS. NOS. 714 AND 715 OF 1925.

O. O. GHOSE, J.

CHOTZNER, J.

1926,

Heard, 4 and

5, February.

Judgment,

16, February.

B. WALVEKAR and ors.

v.

THE KING-EMPEROR.

Calcutta Police Act (IV of 1866), secs. 46 47, sec. 44—Common gaming house—Formalities necessary before issuing warrant for searching such a house—Issuing officer must have information on oath on which he may have reason to believe that the house to be searched is used as a common gaming house—Mere suspicion not sufficient—Warrant issued on suspicion only invalid—Evidence Act (I of 1872), sec. 114, ill. (c), scope and effect of—Official act must be proved to have been done before regularity in doing can be presumed—Search warrant, necessity of caution in issuing.

A warrant such as is issued under sec. 46 of the Calcutta Police Act is not a public record and there is no presumption of any kind attaching to it; therefore the contents thereof must be proved in the regular way. It is incumbent upon the prosecution to prove that a warrant of this description is in strict compliance with the provisions of sec. 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made.

A warrant issued merely on the ground that the issuing officer has cause to suspect that the premises in question are used and kept as and for a common gaming house is not a valid warrant under sec. 46 of the Act and that being so, the presumption that would otherwise have arisen under sec. 47 of the Act cannot arise and the prosecution must fall back upon sec. 44 of the Act for the purpose of proving that the premises in question were kept and used as a common gaming house.

The expression "reason to believe" is entirely different from the expression "cause to suspect." The former connotes a great deal more than is conveyed by the latter. The police may have cause to suspect that a certain house or place is used as a common gaming house but the officer who issues the warrant has to bring his judicial mind to bear upon the question and he can only issue the warrant contemplated under sec. 46 of the Act if in his opinion there is reason to believe that a certain house or place is used as a common gaming house. The law clearly intends that evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is "reason to believe" as required by sec.

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46 of the Calcutta Police Act that a house, room or place is used as a common gaming house.

Search warrants are always open to very serious objections and very great particularity is justly required by law in cases where they are authorised, before the privacy of a man's premises is allowed to be invaded by the minister of the law.

Sec. 114, illustration (e) of the Indian Evidence Act cannot be invoked for the purpose of doing away with the necessity of proving that the formalities required by sec. 46 before issuing a warrant were complied with.

ASHANULLAH v. TRILOCHAN (1) *referred to.*

These were appeals against an order of conviction under sec. 44, Calcutta Police Act, IV of 1866, B. C., with sentences of fine of different amounts passed by the Chief Presidency Magistrate, Calcutta (Mr. Roxburgh), dated the 16th. September 1925.

The facts of the case will appear from the judgment.

Sir B. C. Mitter and Mr. S. K. Sen, Counsel and Babu Probodh Chandra Chatterji for the Appellants in No. 714.

Mr. S. K. Sen (Counsel) and Babu Probodh Chandra Chatterji for the Appellant in No. 715.

Mr. Panckridge, Standing Counsel, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

C. C. GHOSE, J.—There are two appeals, being appeals Nos. 714 and 715 of 1925, arising out of two prosecutions under certain sections of the Calcutta Police Act, being Bengal

Act No. IV of 1866. The accused B. Walvekar and three others named R. N. Habib, Makbular Rahman and Gujanand are the Appellants in appeal No. 714, while the accused R. Walvekar is the sole Appellant in appeal No. 715. In the first case the accused have been convicted under sec. 44 of the Calcutta Police Act and have been sentenced to pay certain fines, i.e., the accused B. Walvekar has been sentenced to pay a fine of Rs. 500 and in default to suffer rigorous imprisonment for a period of 3 weeks; the accused R. N. Habib has been sentenced to pay a fine of Rs. 200 and in default to suffer rigorous imprisonment for a period of 3 weeks; the accused Makbular Rahman and Gujanand have each been sentenced to pay a fine of Rs. 30 and in default to suffer rigorous imprisonment for a period of 3 weeks. In the second case the accused R. Walvekar has been convicted under sec. 44 of the said Act and has been sentenced to pay a fine of Rs. 500 and in default to suffer rigorous imprisonment for a period of 3 weeks.

The facts in the two cases are analogous and it will be convenient to dispose of the two appeals by one judgment. The accused B. Walvekar is the secretary of a club known as the New Sports Club, which has its head office at premises Nos. 4, 5 and 6, British Indian Street, and which has 11 branches in various parts of Calcutta, while of the other accused, R. N. Habib is the lessee of the said premises and Gujanand and Makbular Rahman are employed as clerks in the said club. They were charged with being the owners, occupiers and having the use of the first floor of the said premises Nos. 4, 5 and 6, British Indian Street in Calcutta, known as the New Sports Club, knowing and wilfully permitting the same to be opened, kept at

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used by others as a common gaming house and assisting and conducting the business of the said common gaming house at 12-40 P.M., on the 22nd August 1925, at the said premises. The accused R. Walvekar was charged with being the owner, occupier and promoter of a common gaming house, namely, the Aryan Sports Club, at 15/6, Zakeria Street in Calcutta, and using and permitting the same to be used as a common gaming house for laying wagers and bets on the Poona and Calcutta Races.

The learned Chief Presidency Magistrate who tried these two cases found that gaming was going on at the two places mentioned above and that the said places were kept for the profit or gain of the persons using them and that as such they were common gaming houses. Both the places were raided under warrants signed by the Deputy Commissioner of Police and various articles, which, according to the learned Magistrate, were instruments of gaming were found at the said places. It was held that instruments of gaming having been found at the two places mentioned above, the presumption under sec. 47 of the Calcutta Police Act arose that the said places were used as common gaming houses. The learned Magistrate further held that apart from the question of presumption under sec. 47 of the Calcutta Police Act, the evidence on record pointed to the conclusion that the two places in question were carried on as common gaming houses for the purpose of profit or gain.

It appears from the record that a warrant was issued on the 21st August 1925 purporting to be signed by Mr. H. C. Hunt, Deputy Commissioner of Police, Calcutta, under the provisions of sec. 46 of the Calcutta Police Act authorising Sub-Inspector, A. Gany, to enter into pre-

mises Nos. 4, 5 and 6, British Indian Street, and to search for all instruments of unlawful gaming which might be therein and to arrest, search and bring before him or any other Justice of the Peace the keepers of the same as also the persons there haunting, resorting and playing, to be dealt with according to law. This warrant was executed on the 22nd August 1925. The premises were raided and searched and numerous articles were seized and it is stated that as many as 20 persons were arrested and searched in the said premises. The case was thereafter proceeded with as against the Appellants in the first appeal and the trial in the Police Court lasted from the 7th September to the 16th September 1925. The warrant in question was not tendered as an exhibit in the case till the 15th September 1925, when the evidence had been concluded and when arguments were being addressed to the learned Chief Presidency Magistrate. It was at that stage that the warrant was tendered in evidence and was marked as Ex. 14 in the case. No witness was called to speak to it.

On behalf of the Appellants in the first case it has been contended before us by Sir Benod Mitter that the warrant which has been marked as Ex. 14 has not been duly proved in this case, as no witness had been called to prove the same. In the second place, he argued that it has not been proved that the Deputy Commissioner of Police who signed the warrant had made due enquiry or any enquiry at all and that he had information on oath justifying the issue of such warrant. In the third place, he contended that the issue of such warrant was legal only when the issuing officer had reason to believe upon information on oath and after such enquiry as he might think it necessary to make, that the said premises were

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used and kept as and for a common gaming house and not merely when the issuing officer had or has cause to suspect that the said premises were so used and kept as stated in the said warrant. In the fourth place, it was argued that although Sub-Inspector, Abdul Gany, spoke to the execution of a search warrant there is no evidence on record showing that this particular warrant which was tendered in evidence and marked as an exhibit in the concluding stages of the trial was executed as alleged by the prosecution.

Sir Benod Mitter argued that if the warrant, Ex. 14, goes out of the record on the ground that the mere production thereof is, in the absence of other evidence, no evidence of the validity of the same, the provisions of sec. 47 of the Calcutta Police Act could not be attracted and that therefore the presumption that would otherwise have arisen to the effect that the said premises were used as a common gaming house could not arise in the present case. He further argued on the merits that the articles discovered at the search were not instruments of gaming and that they afforded no evidence whatsoever of any user contradicting the aims and objects of the Club as set out in the rules and regulations thereof and, secondly, that those articles could only be said to be instruments of gaming, provided it was first found as a fact that there was gaming or wagering going on in the said premises. He also argued that in order to show that there was gaming or wagering, the prosecution must prove that there was an agreement between two contracting parties dependent on the happening of an uncertain event which must result in one of such two parties losing money; whereas in the present case there was no such contract or agreement and all that could

be said was that the New Sports Club acted merely as agents of the members of the Club for the purpose of transmitting their instructions to places such as Calcutta, Poona or Lucknow where race meetings were held and where gaming took place. Lastly, it was argued that there was no evidence whatsoever that any profit or gain had accrued to the person or persons owning or keeping the said premises.

On a full and careful consideration of the materials on record and of the arguments which have been addressed to us on both sides, I am of opinion that so far as the signature of Mr. Hunt on Ex. 14 is concerned, it was open to the Magistrate to take judicial notice of the same under sec. 57, sub-sec. (7) of the Indian Evidence Act, Mr. Hunt being an officer whose appointment as Deputy Commissioner of Police, Calcutta, is gazetted in the official gazette of the Local Government. But that is not enough; and in the circumstances disclosed on the record, I am clearly of opinion that the contents of the warrant in question have not been proved in evidence before the Magistrate.

A warrant such as is issued under the provisions of sec. 46 of the Calcutta Police Act is not a public record and there is no presumption of any kind attaching to it; therefore the contents thereof must be proved in the regular way. I hold therefore that it was and is incumbent upon the prosecution to prove that a warrant of this description was and is in strict compliance with the provisions of sec. 46 of the Act and that it was issued after information upon oath had been brought before the issuing officer and after such enquiry as he thought it necessary to make had been made. Sec. 46 of the Calcutta Police Act authorises the issue of a warrant, after the preliminaries

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referred to above have been complied with, only when the issuing officer has reason to believe that any house, room or place is used as a common gaming house. In other words, he may then, and then only, issue his warrant authorising the police to enter such house, room or place and take into custody all persons who are found therein and to seize all instruments of gaming and all monies and articles reasonably suspected to have been used or intended to be used for the purpose of gaming and to search all parts of the house, room or place used as a common gaming house and to seize, etc. In the present warrant, it is stated that the issuing officer has cause to suspect that the premises in question are used and kept as and for a common gaming house. Now, the expression "reason to believe" is entirely different from the expression "cause to suspect." It is obvious that the former connotes a great deal more than is conveyed by the latter. The police may have cause to suspect that a certain house or place is used as a common gaming house, but the officer who issues the warrant has to bring his judicial mind to bear upon the question and he can only issue the warrant contemplated under sec. 46 of the Act, if in his opinion there is reason to believe that a certain house or place is used as a common gaming house. The form of the present warrant therefore is in my opinion not authorised by the provisions of sec. 46 of the Act and it is therefore not valid thereunder. "Search warrants are a species of process exceedingly arbitrary in character and inasmuch as they are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness. In the first place, it is common learning that they are only to be

granted in the cases expressly authorised by law and not generally in such cases until it has been shown before a responsible officer on oath that a crime has been committed and that the officer has reason to believe that the offender or the property which is the subject or the instrument of the crime is concealed in some specified house or place. The law clearly intends that evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is "reason to believe" as required by sec. 46 of the Calcutta Police Act that a house, room or place is used as a common gaming house. In my opinion suspicion itself is no ground whatsoever for the issue of a warrant of this description. Search warrants are always open to very serious objections and I repeat that very great particularity is justly required by law in cases where they are authorised, before the privacy of a man's premises is allowed to be invaded by the minister of the law. The learned Magistrate seems to think that sec. 114, illustration (c) of the Indian Evidence Act covers this case and that we may presume that official and judicial acts have been regularly performed, i.e., that the acts necessary before issue of a warrant of this description were properly performed. This argument, as I understand it, has been employed for the purpose of doing away with the necessity for proof of compliance of the preliminaries referred to above, namely, "information on oath" and of "due enquiry" before issue of warrant. Having regard, however, to what I have already held about the validity of the warrant, sec. 114, illustration (c) of the Indian Evidence Act cannot in my opinion be relied upon in this case. The meaning of that provision is that if an official act is proved to have been done, it will be pre-

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sumed to have been regularly done. In other words, as has been laid down by Mr. Justice Mitter, where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. [See *Ashanullah v. Trilochan* (1).] There are various other authorities to this effect and in my opinion unless the law expressly says that no proof shall be required, evidence ought to be required in every case of this description that the essential preliminaries precedent to the issue of such a warrant have been complied with. In the view which I have taken, it is unnecessary for me to deal with Sir B. C. Mitter's fourth contention noticed above.

It follows from what has been stated above that the warrant, such as was issued in this case, is one which is not authorised by sec. 46 of the Act and that being so, the presumption that would otherwise have arisen under sec. 47 of the Act cannot arise in this case and that therefore the prosecution must fall back upon sec. 44 of the Act for the purpose of proving that the premises in question were kept and used as a common gaming house. On behalf of the prosecution it is urged that on the materials on record it is abundantly clear that gaming within the meaning of the Calcutta Police Act was going on at the premises in question, that instruments of gaming were found in the premises and that the premises were a common gaming house kept or used for profit or gain within the meaning of the said Act. Further, it has been argued that having regard to the rules and regulations of the Club, there can be no doubt

whatsoever that wagering or betting upon horse races was carried on at the said premises. In order to understand the precise significance of the last argument, it is necessary to set out some of the rules and regulations of the Club. The following are the material rules:—

(1) Aims and object:—The Club is started in the year 1922 with a view to conduct by establishing and maintaining a Club for pure sportsmen for the accommodation "only" of members thereof.

(2) For the express purpose of saving time and useless and unnecessary cost to the members, to receive and arrange to carry to the enclosure specified amounts paid to the secretary by the members to back on such horses as may be stated and named by them in their forms of application (or request) and to back on such horses in race enclosure and to inform to the members the results and pay their dues.

(3) That no game of chance for any bet or for money or any kind of gambling will be allowed to be played at the headquarters or at the branches of the Club by any member or anybody; that no illegal wagering will in any case be allowed in the premises of the Club; any member carrying on such prohibitive and illegal practice will be instantly struck off the rolls. No complaints will then be attended to.

(4) That breach of above rules will meet with instant dismembership.

(5) That a member is entitled to go to any of these branches as may suit his convenience and no additional fee will be charged to him for the same.

(6) Members will have to submit in their own handwriting the authorisation letter (i.e., the "original form" with the names of the different plates or races and the numbers and names of the horses in

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them). The said "authorisation letter" will be original copy which will remain with the secretary of the Club (as an important document) for reference, and guidance, should any disputes and differences arise.

(7) Members will be charged a commission of Re. 1 per cent. on the net profit accruing from their bet-money and rupees two per cent. for races other than Calcutta.

(8) The forms shall be clearly and legibly written in "ink" by members. The members are responsible for scratched forms. The members are warned that their original (application) form of betting will be accepted at their own risks and the clerk accepting them is not at all expected to go through all their forms.

(9) In doublings and treblings, etc., the amount put in the win and place columns will be backed on the horses running first and then on the next and so on win and place respectively.

(10) In doublings and treblings, more than one horse in each race will not be allowed. If the names of the horses entered in more than one race or plate are not mentioned, and if any two amongst them happen to run together, the bet will be considered invalid and the original betting amount on it will be returned.

(11) Only doublings and treblings will be accepted. If at all quadruplings and so on are accepted, and if they bring out huge amounts, their payments will be strictly subject to proper limitations decided only by the secretary. In all such cases, members will have to abide by the decision of the secretary, whose decision will be final and therefore binding on the members.

I am satisfied on a close inspection of the numerous articles which were seized by the police at the premises in question

and made exhibits in this case and on a minute examination of the said rules and regulations of the New Sports Club that there is abundant evidence on record showing that the premises in question were kept, used and conducted as a common gaming house. On the materials before me there can be no pretence whatsoever for the suggestion that the authorities of the Club acted as the agents of the members thereof and what they did came within the exception to the definition of gaming in the Calcutta Police Act. Enough has been shown on the record to show that betting or wagering was going on in the premises between the Appellants who opened, kept and conducted the premises and the members of the Club. There is also abundant evidence to show that large sums of money must have been or were paid by the members of the Club to the Appellants and that the Appellants kept and conducted the premises in question for purposes of profit or gain. I am not unmindful of the cases to which Sir Benod Mitter drew attention for the purpose of inducing us to infer that the Appellants were merely acting as agents on behalf of their principals; the evidence, however, is of such a character that this contention must be negatived. Indeed the evidence is of a compelling character and it shows that the betting, such as it was, was with the people who ran the Club.

In this view of the matter and after giving full weight to Ex. 12 on which much stress was laid by Sir Benod Mitter, I am constrained to hold that the Appellants in the first case have been properly convicted under sec. 44 of the Calcutta Police Act. I see no reason whatsoever to interfere with the sentences inflicted on them.

As regards the Appellant in the second

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appeal, the facts are identical, but in this case the warrant has been proved in this sense, namely, that the signature of the issuing officer has been duly proved. The warrant in other respects is open to the same objections on account of lack of proof of the compliance of the preliminaries necessary to the issue of the warrant and on account of its invalidity as having been issued on the existence of "cause for suspicion." I see no reason, however, on the merits to interfere with the conviction of and the sentence passed on the Appellant.

The result therefore is that both the appeals are dismissed.

CHOTZNER, J.—I have had the advantage of reading the judgment of my learned brother and fully agree with the decision at which he has arrived, but as the questions involved in these appeals are apparently of first impression and of considerable public importance, I think that I may perhaps add a few words to what he has said.

The Appellants in appeal No. 714 were charged with conducting the "New Sports Club" at premises Nos. 4, 5 and 6, British Indian Street as a common gaming house, while the Appellant in appeal No. 715 was similarly charged in respect of the "Aryan Sports Club" at 15/6, Zakaria Street.

Searches were held on both premises, the one in execution of a regular warrant, the other in execution of a warrant which has not been regularly proved. My learned brother has dealt very fully with the effect of that, and I would merely point out that the printed form of the warrant which says "there is cause to suspect" is not in conformity with sec. 46 of the Calcutta Police Act which requires the Commissioner of Police to have "reason to believe" that a place is used

as a common gaming house before issuing his warrant.

As a result of the searches, a large quantity of articles were found which have been held by the learned Magistrate to be "instruments of gaming" within the meaning of sec. 2 of Calcutta Police Act as amended by Bengal Act No. IV of 1913. I have examined some of these for myself: they include for instance a black board on which the results of particular races with the odds are to be inscribed, betting slips on which the names of horses to be backed with the amounts to be invested are shown, telegrams from distant race-courses showing the results of races with the odds paid by the totalisator, and a large quantity of blank betting and other forms, showing that the volume of business was considerable. Now it is plain that the presence of these particular articles can be explained on no other supposition than that they were used and intended to be used for the purpose of facilitating betting on horse races. A "common gaming house" is defined in sec. 2 of the statute as being "any house . . . in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house;" and "gaming" in the same section "includes wagering or betting" [except wagering or betting upon a horse race, when such wagering or betting takes place

(a) on the day on which such race is run, and

(b) in an enclosure which the stewards controlling such race have, with the sanction of the Local Government, set apart for the purpose].

It is not disputed that the Appellants were occupying the premises raided and that the betting transactions did not come

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within the exceptions named. The only question therefore that remains is whether the Appellants were using the premises for profit or gain. It has been contended that both the premises were "Clubs" and that the Appellants were merely agents working on the narrow basis of a 1 per cent. commission on winning bets at the local races and 2 per cent. on foreign races supplemented by the rupee entrance fee paid by new members. There is no evidence to show that these places were "Clubs" in the ordinary acceptance of the term. The book of rules (Ex. B) has no list of members, no officials except the secretary (the Appellant B. Walvekar) and no statement of what qualifications are required to make a person eligible for membership. This applies equally to the book of rules of the Aryan Sports Club. On the other hand, the prosecution evidence is clear that any one could go into the house at any time and have a bet without being a member at all. Obviously therefore these places are not genuine Clubs and the term "Club" has merely been adopted as a disguise for an illegal gaming house.

The suggestion made on behalf of the Appellants that they are merely agents and not unlicensed bookmakers is disproved by their own rules. I would refer to r. 18 on page 24 of Ex. B. This reads as follows:—"Only doublings and treblings will be accepted. If at all quadruplings and so on are accepted and if they bring out huge amounts, then payments will be strictly subject to proper limitations decided only by the secretary. In all such cases members will have to abide by the decision of the secretary whose decision will be final and therefore binding on the members."

Now if the Appellants were merely agents employed for the purpose of trans-

mitting bets to be placed on the totalisator, it would be to their interest to encourage and not to discourage quadrupling, because their commission would be proportionately higher in the event of a quadruple bet succeeding. But the fact that quadrupling is as a general rule prohibited and if accepted at all is made subject to the discretion of the secretary to pay (which, if the result involved "huge amounts," he might evidently refuse to do) places it beyond doubt that it was the Appellants who were themselves taking the bets for their own profit and gain.

That being so, they have been justly convicted and their appeals must be dismissed.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

LORD PHILLIMORF.

LORD BLANESBURGH.

SIR JOHN EIDGE

1925,

Heard, 21, 23 and

24, July.

Judgment,

5, December.

LAL CHAND MARWARI,
Appellant,

v.

RAMRUP GIR,
Respondent.

Limitation Act (IX of 1908), Arts. 142, 144—Alienation by mahant of math—Suit to recover by successor—Starting point of limitation—Indian Evidence Act (I of 1872), sec. 108, presumption of death, nature of, under—Onus of proof as to time of death.

If a person has not been heard of for not less than seven years, there is a presumption of law that he is dead: but at what time during the period of his disappearance he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time during that period lies upon the person who claims a right, to the establishment of which that fact is

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essential. There is no presumption that the death took place at the close of the first seven years of such disappearance.

RANGO BALAJI v. MUDIYEPPA (1) and IN RE PHENE'S TRUSTS (2) referred to.

In the case of an unauthorised alienation by a head of a muth,

Quere :—*Whether the statute of limitation began to run in favour of the alienee from the date of the wrongful alienation, or from the date of the death of (or final abandonment of office by) the mahant who alienated the property.*

But the suit in this case which was commenced by his successor more than twelve years after his predecessor's death was barred in any event.

DAMODAR DAS v. LAKHAN DAS (6) and VIDYA VARUTHI THIRTHA v. BALUSAMI AYYAR (7) referred to.

This was a consolidated appeal (No. 34 of 1924) from four decrees, dated the 12th April 1922, of the High Court at Patna, which reversed four decrees of the Court of the Subordinate Judge of Muzafferpur, dated the 12th September 1918.

The suits out of which this appeal arose were instituted by the Respondent Ramrup Gir as mahant of the ancient Sanyasi math Paprikhan Karan.

He alleged that his predecessor-in-office mahant Bhawan Gir had alienated the math properties without legal necessity and he claimed recovery of them.

In 1895 the Plaintiffs had brought a suit for recovery of these properties, but that suit was dismissed on 30th November 1897, on the ground that there was no evidence of the death of Bhawan Gir.

(1) I. L. R. 23 Bom. 290 (1898).

(2) L. R. 5 Ch. 139 (1869).

(6) L. R. 37 I. A. 147; s. c. I. L. R. 37 Cal. 885; 14 C. W. N. 889 (1910).

(7) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

The latter had gone on a pilgrimage sometime prior to 1895 and had not been heard of since.

In the present suit the Plaintiffs asked the Court to presume that the death of Bhawan Gir took place on 30th November 1901, viz., seven years after the decree of the High Court in the 1895 suit and alleged that their cause of action arose on that date.

The Defendants amongst other defences pleaded that the suits were barred by limitation, and that they were *bond fide* purchasers for value.

The Subordinate Judge decided that the properties were held by Phawan Gir as trustee for the math and were alienated without necessity, but he was of opinion that the suits were instituted more than 12 years from the dates of the alienations, and that they were barred by Art. 134 of the Limitation Act. In the event he made a decree dismissing the suits.

On appeal the High Court (Das and Bucknill, JJ.) agreed with the findings of the trial Judge on the questions of fact, but were of opinion that Art. 134 of the Limitation Act was not applicable inasmuch as the property here was vested in the mahant as in *Vidya Varuthi v. Balusami Ayyar* (7) and not in the juridical person, the idol, of whom the mahant was merely the representative, as in *Damodar Das v. Lakhan Das* (6) so that time began to run not from the date of the alienation but from the date of the death of the person who made the alienation. With regard to the date when Bhawan Gir died they said—

“The Court is entitled to presume that he is actually dead at the date of the

(6) L. R. 37 I. A. 147; s. c. I. L. R. 37 Cal. 885; 14 C. W. N. 889 (1910).

(7) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

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institution of the suit and if it be the Defendants' case that he died more than 12 years prior to the institution of these suits, it is for the Defendants to establish the date of Bhawan Gir's death by actual evidence."

They held accordingly that the suit was not barred by Art. 144 of the Limitation Act and made a decree for possession and mesne profits.

Messrs. DeGruyther, K. C. and E. B. Ruikes for the Appellant.—Assuming that the cause of action arose on the death of Bhawan Gir the evidence adduced by the Plaintiffs is that he died in 1892 and there is no evidence that he was alive within 12 years of action brought.

Sec. 108 of the Evidence Act, 1872, provides that death may be presumed when a person has not been heard of for seven years, but no presumption arises as to the date at which the death occurred.

In re Phené's Trusts (2), *Md. Sharif v. Bandi Ali* (8), *Rango Balaji v. Mudiyeppa* (1) and *Fani Bhusan v. Surjya Kanta Roy* (9).

The High Court is in error in saying that the onus is on the Defendants to prove the date of Bhawan Gir's death. The onus is on the Plaintiffs to show that their suit is not barred by limitation.

Code of Civil Procedure, 1908, Or. 7, rr. 1 (e) and 11 (d).

Perlād Sein v. Rajender Kishore Sing (3), *Md. Ibrahim v. Morrison* (4), *Ali Khan v. Abdul Gunny* (10), *Hickman v. Upsall* (11) and *Doe v. Nepean* (5).

(1) I. L. R. 23 Bom. 296 (1899).

(2) L. R. 5 Ch. 139 (1869).

(3) 12 M. I. A. 334, 337 (1899).

(4) I. L. R. 5 Cal. 37 (1878).

(5) 5 B. & Ad. 86, 94 (1833).

(6) I. L. R. 24 All. 36, 41 (1911).

(7) I. L. R. 35 Cal. 25 (1907).

(10) I. L. R. 9 Cal. 744 (1893).

(11) L. R. 20 Eq. 186 (1875).

The cause of action really arose at the date of the alienation [*Damodar Das v. Lakhan Das* (6) and *Ishwar Shyam Chand v. Ram Kanai Ghose* (12)] and not at the date of Bhawan Gir's death; so that *Vidya Varuthi v. Balusami* (7) is not in point.

Messrs. Dunne, K. C. and Wallach for the Respondent.—The suits were brought within the period of limitation. The Plaintiffs have proved Ramrup Gir's title and the death of Bhawan Gir and it is for the Defendants to prove their alleged title by adverse possession. *Mitra on Limitation*, p. 1163.

The Defendants maintained that Bhawan Gir was alive in 1897, and the Plaintiffs are entitled, in view of the Court's decision in 1897, to have it presumed under sec. 108 of the Evidence Act that Bhawan Gir's death took place seven years after that date.

The ownership of the property is in the mahant and the decision in *Vidya Varuthi v. Balusami Ayyar* (7) applies.

Mr. DeGruyther, K. C., replied.

Their LORDSHIPS' JUDGMENT was delivered by

LORD BLANESBURGH.—These are consolidated appeals by the Defendants in four out of eight suits instituted by one Ramrup Gir in the Court of the First Sub-Judge at Muzafferpur on the 30th November 1916. The suits were brought on the allegation that the Plaintiff, as the then mahant of an asthal or math at Paprikhan Karan, was entitled to recover from the Defendants different properties, endowments of the math, then in their

(6) L. R. 37 I. A. 147; s. c. I. L. R. 37 Cal. 885; 14 C. W. N. 889 (1910).

(7) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831; 26 C. W. N. 537 (1921).

(12) L. R. 38 I. A. 76; s. c. I. L. R. 38 Cal. 526; 15 C. W. N. 417 (1911).

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possession. These properties had, it was alleged, been alienated without warrant by Bhawan Gir, deceased, the immediate predecessor as mahant of the Plaintiff. The suits, as they progressed, were amended by the joinder as co-Plaintiffs of three persons to whom in consideration of their supplying funds for the conduct of the litigation Ramrup Gir had agreed to transfer, when recovered, certain portions of the properties in question. As so amended they were heard at length by the learned Subordinate Judge, and, on appeal, by the High Court at Patna, where many issues were raised and strenuously contested. Of these one only remains for determination by their Lordships, namely, the issue of limitation. The learned trial Judge held that the suits were barred by statute. The High Court, on appeal, held that they were not, and made decrees for possession of the properties with mesne profits. It is against these decrees and on the ground that the suits should have been dismissed as being out of time that the present appeals have been brought and argued.

The math in question has a considerable history. It is a math of the Sanyasis who are celibate and have renounced the world. The properties in suit had been amongst its endowed properties for a period of nearly 150 years. They stood in the name of the mahant for the time being, but he had no right to alienate them otherwise than for necessity. The income from them at one time, at all events, amounted to Rs. 4,000 a year, appropriated not to a single deity, but for puja of Siuji, the principal deity, for the pujas of the other established deities of the math and in the entertainment of mendicants and ascetics. These matters, all in dispute in the Courts below, were not ~~agitated~~ raised in contest before the

Board, and may now be taken to be accepted.

In the year 1880 or shortly afterwards Bhawan Gir became mahant of this asthal or math. He had, as his elder chela, the Plaintiff Ramrup Gir, and, as his younger chela, one Harihar Gir. Bhawan Gir was drunken, immoral and dissolute, and, as might be expected of such a person, profligate and extravagant. Portions of the endowed properties he mortgaged without justification by way of security for loans made to himself. Other portions equally without justification he purported to sell outright. The proceeds in every case were, it can hardly be doubted, spent mainly, if not entirely, upon himself. The properties mortgaged have since been sold under decrees made in suits brought to enforce the securities. And so it has come about that those properties now in dispute have all of them been in the exclusive possession of the Defendants or their predecessors-in-title as for absolute interests for periods exceeding on the 30th November 1916, in every instance, a term of 26 years of continuous duration.

By 1888 Bhawan Gir had denuded himself and the math of all its endowed properties. In March 1892, he made the asthal over to the Plaintiff, and, as the Plaintiff recites in a deed of sale of the 15th June 1917, left the place for good. And he has never returned. He went on pilgrimage and Harihar Gir went with him. Some weeks later Harihar Gir came back alone and reported to the Plaintiff that Bhawan Gir had died in his arms at Hardwar on the 27th April 1892.

The Plaintiff accepted that statement. It was, of course, then greatly to his interest to do so. He had become mahant if it were true. It is, however, contrary to his interest now to accept it. Indeed,

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if the fact be as stated, it is fatal to his present claims. Yet in his evidence in these suits—to his credit be it said—he has again declared his belief that Harihar Gir's statement as to Bhawan Gir's death at Hardwar in April 1892 is in accordance with fact. And his actions since the date of Harihar Gir's return, if they be honest, have been consistent, and consistent only with a constant belief that Bhawan Gir was dead. Almost at once he performed his bhandara and shradh, and he was himself instituted as mahant of the math and got chudder and pagree and was installed in the Gaddi. Three years later, that is say, on the 16th April 1895, with money found by others on terms analogous to those on which the funds for the present litigation have been obtained, he instituted a series of suits against the present Defendants or their then predecessors-in-title to recover the properties on the allegation that he had on the death of Bhawan Gir succeeded thereto as mahant. In those suits the Plaintiff gave evidence to the effect just stated. Harihar Gir, too, was called as a witness, and he directly deposed to Bhawan Gir's death in his presence on the date already given. His statements at that date were of course highly interested. Moreover, it was essential to the Plaintiff's case then that they should be true. The learned trial Judge, however, disbelieved them, accepting as preferable, and perhaps as true, a body of evidence adduced by the then Defendants—suspicious only because of its volume and circumstance—that Bhawan Gir was alive after April 1892: that indeed he had been seen alive in 1895 after action brought. For the reason therefore that the Plaintiff had failed to establish the fact essential to the validity of his claim, namely, that Bhawan Gir was dead when the suits were instituted,

the trial Judge by decrees, dated the 27th January 1896, dismissed them all with costs. The Plaintiff appealed to the High Court, but the learned Judges of that Court, finding themselves unable on the materials before them to review the trial Judge's finding on this issue of fact by orders, dated the 30th November 1897, dismissed the appeals. And so that litigation ended. Attention must be given to this last date. It will be found that the Plaintiff sets great store by it in these proceedings.

The Plaintiff in 1905 again performed the bhandara of Bhawan Gir and was again installed in the Gaddi, although in his own view, as he stated in evidence in these suits that ceremony was neither essential to his institution nor redundant in its repetition. On the 30th November 1916, he instituted the present litigation. The date is significant. Required by Or. 7, r. 1 (c) of the First Schedule to the Code to set forth in his plaint the facts constituting his cause of action, and when it arose, the Plaintiff in each of the plaints alleges that the Judges of the High Court in the earlier proceedings had, on the 30th November 1897, accepted the then Defendant's statement that the Plaintiff's Guru, Mahant Bhawan Gir, was then alive: that no particulars regarding him had been known for seven years from the date of that judgment, and that it was necessary for the Plaintiff to accept the 30th November 1904 as the date of death of his Guru when the cause of action accrued to him. His suits were in time—such is the implication of the allegation, and such is his way of establishing it—in that they were commenced within twelve years to a day from the 30th November 1904.

This view is undoubtedly mistaken. It would be fatal to the Plaintiff if it were

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not. For his case on his chosen foundation fails upon the facts. It is not correct to say that the High Court in the earlier litigation found that Bhawan Gir was alive on the 30th November 1897. What that Court did find, affirming the Subordinate Judge, was that he had not been proved to be dead on the 16th April 1895. The latest date at which anyone deposed to his being alive was a later date in the same year. And there is no evidence, either in that litigation—if it may be regarded—or in this that he has ever since been heard of. So far indeed as the present suits are concerned the only testimony adduced, apart from that of Harihar Gir, is that he has been neither seen nor heard of since he left the math in March 1892. Putting the case therefore at its highest for the Plaintiff—that is, excluding altogether from consideration both Harihar Gir's direct evidence of death and the Plaintiff's belief in its truth—the position is that Bhawan Gir has not been seen or heard of since the year 1895. If so, on the principle set up by the Plaintiff, he must be presumed to be dead by the end of 1902. Accordingly these suits commenced only in 1916 are clearly statute-barred as against the Defendants.

But the law really is that on the facts now assumed there is no presumption as to Bhawan Gir being dead either in 1902 or 1904. There is only one presumption, and that is that when these suits were instituted in 1916 Bhawan Gir was no longer alive. There is no presumption at all as to when he died. That, like any other fact, is a matter of proof. And their Lordships would here observe that it strikes them as not a little remarkable that the theory on this point, on which the Plaintiff's pleader hazards his whole case, is still so widely held, although it

has so often been shown to be mistaken. The learned Judges of the High Court have in these suits pointed out the Plaintiff's error. Yet, in another part of their judgment, if their Lordships are not mistaken, they have themselves unconsciously fallen into it. They have made a decree in the Plaintiff's favour because they had, as they thought, no reliable evidence as to the date of Bhawan Gir's death, and because in their judgment it was for the Defendants to prove that date if they relied on it. Yet at the same time they have acceded to the Plaintiff's claim for mesne profits which, at all events, as claimed, are those profits accruing three years prior to the institution of the suits. This imports that Bhawan Gir was dead at that date. But if he was, then the same evidence showed that he had died many years before. The evidence, indeed, if regarded at all, required the Court not to allow mesne profits but to dismiss the suits altogether.

Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the law of England [*Rango Balaji v. Mudiyeppa* (1)], and, searching for an explanation of this very persistent heresy their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words, taken originally from *In re Phene's Trusts* (2), run as follows:—

"If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Following these words, it is constantly assumed—not perhaps unnaturally—that

(1) I. L. R. 23 Bom. 298 (1898).

(2) L. R. 5 Ch. 189 (1869).

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where the period of disappearance exceeds seven years, death, which may not be presumed at any time during the period of seven years, may be presumed to have taken place at its close. This of course is not so. The presumption is the same if the period exceeds seven years. The period is one and continuous, though it may be divisible into three or even four periods of seven years. Probably the true rule would be less liable to be missed, and would itself be stated more accurately, if, instead of speaking of a person who had not been heard of for seven years, it described the period of disappearance as one "of not less than seven years."

To resume, however. It is manifest that the attempt made by the Plaintiff in his plaint to comply with Or. 7, r. 1 (c) and set forth the date when his cause of action arose has failed him on the facts. The result is to disclose, so far as he is concerned, a very serious position. It is made plain by the plaint that as against him the Defendants had at the institution of the suits been by themselves and their predecessors in adverse possession of the properties in question for more than 12 years—in point of fact since 1895 at least when the earlier litigation against them was commenced by the Plaintiff, and which is the last year in which anyone proposes that Bhawan Gir was seen alive. The plaint itself accordingly discloses a state of things to which sec. 144 of the Limitation Act is applicable. In such circumstances it may well be that it is the obligation of the Plaintiff by the law of India as it is by the law of England to satisfy the Court that his action is not barred by lapse of time. See as to India:—*Rajah Sahib Perlal Sein v. Maharajah Rajender Kishore Sing* (3), *Mahomed*

Ibrahim v. Morrison (4): as to England:—"There is no doubt," said the Court of Queen's Bench in *Doe v. Nepean* (5), "that the lessor of the Plaintiff must recover by the strength of his own title and in order to do so must prove that he had a right to enter on the lands sought to be recovered within twenty years before ejection brought."

To all of which may be added the comment by Lord Justice Giffard on *Doe v. Nepean* (5), that the onus of proving death of any person at any particular period must rest with the person to whose title that fact is essential. In *re Phene's Trusts* (2).

On this footing therefore the Plaintiff here would fail in the absence of evidence of the death of Bhawan Gir within twelve years before the institution of the suits.

But it is unnecessary in the state of the evidence in this case to proceed upon any such strict view of the Plaintiff's position. He has himself, and in these suits, supplied affirmative evidence, which their Lordships cannot disregard. Harihar Gir was called as a witness on his behalf. In his evidence-in-chief he solemnly deposed that Bhawan Gir died in his presence at Haridwar in April 1892. In cross-examination he added that he himself performed his funeral ceremonies, and that if anybody said that he did not die in April 1892, it would be false. And by way of confirmation the Plaintiff stated in his evidence, as their Lordships have already observed, that he himself believed that Harihar Gir was telling the truth in this matter, while, as has also been shown, his own actions and claims ever since have alone been consistent with that belief.

(2) L. R. 5 Ch. 139 at pp. 151-152 (1869).

(4) L. R. 5 Cal. 37 (1878).

(5) 5 B. & Ad. 80, 94 (1833).

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To their Lordships it seems impossible that such evidence adduced by the Plaintiff himself, fatal as it is to his case, can be ignored. They are not blind to the difficulty. They do not forget the wealth of circumstantial evidence to the effect that Bhawan Gir was alive as late as 1895 adduced by the Defendants or their predecessors-in-title in the earlier litigation, and then accepted and acted upon by the trial Judge to the Plaintiff's undoing. They do not forget that at that time such evidence was vital to the defence, nor do they fail to note the absence now of any counterpart to it when the lapse of time has made it to the highest interest of the Defendants to accept the Plaintiff's story that Bhawan Gir has been dead all these years. Their Lordships bear all this in mind, and see no occasion to commend these highly sophisticated tactics of the Defendants. But they find it impossible to ignore the consistent attitude of the Plaintiff, supported now by uncontradicted direct evidence of death and a wealth of concurring testimony to the effect that since Bhawan Gir abandoned the math in 1892 with Harihar Gir he has not been seen or heard of. If these suits were being brought against Defendants, neither parties nor privies to the earlier litigation, there could, in their Lordships' view, have been no question that the evidence now adduced on behalf of the Plaintiff would have been completely destructive of his case. Is the position of the Defendants so compromised by their attitude in the earlier litigation that they are in effect estopped from deriving benefit from the Plaintiff's evidence of death even if it now, by reason of the lapse of time, has gained so greatly in force? It is of course hard upon the Plaintiff that evidence rejected in 1895, when it would have helped him, should now be accepted when it hurts

him. On the other hand, it must be remembered that the complete disappearance down to the present time of Bhawan Gir and the now disinterested character of the evidence adds to the Plaintiff's story of his death a strength from external circumstances altogether lacking in 1895. Moreover, to ignore the evidence altogether would be to fly in the face of the statute.

The difficulty of the Plaintiff's present position in this matter was not, it would seem, at all appreciated in the Courts below. Das, J., in the High Court, for instance, proceeded upon the footing that his evidence on this point was adduced only in the earlier proceedings, and the learned Judge disposed of the point:—

"It is quite true that it was the Plaintiff's case in the suit which he instituted in 1895 that Bhawan Gir died on the 15th Baisak 1299, but that case was not accepted by the Courts."

That is all. To the evidence in the present suit the learned Judge makes no allusion. It is that evidence which their Lordships find themselves unable to ignore. The Plaintiff must, as it seems to them, take the consequences of solemn testimony given by himself and adduced on his behalf.

This disposes of the case, and it is unnecessary for their Lordships to deal with the important and difficult question whether here the statute did not commence to run in favour of the Defendants from the dates of the wrongful alienations of the properties or at all events from the date of his final abandonment of his office by Bhawan Gir and not only from his death. Whether, in other words, the case is governed by the decisions of which *Damodar Das v. Lakhan Das* (6) may be taken as the leading authority: or by the line of authority of which *Vidya*

(6) L. R. 37 I. A. 147; s. c. I L R. 37 Cal. 285; 14 C. W. N. 889 (1910).

LAL CHAND MARWARI v. RAMBUP GIB.

Varuthi Thirtha v. Balusami Ayyar (7) may be taken as typical. Their Lordships while not pronouncing upon it have given very careful consideration to this interesting and difficult question. Upon it they say no more than this, that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned the question remains entirely open to be determined when it arises.

For the reasons above given, however, they are of opinion that the decree of the High Court should be re-called and that of the trial Judge restored, and they will humbly advise His Majesty accordingly. The Respondents must pay to the Appellants their costs before the Board and in the High Court.

Solicitors: *Messrs. Watkins & Hunter* for the Appellant.

Solicitor: *Mr. H. S. L. Polak* for the Respondent.

G. D. M.

(CIVIL REVISIONAL JURISDICTION.)

Full Bench Reference

No. 1 of 1925

IN

REV. No. 429 OF 1925.

CHATTERJEA, J.

CUMING, J.

B. B. GHOSH, J.

PANTON, J.

PAGE, J.

1926,

14, May.

JHARU MONDAL,
Petitioner,

v.

KHETRA MOHAN
BERA and ors.,
Opposite Parties.

Bengal Tenancy Act (VIII of 1885), sec. 170 (3)

—Purchaser of non-transferable occupancy holding not recognised by the landlord cannot make deposit under section.

The purchaser of the whole or portion of a non-transferable occupancy holding who has not been recognised by the land-

(7) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 281; 26 C. W.N. 537 (1921).

lord has not an interest in the holding which is voidable on the sale and is not entitled to make a deposit under sec. 170 (3) of the Bengal Tenancy Act.

This was a Rule granted on the 9th of April 1925 against an order of the Munsif, 3rd Court, Contai (Mr. D. N. Basu), dated the 23rd February 1925.

The Rule came on for hearing before Cuming and Mukerji, JJ., who, owing to conflict of decisions on the point that arose for consideration in the Rule, referred the case to the Full Bench.

The ORDER OF REFERENCE was as follows:—

CUMING, J.—The facts of the case out of which this Rule has arisen are briefly these:—

The Petitioner purchased a certain holding in 1907 in execution of a mortgage decree against the recorded tenants Opposite Party Nos. 2 and 3 and obtained possession. The property was sold in execution of a decree for rent in Execution Case No. 136 of 1924. On this the Petitioner applied to deposit the decretal amount under sec. 170, Bengal Tenancy Act. The learned Munsif held that he was not a person having an interest voidable on the sale and hence was not entitled to make the deposit. The Petitioner moved this Court and has obtained this Rule. Speaking for myself, I should hold that the learned Munsif is right.

Admitting for the sake of argument that the Petitioner has an interest in the holding that interest is not voidable but passes with the sale.

When a holding is sold in execution of an arrear of rent what passes to the purchaser is the holding subject to the provisions of sec. 22 and also subject to the interests defined in sec. 159 which are described as protected interests but with the power to annul the interests defined as

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incumbrances. Sec. 160 defines a protected interest and sec. 161 defines what are not protected interests but are interests which are described as encumbrances. These interests or encumbrances are voidable and it is obvious that sec. 170 (3) would apply to such an unprotected interest. If therefore the interest that the Petitioner holds falls within neither of these sections, it is an interest that passes with the sale and so is not a voidable interest.

Clearly a purchase of the whole holding at a sale in execution of a decree does not fall within either sec. 160 or sec. 161. An incumbrance implies a limitation of the right of the tenant and not a total extinction [*Tomizuddi Khan v. Khuda Newaz Khan* (1)]. I should thus have no hesitation in holding that a purchaser of a non-transferable occupancy holding without the landlord's consent had no interest in the holding voidable by the sale which would entitle him to make a deposit under sec. 170 (3).

Unfortunately the question is not *res integra*. It has been the subject of numerous decisions of this Court and these decisions are not uniform.

I propose to deal with, first of all, the decisions which take the contrary view.

The first of these is the case of *Tarak Das Pal v. Harish Chandra Banerji* (2).

In that case it was held that the purchaser of a holding who has not been recognised as a tenant by the landlord has an interest in the holding which is voidable on a sale held in execution of a decree for rent against the registered tenant. It was held in that case that as the purchaser had been in possession claiming for more than 12 years to be tenant to the

knowledge of the landlord that he had such an interest as is contemplated by sec. 170 (3) and that such an interest was voidable by the sale.

With the greatest respect to the learned Judge I am unable to understand what the interest could be unless it were the limited interest of a tenant.

The learned Judge then held, though for reasons that are not very clear, that this was an interest voidable by the sale.

The next case to be considered is the case of *Ahamadulla Choudhury v. Prayag Sahu* (3). This again was the purchase of a holding. In this case no question arose of the purchasers being in possession for more than 12 years. In this case the Full Bench case of *Dayamoyi Dasi v. Ananda Mohan Roy* (4) was considered. The learned Judge held that the effect of the sale was to give the auction-purchaser the right to oust the transferee and that it had been held in *Tarak Das Pal v. Harish Chandra Banerji* (2) that that fact makes the interest of the purchaser one that is voidable on the sale.

As against this decision we have been referred to the case of *Barada Prosad Roy Choudhury v. Foizuddi Haldar* (5). In that case the purchaser of a part of a holding who had not been recognised by the landlord applied to make the deposit. In their judgment the learned Judges remarked that there had been some conflict of decisions in this Court on the point. They referred to the cases I have already mentioned and also to two unreported cases I shall presently deal with, *Kumar Narendra Mitter v. Abdul Molla* (6) and

(2) 17 C. W. N. 163 (1912).

(3) 20 C. W. N. 39 (1914).

(4) I. L. R. 42 Cal. 172; s. c. 18 C. W. N. 971 (F. B.) (1914).

(5) 28 C. W. N. 845 (1924).

(6) Civil Rule No. 37 of 1923; 27 C. W. N. 175 (Short-notes) (1923).

(1) 14 C. W. N. 229; s. c. 11 C. L. J. 16 (1909).

(2) 17 C. W. N. 163 (1912).

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Mahomed Ismail v. Satya Chandra Sarkar (7).

The learned Judges did not distinguish these cases from the first two cases referred to, but held that as the contrary view had been taken in a number of later cases they did not think it necessary to refer the matter to the Full Court. They held that the transferee of a whole or a part of a non-transferable occupancy holding not recognised by the landlord was not entitled to make a deposit under sec. 170 (3), because the interest of such a transferee passed by the sale and was not voidable on the sale.

In the Appeal from Appellate Order No. 244 of 1921 and Civil Revision Case No. 591 of 1921, *Mahomed Ismail v. Satya Chandra Sarkar* (7) and in Civil Rule No. 37 of 1923, *Kumar Narendra Nath Mitter v. Abdul Molla* (6), the same view was taken.

There is clearly therefore a conflict of decisions in the Court and for this reason a reference to a Full Bench is necessary.

The point on which the decision of the Full Bench is required is whether a purchaser of the whole or portion of a non-transferable occupancy holding who has not been recognised by the landlord has an interest in the holding which is voidable on the sale and so entitled to make a deposit under sec. 170 (3), Bengal Tenancy Act.

Under r. 1, Chap. VII, High Court Rules, the case is referred for decision to a Full Bench.

MUKERJI, J.—I agree.

Babus Sitaram Banerjee and Bijoy Prasad Singh Roy for the Petitioner.

Dr. S. C. Basak and Babu Bhupendra Narain Bera for the Opposite Parties.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA, J.—The question referred to the Full Bench is whether a purchaser of the whole or portion of a non-transferable occupancy holding who has not been recognised by the landlord has an interest in the holding which is voidable on the sale and so entitled to make a deposit under sec. 170 (3) of the Bengal Tenancy Act.

Sec. 158B of the Bengal Tenancy Act provides that where a tenure or holding is sold in execution of a decree for arrears of rent (under the provisions of Chap. XIV of the Act), the tenure or holding shall (subject to the provisions of sec. 22) pass to the purchaser. Sec. 159 lays down that such purchaser shall take subject to certain interests defined as "protected interests and with power to annul the interests defined in Chap. XIV as incumbrances." That being so, the holding itself passes to the purchaser subject only to the "protected interests" and with power to avoid incumbrances.

In the present case, the Petitioner is the unregistered transferee of the holding from Opposite Parties Nos. 2 and 3 who are recorded as tenants of the holding in the office of the landlord, the Opposite Party No. 1. The Opposite Parties Nos. 2 and 3, the original tenants, represent (so far as the landlord is concerned) the ownership of the holding. Sale held in execution of a rent decree under the provisions of Chap. XIV of the Act would pass to the purchaser the holding itself free of any interest of the unregistered transferee. That being so, the question arises whether the interest of the Petitioner can be said to be an interest which is "voidable on the sale." Now if

(4) Civil Rule No. 37 of 1923; 27 C. W. N. 175 (Short-notes) (1923).

(7) *Mis. App. No. 244 of 1921 and Civil Rule No. 591 of 1921*; 26 C. W. N. 170 (Short-notes) (1923).

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the interest is extinguished by the sale and ceases to exist, can it be said that the interest is voidable on the sale? There is no doubt that the Petitioner had acquired (except against the landlord) an interest in the holding. But if such interest did not subsist after the sale, it is difficult to see how any question can arise of avoiding such interest.

Apart from the authorities on the point, it appears to me that the words "interest voidable on the sale" refer to interests coming within the description of "incumbrance," which, unless steps are taken to avoid them, subsist after the sale, and the interest of a transferee of the holding itself from the tenant is not such an interest. Sec. 161 of the Act defines "incumbrance," and sec. 167 lays down how such incumbrance can be annulled by a purchaser having power to annul the same. In the case of *Abdul Rahaman Choudhury v. Ahamader Rahaman* (8), it was held that the interest of an unregistered purchaser of a portion of *patni* tenure is not an incumbrance within the meaning of sec. 161 of the Act, and so far as the present question is concerned, there is no difference between a *patni* tenure and a holding. And if a portion of a tenure or holding is not an incumbrance, the entire tenure or holding cannot be an incumbrance. Apart from the decided cases, therefore, it appears that the interest of an unregistered transferee is not an interest "voidable on the sale."

It has, however, been held in some cases that it is an interest voidable on the sale. In *Radhika Nath Sarkar v. Rakhal Raj Gayen* (9) (a case under sec. 171 of the Bengal Tenancy Act) the question was whether an unrecorded purchaser of

a share in a *darpatni* tenure had an interest in the tenure which was voidable upon a sale in execution of a decree for rent obtained by the *patnidar* against the recorded tenants of the *darpatni* and, as such, could apply under sec. 171 of the Bengal Tenancy Act. The learned Judges observed as follows:—There can be no question that the predecessor-in-interest of the present Appellants was a person who had an interest in the tenure. There can be no question also that the interest was such as would be voidable upon the sale because the *patnidar* was entitled in execution of the decree obtained against the recorded tenants of the *darpatni* to sell the entire tenure. The reason, therefore, why the learned Judges held that the interest would be voidable on the sale was that the entire tenure would be sold in execution of the rent decree obtained against the recorded tenants. That shows that the learned Judges were of opinion that an interest which would be injuriously affected by the sale is an interest voidable on the sale. But as already pointed out, the expression "voidable on the sale" indicates the subsistence of some interest which has to be avoided after the sale. The case of *Jugal Mohini Dasi v. Srinath Chatterjee* (10) was a case under sec. 170, cl. (3) of the Bengal Tenancy Act. But it proceeds upon the same reasoning. These were followed in the case of *Tarak Das Pal Choudhury v. Harish Chandra Banerji* (2), where it was held that "a purchaser of a holding who has not been recognised as a tenant by the landlords has an interest in the holding which is voidable on a sale held in execution of a decree for rent against a registered tenant within the meaning of cl. (3) of sec. 170 of the

(8) I. L. R. 43 Cal. 558: s. c. 19 C. W. N. 1217 (1915).

(9) 13 C. W. N. 1175 (1909).

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Bengal Tenancy Act." The learned Judges pointed out that "the expression used by the legislature is interest voidable on the sale," and not incumbrance "voidable on the sale" under the provisions of the 14th Chapter of the Bengal Tenancy Act. The language used by the legislature is comprehensive and should not be narrowly construed in view of the obvious object of this provision. The case of *Ahamdulla Choudhury v. Prayag Sahu* (3) merely followed the above case.

The whole thing turns upon the meaning to be attached to the expression "voidable on the sale," whether it means an interest injuriously affected by the sale, or an interest which subsists and which has to be avoided after the sale. The opinions of the learned Judges who decided the above cases are entitled to the highest respect, but it seems to me that the distinction pointed out above was not kept in view in those cases.

It is contended by the learned vakil for the Petitioner that some steps have to be taken by the purchaser at a sale if the unregistered transferee does not give up possession of the holding, and, therefore, it is a case of avoiding the interest on the sale. But if that contention is well-founded, it may be applied with equal force to the case of a trespasser, who certainly has no interest voidable on the sale.

There are a large number of decisions of our Court and a decision of the Special Bench of the Patna High Court [*Mahadeo Lal v. Langat Sing* (11)] supporting the view I have taken. They are all noted in Sen's Bengal Tenancy Act, 5th Edition at pages 797-798. It is unnecessary to discuss them.

For these reasons, I think that the

question referred to the Full Bench must be answered in the negative. The result, therefore, is that the Rule is discharged with costs, two gold mohurs, for all the hearings.

CUMING, J.—I agree. I have already stated my reasons in the Letter of Reference and I do not think that I should take up the time of the Court by reiterating them.

B. B. GHOSE, J.—I agree. My view was already expressed in the case of *Barada Prosad Roy Choudhury v. Foizuddi Halder* (5) and the discussions that I have heard to-day confirm me in my opinion. The only thing that I may add is that where an interest is extinguished on a sale, nothing remains afterwards which need be avoided. The interest, therefore, of the Petitioner cannot be called an "interest voidable on the sale."

PANTON, J.—I agree in the judgment delivered by my learned brother Mr. Justice Chatterjea.

PAGE, J.—I agree. The words "interest voidable on the sale" in sec. 170 (3) of the Bengal Tenancy Act connote that such interest may or may not be avoided by the auction-purchaser at his election. But whether the interest in question will cease on the sale or subsist thereafter is a matter over which the purchaser has no control. He can neither make the holding transferable by affirmation nor avoid the transfer by disclaimer. It seems to me, therefore, that it is not quite correct to say that the Petitioner's interest would pass on the sale. What really would happen is that under the sale the title to the holding would pass to the purchaser free from such interest, which would be extinguished on the sale taking place.

S. C. M.

(3) 20 C. W. N. 39 (1914).

(11) [1917] Pat. 169; 2 P. L. J. 487 (Spl. B.) (1917).

(5) 25 C. W. N. 845 (1924).

ORDINARY ORIGINAL CIVIL JURISDICTION.

SUIT No. 11 OF 1912.

BUCKLAND, J.

1926,

13, January.

SUGAN CHAND DAGA

v.

KANAPPA CHETTY and

ors.

Civil Procedure Code (Act V of 1908), Or. 49, r. 1—R. 14 of Chap. VIII of the Rules of the High Court, Calcutta—Service of summons, how to be effected, by person employed by the attorney or employed by the client.

Summonses should be served by the attorney's employee and not by an individual specially employed for the purpose by the client.

This was an application in chambers before Buckland, J., on behalf of S. V. Supramania Chetty, one of the Defendants in this suit, for an order that the execution of the *ex parte* decree in this suit be stayed on the ground that there was no proper service of summons. It appears that a summons was directed to be issued by this Court under Or. 21, r. 16 of the Civil Procedure Code calling upon the Defendants to show cause why leave should not be granted for execution of the *ex parte* decree passed on 18th March 1912. The said summons was served by the *monib gomasta* of the Plaintiff and one K. P. Raju Naidu, who purported to be a village headman of the village of Sirukunapatti, on the said Defendant by affixing a copy thereof on the outer door of the ordinary place of residence of the said Defendant in that village on 4th May 1925, on the Defendant's refusing to acknowledge service thereof. The Defendant denied service. He submitted that K. P. Raju Naidu had no right or authority to serve the said notice and the notice was not legally or properly served.

Sir Benode Mitter (with Mr. S. M. Bose) on behalf of the Defendants applicants referred to Or. 49, r. 1 of the Civil

Procedure Code and r. 14, Chap. VIII of the Rules of the High Court. He argued that the village headman was not an attorney's employee and he had no authority to serve and therefore the service was not in accordance with law.

Mr. A. K. Roy opposed the application on behalf of the Plaintiff. He argued that there was nothing to show that the headman of the village was not a person employed by the attorney. He sent out the summons to his client in Madras who employed the headman. The Court having made the order, it should be presumed that the service was proper.

The JUDGMENT OF THE COURT was as follows:—

BUCKLAND, J.—This is an application to set aside an order of 18th May 1925 giving the assignee of a decree made on the 8th March 1912 liberty to execute the decree and for transmission of the decree to a Court in the Madras Presidency for the purpose.

The applicant states he was never served with notice of that application and he relies on his own petition verified by the affidavit of K. N. M. Kasi Viswanath Pillai as well as the affidavits of other persons. I may say at once that I do not decide upon the facts or any point argued or touched upon in the affidavits other than that to which I shall presently refer, not that they have been abandoned, but because the point upon which I propose to dispose of this matter appears to be conclusive and entirely sufficient for the purpose.

The affidavit of service of the original notice is by K. P. Raju Naidu who says that he is the village headman of village Sirukunapatti in the District of Ramnad in the Presidency of Madras. He then goes on to state what he did and assuming that these statements are accepted, as to

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which I say nothing, on the face of it the affidavit is impeachable. The affidavit purports to have been sworn by this village headman before a gentleman who signs as a member of the Ramnad District Board and the Taluk Board. With regard to the power of this gentleman to administer the oath that only affects the matter of proof of service and does not go to the root of the whole matter, but it is argued that the village headman is not a proper person to serve the summons.

Service of process through another Court need not be considered. Otherwise service of process issued by this Court is governed by Or. 49, r. 1 of the Code of Civil Procedure and Chap. VIII, r. 14 and r. 24A of the Rules of this Court as regards process other than summonses to Defendants, writs of execution and notices to Respondents. Outside the local limits of the jurisdiction of this Court such processes as may be served by attorneys are usually served either by their employing somebody for the purpose or by registered post under r. 24A. In this particular matter service purports to have been effected by none of the recognised means.

There is no provision of law so far as I am aware for handing the notice to a village headman to serve upon a party resident in his village. It has been argued that an attorney may employ the village headman. The special employment of an individual does not seem to me what is contemplated by Or. 49, r. 1 of the Code which might be deemed to refer to persons in the attorney's regular service, but I need not decide that, because I enquired of the attorney through learned Counsel whether or not the attorney was prepared to say that he did employ the village headman, and the answer that I received was that the attorney told

his client to do it through the village headman which I was informed is the common practice in the Madras Presidency.

In these circumstances I am of opinion that there was no service upon the Defendant that I may recognise and apart from the facts there was therefore no service as contemplated by law and the applicant is entitled to the order.

There will be an order in terms of summonses.

Mr. M. N. Dutt, Solicitor for the Plaintiff.

Mr. Raj Kumar Basu, Solicitor for the Defendants.

P. D.

Application allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 12666 OF 1923.

B. B. GUOPE, J.
PANTON, J.
1926,
24, February.

AKHOY KUMAR
TALUKDAR and ors.,
Appellants,
v.
SURENDRA LAL PAI,
Respondent.

Civil Procedure Code (Act V of 1908), sec. 73, Or. 22, r. 12—Money decrees against same judgment-debtor, applications for execution by two decree-holders—Death of one before assets received—No application by legal representative to continue proceeding when money received and paid to surviving decree-holder—Suit by legal representative of deceased decree-holder to recover share of assets if lies under sec. 73 (2) or on equitable principles.

Where one of two persons who had applied to the same Court for execution of their respective decrees for money against the same judgment-debtor died before the assets were received by the Court :

Held—That under Or. 22, r. 12, C. P. C., it was not necessary for the representative of the deceased decree-holder nor was it competent for him to apply for substitution in the execution proceedings.

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It was open to him to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution under Or. 21, r. 16 of the Code. Failing such an application and in the absence of anyone between whom and the surviving decree-holder a rateable distribution could be ordered, the Court acted correctly in allowing the latter who had bid at the execution sale to set off his decretal money against the purchase money, and a suit by the legal representative of the deceased decree-holder under sec. 73 (2) of the Code for a share of the assets was not maintainable, nor was he entitled to any such relief on equitable principles.

No relief can be granted on equitable principles about a cause of action which is created by and specially provided for in a statute if it does not fall within its provisions.

This was an appeal against the decree of P. M. Chatterjee, Esq., Additional District Judge of Zillah Dacca, dated the 14th day of August 1923, modifying the decree of Babu Pashupati Bose, Subordinate Judge, 4th Court of Dacca, dated the 24th day of June 1921.

The facts of the case will appear from the judgment.

Babus Jogesh Chandra Roy and Bankim Chandra Banerjee for the Appellants:

Mr. Sarat Chandra Roy Choudhury (with Babu Bhagirath Chandra Das) for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Defendant No. 1 against a judgment and decree of the Additional District Judge of Dacca reversing a decree of the Subordinate Judge of that place. The facts are as follows:—The Defendants obtained a

money decree against certain persons on the 30th May 1917. The Plaintiffs' father also obtained a money decree against the same judgment-debtors on the 3rd October 1917. Both the Defendants and the Plaintiffs' father applied for execution of their decrees. The Plaintiffs' father made an application for rateable distribution of the assets under sec. 73 of the Code of Civil Procedure on the 9th October 1917. Then the Plaintiffs' father died on the 18th February 1918. The property which was attached in execution of the Defendants' decree was sold on the 9th March 1918 and it appears that the decree-holder was allowed to set off the purchase money against the decretal amount. The present Plaintiffs made an application for substitution in the place of their deceased father in the execution proceedings in the Court of the Subordinate Judge on the 6th April 1918. The Subordinate Judge rejected the application on the 12th April 1918. Against that order there was an appeal by the Plaintiffs and the Appellate Court made an order for substitution on the 31st May 1918 and the Plaintiffs were substituted in the execution proceedings on the 6th July 1918. Thereafter the Plaintiffs made an application for rateable distribution of the assets on the 20th June 1918; that was rejected in September 1918. Against that order the Plaintiffs moved this Court in its revisional jurisdiction and the rule obtained by him was discharged on the 24th March 1919. The present suit was instituted purporting to have been made under sec. 73, sub-sec. (2) of the Code of Civil Procedure, on the 22nd September 1919. The trial Court dismissed the suit mainly on two grounds. First, that the Plaintiffs did not obtain a certificate under the Succession Certificate Act in order to recover the amount

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which was due to their deceased father. Secondly, that the provisions of sec. 73 of the Code of Civil Procedure did not apply to the suit and therefore it ought to fail. On appeal by the Plaintiffs the learned Judge has reversed the decision of the Subordinate Judge on the question of succession certificate as he held that as the Plaintiffs had substituted themselves in the execution case in place of their deceased father the money really accrued to them after the death of their father and no succession certificate was necessary. It is unnecessary for us to come to any decision on this question, because it is really a matter of form and no suit could have been dismissed on the ground of absence of a certificate. If we held that a succession certificate was necessary, we should hold that the proper course for the trial Court ought to have been to allow the Plaintiffs time to produce a succession certificate retaining the suit in the file of the Court. The real question is whether the Plaintiffs are entitled to the relief they claim. The learned Additional District Judge has held that sec. 73, sub-sec. (1), of the Code of Civil Procedure did not apply in terms to this case, and that being so, he ought to have held that sub-sec. (2) of sec. 73 does not entitle the Plaintiffs to bring such a suit as this. But the Additional District Judge has decreed the suit on the ground that the Plaintiffs are entitled to relief on principles of equity. Sec. 73, sub-sec. (1), enacts that "where assets are held by a Court, and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realization shall be rateably distributed

among all such persons." In this case there was an application by the Plaintiffs' father for the execution of the decree which he had obtained against the same judgment-debtor as the Defendant No. 1 had. The order therefore for rateable distribution ought to have been made on that application. But the unfortunate circumstance which happened on the death of the Plaintiffs' father on the 18th February 1918 led to the result that there was no one in existence at the time when the assets were realized between whom and the Defendant the assets could be rateably distributed. It is contended on behalf of the Plaintiffs that the fact that an order for substitution was made by the Appellate Court on the 30th May 1918 kept alive the application made by the Plaintiffs' father and it ought to be held that the application for execution made by the Plaintiffs' father continued throughout which would entitle the Plaintiffs to a rateable distribution of the assets. The difficulty in accepting this contention arises from the fact that there is no provision for any substitution in the case of the death of a decree-holder who has applied for the execution of his decree. Or. 22, r. 12 of the Code of Civil Procedure provides that r. 3 which refers to substitution of legal representatives of a deceased Plaintiff does not apply to proceedings in execution of a decree. On the death of the applicant for execution it was open to the legal representatives of the deceased decree-holder to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution under Or. 21, r. 16 of the Code of Civil Procedure. It was not necessary for them nor was it competent to make an application for substitution. The order for substitution of the Plaintiffs in the place of their deceased father

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in the execution proceedings cannot be held to have continued the application made by the father of the Plaintiffs, during the period between the 18th of February and the 6th of April 1918.

The position is that the applications for execution and for rateable distribution of the assets by the Plaintiffs' father were not continued on his death on the 18th of February 1918 and when the property was sold on the 9th March 1918 there was no person before the Court who could participate in the rateable distribution of the assets. That being so, the order of the Court allowing the Defendants to set off the decretal money against the purchase money of the property cannot be questioned as having been wrongly made. It cannot therefore be held under sub-sec. (2) of sec. 73 of the Code that the assets were liable to be rateably distributed under sec. 73 (1) and that they were paid to a person not entitled to receive the same. On that ground the Plaintiffs' suit is not maintainable and it must be dismissed.

The last argument addressed to us by the learned Advocate of the Plaintiffs was that it was a very hard case and that we should on equitable principles give relief to the Plaintiffs. The difficulty in accepting this contention is that one cannot grant relief about a cause of action which is created by and especially provided for in a statute if the matter does not fall within its provisions, on equitable principles. Ordinarily a decree-holder is entitled to realize his dues from the property of the judgment-debtor. It is only by virtue of sec. 73 of the Code of Civil Procedure that rateable distribution between different decree-holders is allowable. It is unfortunate that on account of the death of the Plaintiffs' father they have been deprived of the advantages allowed

under that section, but it appears that they were wrongly advised in not presenting their application on the death of their father for rateable distribution of the assets before the assets were realised. They delayed for about two months before they made any application and about a month after the sale of the property. The appeal must be allowed on the ground we have stated above and the Appellant will be entitled to his costs in this Court and in the Courts below.

Sometime after our judgment was pronounced but before the transcript was submitted for our signature, the learned Advocate for the Respondent drew our attention to the case of *Manmatha Nath Mitra v. Rakhal Das Tewary* (1). In that case it was held that on the death of a decree-holder, during the pendency of an appeal in execution proceeding, it was open to the legal representatives of the decree-holder to apply for leave to prosecute the appeal. But that case is no authority for the proposition that an order for rateable distribution of the assets may be made when the person in whose favour it might be made is dead and there is no other person on the record at the time when such distribution might have been directed.

N. G.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM APPELLATE DECREE**

No. 59 of 1924.

CUMING, J.	}	SAILAJA NATH GUHA
B. B. GHOSH, J.		Roy, Plaintiff,
1926,		Appellant,
4, March.		v.
		CHARU BALA DASGUPTA,
		Defendant, Respondent.

Appeal, maintainability of—Review, grant of—

(1) 14 C. W. N. 752; a. c. 10 C. L. J. 303 (1909).

SAILAJA NATH GUHA ROY v. CHABU BALA DASGI.

Original decree superseded—Appeal from original decree.

When an application for review is granted and a new decree is drawn up superseding the decree previously made, the consequence is that an appeal preferred against the decree previously made can no longer be prosecuted.

This was an appeal against the decree of Babu Nagendra Nath Bhattacharjee, Subordinate Judge of Zillah Jessore, dated the 21st of June 1923, modifying the decree of Babu Jogendra Nath Roy Chaudhury, Munsif, 1st Court at Jhenidah, dated the 20th of February 1922.

The facts of the case will appear from the judgment.

Babus Dharendra Lal Kastgir and Nagendra Nath Bose for the Appellant.

Babu Prafulla Kamal Das for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

CUMING, J.—In the suit out of which this appeal has arisen the Plaintiff sued for recovery of *khas* possession of a certain plot or plots of land on eviction of the Defendant therefrom and after establishment of his title. In the first Court the suit was decreed with costs against the Defendant. The Defendant appealed to the District Court. The District Court on the 21st of June 1923 decreed the appeal in a modified form and varied the decree of the trial Court and against the decree that followed on this judgment the Plaintiff appealed to this Court. A preliminary objection has been raised by the Respondent as to the competency of the appeal. The facts appear to be these: The decree now appealed against was signed on the 26th June 1923, the judgment having been delivered on the 21st June 1923. On the 2nd October, an ap-

plication for review was made to the learned Subordinate Judge. Notice was issued on the Opposite Party and the Opposite Party appears to have filed objections. The matter was heard on the 27th of February when the learned Subordinate Judge passed the following order:—“Review being granted the appeal is restored to file. Judgment is delivered in the review case modifying the decree of the appeal to this extent that the Plaintiff's claim to plot ‘unga’ of the plaint is dismissed.” A separate judgment was written by the learned Subordinate Judge in which he dealt with both the application for review and also the appeal after review. On the 6th March a decree was drawn up in accordance with this judgment.

The learned vakil for the Respondent contends that the decree of the 26th June, against which the Plaintiff has appealed, is no longer in existence but has been superseded by the decree of the 6th March.

We think this contention is quite right. The decree of the 26th June is no longer in existence and has been superseded by the decree of the 6th March. Therefore the present appeal being against the decree which is not in existence is incompetent.

The appeal must therefore fail and is dismissed with costs.

B. B. GHOSE, J.—I agree.

P. K. D. *Appeal dismissed.*

(CIVIL APPELLATE JURISDICTION.)
 APPEAL FROM APPELLATE DECREE
 No. 2144 of 1923.

SUBHRAWARDY, J. MUKERJI, J. 1926, 5, February.	}	RAJA MANINDRA
		NARAYAN ROY, Plaintiff,
		Appellant,
		v.
		SARAT CHANDRA
		BANDOPADHYA and ors.,
		Defendants, Respondents.

*Limitation Act (IX of 1908), Arts. 184, 144—
 Sale or mortgage by shebait not supportable for
 necessity—Possession of alienee, if adverse and
 from when.*

There is no question that the possession of the alienee of debutter property becomes adverse from the death of the shebait who made the alienation. Where the alienation is in the form of an unauthorised lease, if the lessee's possession is consented to by the succeeding shebait, the consent being referable to a new tenancy created by him, there is no adverse possession until his death. This reasoning, however, is not applicable to the case of a sale.

VIDYA VARUTHI THIRTHA v. BALUSAMI AYYAR (1), SUBBAIYA PANDARAM v. MOHAMMED MUSTAFA MARACAYAR (3), NAINAPILLAI MARAKAYAR v. RAMANATHAN CHETTIAR (5) and LAL CHAND MARWARI v. RAMRUP GIR (6) referred to.

This was an appeal against the decree of A. Henderson, Esq., District Judge of Zillah Midnapore, dated the 20th day of April 1923, reversing the decree of Babu Nitai Charan Ghose, Subordinate Judge, 2nd Court of Midnapore, dated the 16th September 1921.

(1) L. R. 48 I. A. 302: s. c. I. L. R. 44 Mad. 331; 26 C. W. N. 537 (1921).

(3) L. R. 50 I. A. 295: s. c. I. L. R. 46 Mad. 751; 28 C. W. N. 493 (1923).

(5) I. L. R. 47 Mad. 337: s. c. 28 C. W. N. 309 (P. O.) (1923).

(6) I. L. R. 5 Pat. 312: s. c. 30 C. W. N. 721 (P. O.) (1925).

The facts of the case will appear from the judgment.

Mr. Ram Chandra Majumdar and Babu Annada Charan Karkoon for the Appellant.

Mr. Amarendra Nath Bose and Babu Apurba Charan Mukherjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff who is the Appellant in this appeal sued as *shebait* of a certain deity for a declaration that the deity has got *lakheraj* title to the lands in suit. The suit was decreed by the Court of first instance, but has been dismissed on appeal.

The Plaintiff's case was that the lands were dedicated to the deity by his ancestor Raja Rudra Narayan Roy but the Defendants have got themselves recorded in the settlement papers as the owners of the lands, and the said entry has thrown a cloud over the deity's title to the lands.

The case of the Defendants was that the lands were the *niskar* property of Raja Rudra Narayan Roy, that the said Raja had never dedicated the lands to the deity, but had mortgaged them to one Joy Narayan Maity, and that their predecessors had purchased them at an auction sale in execution of the decree on the said mortgage and since then they or their predecessors have been in possession thereof.

The learned District Judge held in his judgment that the title of the deity had been established but that it had been extinguished by adverse possession on the part of the Defendants and their predecessors. In this view of the matter the learned District Judge dismissed the suit. He further observed in his judgment that as the Plaintiff was out of possession he should have filed a suit for recovery of pos-

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session, and as he did not do so but merely asked for a declaration of the title of the deity to the lands, a declaratory decree ought not to be given to him.

The first contention of the Appellant is that in arriving at his finding on the question of possession the learned Judge had omitted to take into consideration some of the materials which were relied upon in the judgment of the Court of first instance and has proceeded upon a misconception of some of the facts. Many of the matters to which our attention was drawn in this respect are pieces of evidence or circumstances which it is difficult to say were overlooked or ignored by the learned Judge. And the matters which need be considered so far as this ground is concerned are three in number. It is said in the first place that there is on the record the evidence of D. W. No. 2 who states that the Defendants had not been in possession of the lands for sometime before the suit and if this evidence was taken into account the presumption afforded by the record-of-rights would be destroyed. The learned Judge has remarked in his judgment that the oral evidence cannot be taken to mean that the tenants are actually paying rent to the Plaintiff. As the lands are rent-paying lands in the occupation of tenants, the passage in the deposition of the witness can only mean that the Defendants have not realised the rents for sometime; but that does not mean that the Defendants were out of possession or that the Plaintiff was receiving rents from the tenants. The learned Judge has referred to the facts that the tenants are siding with the Plaintiff and that taking advantage of the dispute they are not paying rent to either of the parties. Nextly, it is said that the learned Judge was in error in supposing that there was no objection

on behalf of the Plaintiff when the names of the Defendants' predecessors were recorded in respect of the lands under the Land Registration Act, after their purchase. What the learned Judge has observed in his judgment in this connection seems to us to be quite correct. He has remarked that there was a question as to whether these lands or some other lands were purchased, but as only one property admittedly was purchased, namely, the property in suit, the registration of name must have been in reference to that property. He seems to us to have been right in observing that there was no objection as to the registration, for the only objection that was raised was as to the identity of the property in respect of which names were to be registered. Lastly, it is said that the learned Judge was wrong in supposing that Ex. 15, the statement in connection with the Thakbust survey, shows that the Defendants' predecessors were in possession of Chak No. 5 only and not of Chak No. 1 in which the lands in suit are situate. This argument is based on a misapprehension as we find that it is clear from the statement itself that Chak No. 5 was carved out of Chak No. 1 which was a much larger area, and it contains 37 acres 3 roods of land which is approximately the area of the land in suit. We think that the learned Judge was right in the view that he has taken of these materials to which reference has been made here and that no objection can be taken to the learned Judge's finding that the presumption in favour of the Defendants which arises upon the record-of-rights has not been rebutted, but, on the other hand, has been supported by other evidence.

The next ground urged is a question of law. It is said that the possession of the Defendants has not run for a sufficient

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length of time to extinguish the Plaintiff's title. To appreciate this contention a few dates need be noted. Raja Rudra Narayan, the author of this endowment, who created the *debutter* and constituted himself the first *shebait*, died some 16 or 17 years before this suit. After him his son Raja Bejoy Narayan became and acted as *shebait* till his death in 1914 when the Plaintiff became the *shebait*. The Defendants' predecessors purchased the lands when Raja Rudra Narayan was alive. It is contended on behalf of the Appellant that upon the authority of the decision of the Judicial Committee in the case of *Vidya Varuthi Thirtha v. Balusami Ayyar* (1) possession of the Defendants can only be adverse from the death of the Plaintiff's predecessor, that is to say, from 1914. It is said that there can be no distinction between a sale and a permanent lease, and the logical effect of *Vidya Varuthi's* case (1) would be to hold that each succeeding *shebait* when he assumes office can repudiate his predecessors' action or ratify it, and that therefore any possession acquired adversely to the preceding *shebait* cannot enure to the benefit of the possessor when the next incumbent comes in; but that the advent of a new *shebait* gives a fresh start to such possession. It is argued that the earlier decisions of the Judicial Committee are no longer to be treated as good law and that the later decisions of the Board after *Vidya Varuthi's* case (1) tend to establish this position. I am clearly of opinion that this contention is not well-founded.

At the outset it should be observed that a case is only an authority for the proposition it decides and not for any proposition that may seem to follow logically from it

[*Queen v. Leatham* (2)]. *Vidya Varuthi's* case (1) was that of a permanent lease granted by the head of a *math*. In that case it was held that the lessee had no adverse possession under Art. 144 of the schedule to the Limitation Act until the death of the head who granted the lease, and that if the lessee's possession is consented to by the succeeding head that consent is referable to a new tenancy created by him, and there is no adverse possession until his death. The reason given by their Lordships as to why the possession cannot be adverse until the death of the second head is that it is within his power to continue the tenancy during his life and if there is receipt of rent by him the proper inference is that the tenancy has been so continued and consequently the possession of the lessee never becomes adverse till his death. Possession of the lessee cannot be adverse so long as the tenancy continues and it is only if the tenancy comes to an end that the possession of the lessee becomes adverse. What room is there for the application of this principle in the case of a sale? The character of the purchaser's possession remains the same, whatever the succeeding *shebait* may choose to do or not to do. There is thus a radical difference between a sale and even a permanent lease in this respect.

I propose now to refer to some of the later decisions of the Judicial Committee in this connection. In the case of *Subbaiya Pandaram v. Mohammed Mustafa Maracayar* (3) there was an endowment created in 1890 in respect of some moveable property for some charitable

(1) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831 26 C. W. N. 537 (1921).

(2) [1808] A. C. 495.

(3) L. R. 50 I. A. 295; s. c. I. L. R. 48 Mad. 751; 28 C. W. N. 438 (1923).

(1) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831, 26 C. W. N. 537 (1921).

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objects, and in 1898 a part of the property was sold in execution of a decree against the son of the author of the endowment, who was the then trustee, for debts incurred by him. The purchaser and some other persons who claimed under him were in possession since that date. In 1918 the grandson of the author of the endowment having been appointed trustee by the District Judge sued the purchaser and the persons who claimed under him for possession of the purchased property. The case no doubt was one by a trustee and not a *shebait* of a deity, but when dealing with the contention that limitation runs afresh as each new trustee succeeds to the office the Judicial Committee made the following observations which indicate the true scope of the rule laid down in *Vidya Varuthi's* case (1): "A further argument has been put forward to the effect that the statute of limitation begins to run afresh as each new trustee succeeds to the office, and in support of that view reliance is placed on *Iswar Shyam Chand Jiu v. Ram Kanai Ghose* (4) and *Vidya Varuthi Thirtha v. Balusami Ayyar* (1), but those authorities do not assist the Appellant. In each case they relate to the effect of an attempt on the part of a trustee to dispose of the property by a permanent *mokarari* lease. This he has no power to do, though he is at liberty to dispose of it during the period of his life and a grant made for a larger period is good, but good only to the extent of his own life-interest. It follows, therefore, that possession during his life is not adverse, and that upon his death the succeeding trustee would be at liberty to institute proceedings to recover the estate, and the statute

would only run against him as from the time when he assumed the office. Such an argument has no relation to the case where, as here, property has been acquired under an execution sale and possession retained throughout. Their Lordships are therefore of opinion that this suit is barred either under Art. 134 or Art. 144 of Sch. I to the Indian Limitation Act." Their Lordships further pointed out in that case that there is little difference in principle between a transfer under an adverse execution and a sale by a trustee and as it was not a transfer by the trustee himself for a valuable consideration Art. 134 should be disregarded and Art. 144 governed the case. In the case of *Nainapillai Marakayar v. Ramanathan Chettiar* (5) which was the case of a permanent lease granted by a *shebait* their Lordships of the Judicial Committee enunciated the proposition on reference to *Vidya Varuthi's* case (1) and other cases on the point in these words:—"In the case of a *shebait* the grant by him in violation of his duty of an interest in endowed lands which he has not authority as *shebait* to grant may possibly under some circumstances be good as against himself by way of estoppel, but is not binding upon his successors." In a more recent decision of the Judicial Committee in *Lal Chand Marwari v. Ramrup Gir* (6), which has not yet been reported, the question of adverse possession in a case of this nature has been considered. In that case the properties of the *math* were alienated by a Mohant who came into office in 1880 or shortly thereafter; some were given in mortgage, others were sold out-

(1) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831; 26 O. W. N. 537 (1921).

(4) L. R. 38 I. A. 76; s. c. I. L. R. 38 Cal. 526; 15 O. W. N. 417 (1911).

(1) L. R. 48 I. A. 302; s. c. I. L. R. 44 Mad. 831; 26 O. W. N. 537 (1921).

(5) I. L. R. 47 Mad. 337; s. c. 28 O. W. N. 809 (P. C.) (1923).

(6) I. L. R. 5 Pat. 312; s. c. 30 O. W. N. 721 (P. C.) (1925).

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right. These alienations took place between the years 1880 and 1888, by which latter date the Mohant had denuded himself and the *math* of all its endowments. So it came about that the predecessors-in-title of the Defendants were in possession as for absolute interests for periods exceeding on the date of the suits, in every instance, a term of 26 years of continuous duration. In 1892 the Mohant made over the *asthal* to the Plaintiff and left the place for good and died thereafter, the date of his death being one of the questions in dispute. The suits were commenced to recover the properties and one of the questions which arose in the suits was that of limitation. Their Lordships observed in their judgment that the Plaintiff would fail in the absence of evidence of the death of the Mohant having taken place within twelve years before the institution of the suits. Their Lordships were of opinion that the Mohant had died in 1892 and so the suits were barred, and then proceeded to observe as follows: "This disposes of the case, and it is unnecessary for their Lordships to deal with the important and difficult question whether here the statute did not commence to run in favour of the Defendants from the dates of the wrongful alienations of the properties or at all events from the date of his final abandonment of his office by Bhawan Gir and not only from his death. Whether, in other words, the case is governed by the decisions of which *Damodar Das v. Lakhan Das* (7) may be taken as the leading authority; or by the line of authority of which *Vidya Varuthi Thirtha v. Balusami Ayyar* (1) may be taken as typical. Their Lordships while not pro-

nouncing upon it have given very careful consideration to this interesting and difficult question. Upon it they say no more than this, that they must not be taken to accept the view with reference to it propounded by the High Court. So far as they are concerned the question remains entirely open to be determined when it arises." These observations clearly indicate that whatever may be said on the question whether adverse possession should run from the date of the alienation or the date of the final abandonment of office by the Mohant who made the alienation, there can be no question that in any event it would run from the date of that Mohant's death. In the present case more than twelve years have admittedly expired since the death of Raja Rudra Narayan, and the learned Judge was right in holding that the adverse possession of the Defendants had run for a sufficient length of time to extinguish the Plaintiff's title.

The third contention of the Appellant relates to the question of the maintainability of the suit and it is based upon a misconception as to the prayers in the plaint, it being urged that there was a consequential relief asked for in the shape of a prayer for correction of the entry in the record-of-rights. It appears however that this prayer, though contained in the plaint, was afterwards withdrawn and so in our opinion the learned District Judge was right in the view he has expressed with regard to this matter.

The appeal accordingly fails and must be dismissed with costs.

SUHRWARDY, J.—I agree.

N. G.

(1) L. R. 48 I. A. 302: s. c. I. L. R. 44 Mad. 591; 26 O. W. N. 537 (1921). •

(7) L. R. 37 I. A. 147: s. c. I. L. R. 37 Cal. 486; 14 O. W. N. 889 (1910).

PRIVY COUNCIL.
[APPEAL FROM BENGAL.]

VISCOUNT FINLAY.	THE SECRETARY OF STATE FOR INDIA IN COUNCIL and ors., Appellants, v. JYOTI PRASHAD SINGH DEO and ors., Respondents.
LORD PHILLIMORE.	
LORD BLANKENBURGH.	
SIR JOHN EDGE.	
LORD SALVESEN.	
1924,	
Heard, 1, 2, 4 and	
5, December.	
1926,	
Re-heard, 18, 19, 21,	
22, 23, 25, 26, 28	
and 29, January.	
Judgment,	
8, March.	

Service tenures Lands held by digwar or ghatwal—Relation with zamindari within ambit of which lands situated—Onus of proof—Ancient document, when to be construed with reference to usage—Thanadari lands, whether resumed or not—Minerals, whether belong to Government or landowners—Privy Council practice—New ground of argument.

While it may well be that the digwars or ghatwals are subordinate to the zamindar, it is always a question of fact whether they are or are not subordinate. The burden of proving that the lands of the digwar or ghatwal though within the geographical limits of the zamindari are a part thereof is on the zamindar.

FORBES v. MEER MAHOMED TUQUEE (1) relied on.

Should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage.

DUKE OF BEAUFORT v. THE MAYOR, ALDERMEN AND BURGESSES OF SWANSEA (7), VAN DIEMEN'S LAND CO. v. TABLE CAPE MARINE BOARD (8) and WATCHAM v. ATTORNEY-GENERAL OF EAST AFRICA PROTECTORATE (9) referred to.

The question whether mines and

minerals belong to landowners or to the Government not considered.

Quare.—Whether the statement in the High Court's judgment that thanadari lands though made resumable were not always resumed is consistent with the observations of the Judicial Committee in LELAND SING BAHADOOR v. BENGAL GOVERNMENT (1), JOYKISHEN MOOKERJEE v. COLLECTOR OF EAST BURDWAN (5) and RANJIT SINGH v. KALIDASI DEBI (6).

The Privy Council would be very chary of entertaining an argument never raised before or considered by the Courts below in a case from India.

This was a consolidated appeal from two decrees, dated the 24th June 1921, of the High Court at Calcutta, which reversed decrees, dated the 28th May 1918, of the District Court of Burdwan.

The Respondent, the Raja of Pachete, instituted the suit in 1914 to establish his right to certain *digwari* lands in the Burdwan District. These lands consisted of three villages, Kendua, Parira and Garh Parira, and contained rich coal-bearing properties.

In 1860 the villages were leased to the Erskines by the *digwari* holders and the Birbhum Coal Co. obtained assignments of their leases from the Erskines.

In 1876 the Company granted a perpetual lease of Kendua to the Bengal Iron Works Co., Ltd. and on the latter Company going into liquidation, its interest in the property was acquired by the Secretary of State, who granted a lease of the mining rights to the Bengal Iron and Steel Co., Ltd. Under the above leases the Companies opened coal mines and raised coal for a number of years.

In 1904 Government decided to resume the *ghatali* tenures in Bankura and

(4) 13 M. I. A. 438; 14 W. R. 28 (1870).

(7) 3 Exch. 413 (1894).

(8) [1908] A. C. 92.

(9) [1919] A. C. 533.

(1) 6 M. I. A. 101, 114-115 (1855).

(5) 10 M. I. A. 34, 44 (1864).

(6) L. R. 44 I. A. 117, 122; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

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Burdwan. The Pachete Estate was then being administered under the terms of the Encumbered Estates Act and difficulties arose in completing the settlement owing to the grants by the *digwars* of permanent leases; the resumption of the tenures in this *ghat* were accordingly abandoned.

In 1908 the estate was released from management under the Act, and was handed over to the present Respondent, who filed his suit in 1914, impleading the Secretary of State, the *digwars* and the Companies which had been working the minerals. The Plaintiff claimed a declaration that he was the rightful owner of the minerals and a further declaration that the *digwar ghatwals* had no right to the same and prayed for an injunction restraining the Defendants from trespassing into and working the minerals.

The main defences set up in the written statements were (1) that the villages in dispute were never permanently settled and did not form part of the Plaintiff's permanently settled estate, (2) that the Plaintiff had no right to the minerals, and (3) that the Companies had obtained a prescriptive title both to the surface and to the minerals by more than 12 years' possession adversely to the Plaintiff.

The District Judge dismissed the suit. He was of opinion that the lands in suit had been held in service tenure by *digwars* from before the Permanent Settlement and that they were left out when the *jumma* of the zamindari of Pachete was fixed at the Permanent Settlement, and after stating the effect of certain leading cases he added :—

"It is clear that these *ghatwali* tenures are neither the *thanadari* lands mentioned in Reg. I of 1793 nor the *chakran* lands within the meaning of sec. 41 of the Reg. VIII of 1793. Lord Kingsdown observed [*Lekanund Sing Bahadur*

v. Bengal Government (1)] that the *thanadari* lands were resumed shortly after the Permanent Settlement, and Lord Parker seems to have expressed an opinion in the recent case of *Ranjit Singh Bahadur v. Kalidasji* (6) that the *thanadari* lands were resumed and became the property of the Government. The *thanadari* lands were made resumable by Government, but I do not find that they were actually resumed. The *chowkidari chakran* lands were declared to be annexed to the *malguzari* lands, but they have been now resumed or enfranchised under a special Act passed by the Bengal Council. The *ghatwali* lands are of a different class."

The learned Judge then considered the evidence as to whether the said lands were included at the Permanent Settlement or not; and his conclusion was that, though situated within the geographical limits of the Plaintiff's zamindari, they were left out of consideration in fixing the assessment and that they were not part of the zamindari, nor annexed to the *malguzari* lands so as to be responsible for the revenue. He added :—

"In the case of the *digwars* the Government have asserted their rights to the whole of their services and to the lands held by them. The early documents show that the *digwari* villages were not settled with the Raja of Pachete The fact that no rent was ever paid to the Pachete Raj and that no services were ever rendered to him makes it very clear that the *digwari* villages were granted by Government [*vide* Sir Barnes Peacock, *Nilmoney Singh v. The Government* (11)]. We know now that they were excluded from settlement with the Pachete Raj."

(1) 6 M. I. A. 101 at p. 125 (1855).

(6) L. R. 44 I. A. 117; s. c. I. L. R. 44 Cal. 841; 31 C. W. N. 609 (1917).

(11) 6 W. R. 121 (1866).

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The High Court (N. R. Chatterjee and Newbould, JJ.) reversed the decision of the District Judge and held that the villages were *thanadari* lands to which cl. 4 of sec. 8 of Reg. I of 1793 applied, and that on resumption by Government they would automatically form part of the Pachete Estate subject only to the right of Government to assess them for police purposes. They accordingly granted the Plaintiff the declaration prayed for and issued an injunction restraining the Companies from working the coal or other minerals. From the decree of the High Court separate appeals were brought to His Majesty in Council by the Secretary of State and by the New Birbhum Coal Co., Ltd. and the Bengal Iron and Steel Company, Limited.

Messrs. Dunne, K. C. and Kenworthy Brown for the Secretary of State.—The first question for decision is as to whether the villages in suit form part of the Pachete settled estate.

That is a question of fact and the onus of proof is upon the Respondent.

Forbes v. Meer Md. Tuquee (4) and *Jagadindra Nath Roy v. Secretary of State* (12).

The *digwars* have been in possession of these villages from time immemorial and there is no evidence to show that the lands ever formed part of the zamindari of Pachete. The High Court have assumed that these were *thanadari* villages within sec. 8, sub-sec. (4) of Reg. I of 1793 but the evidence on the record does not bear out that theory. Moreover, the Privy Council has decided that land-holders of the type of *digwars* were never intended to be included within that section.

Lelanund Sing Bahadoor v. Bengal Government (1).

Both the actions of the Government and of the Pachete zamindars, ever since the District was ceded to the East India Co., tend to show that these particular villages were not subject to Pachete and were never settled with him.

Sir Geo. Lownes, K. C., Messrs. E. B. Raikes and Douglas McNair for the Appellant Companies.—The earliest document bearing on the question of title is the *kabuliyat* executed by the Respondent's predecessor in 1790. That document was intended to have particulars of the grant contained in a schedule; no schedule was in fact exacted because the details required were furnished in the *sarsikan* papers. The villages in suit are not mentioned in these papers because it was known by the then Raja that they were not within his zamindari.

The same argument applies to the *lot-bundi* papers of 1795, 1803 and 1807 which contain the Pachete properties put up for sale in execution of decrees but do not contain the villages in suit, and to the *terij bazey zamin* list 1791 which includes lands within the ambit of the zamindari and producing no revenue.

Government officers have frequently reported that *digwari* lands were not included in the Permanent Settlement, *e.g.*, Hannyngton in 1841 and 1857, Dalton in 1862 and Munshi Nandji in 1883. The lands cannot be *thanadari*.

By a regulation of 1792, *thanadari* lands were forbidden and all that could remain were *thanadars* under the Government.

Colebrooke's Digest, pp. 167, 168, 190.

Lelanund Sing Bahadoor v. Bengal Government (1), *Joykishen Mookerjee v.*

(4) 13 M. L. A. 488; 14 W. R. 28 (1870).

(12) L. R. 30 I. A. 44, 53; s. c. I. L. R. 30 Cal. 291; 7 C. W. N. 193 (1902).

(1) 6 M. L. A. 101 at p. 125 (1855).

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Collector of East Burdwan (5) and *Ranjit Singh v. Kalidasi Debi* (6).

It is inconceivable that this contention should only now be put forward after 125 years, and that the Government should have acquiesced during all that time in being deprived of the revenue to which they would be entitled had the lands been *thanadari*.

Although the onus is on the Respondent these Appellants can in fact show that the lands in suit were *lakhiraj*. The incidents of the tenure point to that conclusion.

Government *ghatwali* lands are *lakhiraj*. Zamindari *ghatwali* lands are *bazey zamin*.

Both Courts below have held that the tenure of the *digwars* was from time immemorial and there is support for Dalton's theory that their origin was "ceval" with that of the Pachete Rajas.

Their status is the same as that of the Birbhum *ghatwals*. The villages in suit were part of Birbhum until transferred to the jungle *mahals* by Reg. XVIII of 1805. Had they remained in Birbhum they would have had by regulation the status of Birbhum *ghatwals* as laid down in Reg. XXIX of 1814.

Though not under that regulation they do retain that status.

That was decided by the Privy Council in relation to a *jaigir* in Pachete in *Raja Nilmoni Singh v. Bakranath Singh* (13) and if applicable to a *jaigirdar*, it would *a fortiori* be applicable to a *digwar*.

The right of the Birbhum *ghatwals* to the minerals was recognised by Bengal Act V of 1859, which empowered them to grant leases beyond their own lines.

Reference was also made to Fifth Re-

port on East India Affairs; Aitchison's Treaties, Vol. I, p. 218; Hunter's Statistical Account of Bengal, Vol. XVII, p. 311.

Secretary of State v. Bai Rajbai (14) and *Satya Narayan Singh v. Satya Niranjan Chakravarti* (2).

Messrs. Upjohn, K. C., DeGruyther, K. C. and Parikh for the Respondents.—The Rajas of Pachete were independent sovereigns down to 1771 and the *digwars* were created by them.

The only cession made by the Moghul Government was the cession of tribute received from the Pachete Raj. There was no cession of territory.

After the conquest the British took away the sovereignty of the Pachete Rajas but confirmed their rights as land-holders, to whom the *digwars* were subject.

Fifth Report (Madras Edition), pp. 241, 242, 246, 259, 464.

Millet's Report and Munshi Nandji's Report.

The actual ownership of the land is outside the settlement. The Permanent Settlement was made with the actual proprietors of the soil. The zamindars are recognised and declared to be proprietors irrespective of their making a settlement with the Government.

Ben. Reg. I of 1793.	Ben. Reg. 72 of 1791,	cls. 31—37.
" " II of 1793.	" " 8 of 1792,	cls. 37—47.
" " XI of 1793.	" " II of 1819,	cls. 5, 10, 11, 31.

The *prima facie* title to all lands is in the zamindar and even if these particular villages are not mentioned in any of the documents, there is nothing to show that the zamindar has parted with his interest in them.

(5) 10 M. 1 A. 34, 44 (1884).

(6) L. R. 41 I. A. 147, 123; s. c. I. L. R. 44 Cal. 841; 21 C. W. N. 609 (1917).

(13) L. R. 9 I. A. 104, 120 (1883).

(2) L. R. 51 I. A. 60; s. c. I. L. R. 3 Pat. 183; 28 C. W. N. 351 (1902).

(14) L. R. 42 I. A. 239, 239; s. c. 19 C. W. N. 1087 (1915).

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Freeman v. Fairlie (15) and *Rajah Perhlad Sein v. Doorga Pershad* (16).

The *digwar* or *ghatwal* was the creation of the zamindar and if his services were dispensed with, the lands held by him would revert to the zamindar. Reg. XXXVII of 1793, secs. 5 and 6, and Reg. II of 1819, sec. 28.

The Permanent Settlement made no alteration in the tenure. The *digwar* or other *ghatwali* holder's right continued although he was not assessed to revenue.

Lelanund Sing Bahadoor v. Bengal Government (1), *Kooldeep Narain Singh v. The Government* (17), *Raja Leelanand v. Thakoor Munoorunjun Singh* (18), *Raja Leelanand Singh v. Thakoor Munoorunjun Singh* (19) and *Raja Nilmoni Singh v. Bakranath Singh* (13) and the regulations of 1793 contain statutory recognition of the pre-existing rights of ownership of the zamindar. The lands in suit may be the property of the zamindar even though they were not included in the Permanent Settlement.

The contention of the zamindar, however, is that the lands are *digwari chakran* and so within his zamindari and included in the settlement. They are admittedly within the geographical limits of the zamindari and so *prima facie* belong to the zamindar.

Raja Perhlad Sein v. Doorga Pershad (16).

Lala-Kanji's Report contains the returns sent in by Higginson in accordance with the Regulation of 16th August 1769 (Colebrooke, p. 174) under which he ascertained the lands of which the Pachete

Estate consisted and these villages are shown in that return. It is a fair inference from this report that the *digwars* were originally appointed by the Raja and remunerated either by lands or by payment. After the British conquest the conquerors recognised the Raja's two-fold position as (1) semi-sovereign and (2) land-owner, and the similar rights in the office of *digwar* and they assumed only those rights which appertained to the semi-sovereign power and confirmed the rights of the Raja and of the *digwar*, as land-owners.

It is immaterial to the Respondent under what heading of his lands these villages are classed—whether *chakran* or *thanadari*. They were in fact granted to *digwars* who received them in return for police services and the High Court is of opinion that the *digwars* were *thanadars*. Government retained the actual people who were acting as police but they were still paid from the lands which they held. *Thanadari* lands became resumable in 1793 but were not always resumed. Were these lands to be resumed now they would revert to the zamindar who granted them and in whom the ultimate title rests.

Mr. Dunn, K. C., in reply.—The case of the Raja in the Lower Courts has always been based on a contention that the villages were settled with him. The Permanent Settlement created a title in the zamindars, it did not merely acknowledge a previous title.

Phillips's Landed Tenures, pp. 225-244, 259, 282, 311 and *passim*.

Even if Pachete were originally an independent sovereign, on conquest the ownership of the land passed to the British and they could settle it with anyone they pleased.

Mr. Lowndes, K. C., in reply.—The

(1) 6 M. I. A. 101 (1855).

(13) L. R. 9 I. A. 104, 120 (1882).

(15) 1 M. I. A. 305, 321 (1856).

(16) 12 M. I. A. 286, 331 (1859).

(17) 14 M. I. A. 247 (1871).

(18) L. B. I. A. Sup. Vol. 181 (1873).

(19) I. L. R. 3 Cal. 251 (1877).

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contention that the regulations of 1793 contain statutory recognition of the rights of ownership of the zamindar is an entirely new case which cannot be raised before this Board without having been adjudicated on by the Lower Courts.

Lala Kalyan Dass v. Sheikh Maqbul (20), *Afzulun-Nisa v. Abdul Karim* (21) and *Satya Narayan Singh v. Satya Niranjan Chakravarti* (22).

The Respondent admits that sovereign power was taken over by the British on conquest and the right of escheat is a sovereign attribute which would also pass to the conqueror.

Rance Sonet Kowar v. Mirza Himmut (22).

He also referred to Field's Introduction, secs. 27 and 31.

Their LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—This suit was brought on the 3rd September 1914 by the Respondent, the Raja of Pachete, against the Secretary of State for India and certain coal and iron Companies who are, with the Secretary of State, Appellants before their Lordships' Board and other parties described as *digwar ghatwals*, alleging that three mouzahs known as Kendua, Parira and three-quarters of Garh Parira in the Burdwan District of Bengal were included in his zamindari, and that this being so he was the proprietor of the mineral rights under the said mouzahs, and that the Secretary of State and the *digwars* had purported to grant leases of the mineral rights to the

Defendant Companies, and praying that it might be declared that he was the rightful owner of the minerals and that the lessees and sub-lessees had no right to them and should be restrained by injunction from trespassing and working the minerals, and asking for damages with interest and costs.

The Secretary of State in his defence said that the Plaintiff was never within 12 years in possession of the mineral rights claimed by him, and that he and the Defendants Nos. 2, 3 and 5 had been for more than the said period openly and as of right in enjoyment of the minerals, and that the three mouzahs did not form part of the permanently settled estate of the Plaintiff, but had been *digwari chakran* from before the Permanent Settlement of 1793. He further denied the Plaintiff's title to the minerals. The other Defendants set up similar defences.

Issues having been settled by the Subordinate Judge, the case was transferred by the District Judge to his Court in July 1917, and heard by him on oral and documentary evidence, in the months of April and May 1918.

On the 28th May 1918, he delivered judgment, supporting all three of the defences raised, i.e., holding that the Plaintiff had no title to the villages in suit, that if he had been the landowner he would not have the right to the minerals which would still be in the Crown, and that the defence of adverse possession and consequent limitation was also good.

The appeal being taken to the High Court of Judicature at Calcutta, that Court on the 24th July 1921 reversed the judgment, and while refusing the Plaintiff some of the relief which he claimed, made a decree in his favour in terms following:—

"It is ordered and decreed that the Plaintiff be

(2), L. R. 51 I. A. 50; s. c. I. L. R. 3 Pat. 183; 28 O. W. N. 351 (1923).

(20) 23 O. W. N. 860 at p. 870 (1918).

(21) L. R. 46 I. A. 131, 134; s. c. 23 O. W. N. 408 (1919).

(22) L. R. 3 I. A. 92; s. c. I. L. R. 1 Cal. 391; 25 W. R. 239 (1876).

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and he is hereby entitled to a declaration that the mouzahs in dispute described in the plaint out of which this appeal arises together with the minerals underlying them are included within his permanently settled estate, that he is the rightful owner of the minerals in the mouzahs and that none of the Defendants has any right to the minerals in the mouzahs. And it is further ordered and decreed that a perpetual injunction do issue restraining the Defendants from working coal or other minerals in the mouzahs."

The Secretary of State and the Companies have appealed to His Majesty in Council from this decree.

The ground upon which the High Court held that the mouzahs in dispute with the minerals underlying them were within the permanently settled estate was that they were what is called *thanadari* lands. Having so decided, the Judges thought that the further defence of limitation was not good, nor was the defence good that the minerals under these villages belonged to the Crown. Their Lordships will take the question of ownership first.

The learned Counsel for the Respondent Raja, when it came to their turn, while accepting and supporting the reasoning of the High Court, rested the main strength of their argument upon two other grounds, the first of which comes to be discussed in logical order before the submissions made by the Appellants.

This first argument was founded upon the language of the regulations of 1790 and 1793, which established the Decennial and Permanent Settlements of Bengal, Orissa and Behar.

Reg. VIII of 1793, sub-sec. (4), speaks of the settlement being "concluded with the actual proprietors of the soil whether zamindars, talukdars or chaudhris."

Upon the strength of this and other passages in the regulations, it was urged that the Government of the day recognised a pre-existing right in the zamindars and others and did not confer rights by the settlement, and consequently that

it was possible that lands owned by a zamindar—though not *lakhiraj* or *thanadari*—might never have been settled and yet be his property and so might descend to the successor-in-title of the original zamindar, having remained unsettled through all these years.

Whether such lands according to the argument were to be reckoned as part of a zamindari or to be treated as *de hors* the zamindari was not made clear.

The argument receives no support from decided cases and appears at first sight to be contrary to the teaching of the textbooks; but their Lordships are relieved from considering its force because it was never submitted to either of the Courts in India.

Courts of final appeal—whether it be the House of Lords or this Board—have long established it for themselves as a principle of wisdom and prudence that they should be very chary of entertaining an argument which has not been sifted in the Courts below; and if this be true as a general rule, it is especially true when the question to be decided concerns the diversified and complicated Indian law as to tenure of land.

Not only is there no trace of this point having been brought before the Indian Courts, but it is apparent that the case of the Respondent was rested from the beginning on other grounds. Para. 2 of his plaint states that the three mouzahs in question are "included in the revenue-paying ancestral zamindari of the Plaintiff known as 'hakla Pachete.'"

The 2nd issue as suggested by the Plaintiff was:—

"Are the mouzahs Kendua, Parira and three-fourths of Garh Parira situate within Chakla Panohkote, the permanently-settled zamindari of the Plaintiff, and are they included within the said permanent settlement?"

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and as actually fixed, was in the following words :—

"Were the mouzahs in suit permanently settled by Government with the Plaintiff's ancestors, and is the Plaintiff by right of such settlement entitled to the mineral rights under the mouzahs?"

These things being so, their Lordships do not feel that they ought to give further consideration to this argument.

The argument, however, as to the kind of recognition which was given to those who were in the position of zamindars at the time of the Decennial and Permanent Settlements, and the deductions to be drawn not only from the regulations but from the despatches and minutes of those in authority is not, as will be noticed hereafter, without valuable bearing upon the question, which in their Lordships' opinion is the real question which was intended to be raised, that is, whether the three mouzahs were permanently settled with the Plaintiff's ancestors and form part of the Plaintiff's zamindari.

The zamindari of the Raja of Pachete is of great size and is said to extend over more than 2,000 square miles, with more than a thousand villages or mouzahs upon it. The three mouzahs in question are interlocked with the unquestioned portion of the zamindari but it is doubtful whether all three are absolutely enclosed in it. The topographical situation is such as to afford some slight presumption that the three mouzahs are part of the zamindari.

The contents of the Plaintiff's estate are to be deduced from the *kabuliyat* given by the then Raja upon the occasion of the permanent settlement of his zamindari in the year 1793.

The divergence of the two Courts in India begins with the construction of this *kabuliyat*.

The material parts of it are as follows :—

"This *kabuliyat* is executed by me Maharaja Sri Sri Baghunath Narayan Deb to the effect following.—That my zamindari Pargana Punohtoti, &c., appertaining to the Province of Bengal, the paradise of the world, exclusive of Gunjes, Bazars and Hats and of the entire *sayeruts* and *mulfara* (ground rents) and exclusive of all lakheraj lands whether *Sanadi* or *Deenadi* of that pargana, is settled with me in *mokurari* as my Tahut for the term of ten years from 1197 B. S. to 1206 B. S. as per schedule below, at a jumma of sicca Rs. 52,853 (fifty-two thousand eight hundred and fifty-three) annually, i.e., at sicca Rs. 5,28,530 (five lakhs twenty-eight thousand five hundred and thirty in the total, inclusive of all *abwabs* in force in the said zillahi. So I agree, and give in writing that I shall pay the said amount of revenue as per separate *kistibandi* without excuse or variation. . . . And I shall file within the current year in the Zilla Record Room a list under my signature, showing village by village the *mofussil* distribution of the jumma fixed in the Sadar for my Tahut in proportion to the rentals therefrom together with the areas of Talabi and Betalabi lands within the four boundaries of the settled Hudda. And in future in the beginning of each year, within the first three months, I shall deliver a list of such distribution of revenue. In case of neglect or delay in this matter, I shall be answerable to the Government. I shall not without the Iluzur's permission and advice make any Brah-mottar, Debottar, Mahatran, Aima, Madadmas, Piran and Fakiran grants, &c.—any sort of lakheraj (tenures)—to anybody in the said pargana. . . ."

The schedule, if ever there were one, is missing. There are certain *sarsikan* papers of 1790 bearing the signature of the Raja, which in the opinion of the District Judge represent the list which the Raja undertook to file within the current year showing not only the *mofussil* distribution of the *jumma* but also the area of the lands, whether *talabi* or *betalabi*. These *sarsikan* papers mention 1,197 villages. They do not contain the three mouzahs in question. They contain, however—and this is of some importance—the name of one mouzah stated to be occupied by *digwars* and to be paying a rent.

The three mouzahs in question in this suit have been in the occupation of the

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digwar ghatwals for as far back as can be traced, certainly for a period anterior to the settlement with the Raja. They may, notwithstanding, be within his zamindari; or the *digwars* may hold directly of the sovereign power as co-ordinate with rather than subordinate to the Raja.

In the weighty judgment prepared and delivered in 1855 on behalf of the Board by Mr. Pemberton Leigh (afterwards Lord Kingsdown) in the case of *Raja Lelanund Sing Bahadoor v. The Bengal Government* (1), an account was given of the three classes of service tenures which are or were not uncommon in India.

The lowest class of *chakran* lands are those held by minor officers of the zamindar whom he appoints and with whose services he could dispense, thereupon resuming their lands for the purpose of imposing upon them suitable rent. Next in order come the *tannahdars*, police officials, whom in old times it was the duty of the zamindar to provide, whom he allowed to occupy their lands, either rent free or subject only to a quit rent, and in respect of whom the Government made an allowance to the zamindar to recompense him for the rent which he had lost.

By Reg. I, sec. 8, cl. (4) of 1793, it was provided that the zamindars might be relieved of their police duties; and in that case the Government might resume the allowances or the produce of the lands, as it thought proper. In such cases the zamindars would in turn resume the lands of their subordinate *tannahdars*.

A higher class is that of *ghatwals*, some of whom, as mentioned in Lord Kingsdown's judgment, might be persons of high rank, though in other cases the position of a *ghatwal* might be treated as "something between that of a chowkidar and an office peon," to adopt the language

of the District Judge in this case.

But whatever their dignity, these *ghatwals* were always of ancient date. It is said by the High Court in this case that the East India Company never created a *ghatwali* tenure; and though there is some indication in the narrative in Lord Kingsdown's judgment that there actually were creations of some *ghatwali* tenures in that case, no doubt the action of the East India Company was generally confined to recognition and confirmation. *Digwars* in this District appear to take the same position as *ghatwals* in other Districts.

Still the question remains—were the officers of the highest class always subordinate to the zamindar, or were they sometimes co-ordinate? In the case of *Lelanund Sing Bahadoor v. Bengal Government* (1), it was held that the Raja had made his settlement for his zamindari as a whole or block, that the *ghatwali* lands were included in this settlement, and that the *ghatwals* held of him. Indeed, it was agreed and admitted in that case that the *ghatwali* lands formed part of the zamindari, the holders paying a quit rent to the zamindar.

But as stated in the judgment already quoted, the nature and extent of their rights probably differed in different Districts and in different families. That judgment refers to the tenures in Birbhum, the holders of which—though no doubt they paid a fixed rent to the zamindar—are entitled to hold their lands in perpetuity, subject to the performance of certain duties. (See Reg. XXIX of 1814.)

The classes of possible *ghatwali* tenures and their nature are described in much detail in the case of *Satya Narayan Singh v. Satya Nirnanjan Chakravarti* (2), in

(1) 6 M. I. A. 101 (1855).

(2) L. R. 51 I. A. 501; a. c. I. L. R. 8 Pat. 185; 28 C. W. N. 851 (1923).

(1) 6 M. I. A. 101 (1855).

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which the judgment of the Board was delivered by Lord Sumner in 1923, dealing with the Sonthal Parganas. He says :-

"In the Sonthal Parganas there are for practical purposes three classes of ghatwali tenures: (a) Government ghatwalis created by the ruling power; (b) Government ghatwalis, which since their creation and generally at the time of the Permanent Settlement have been included in a zamindari estate and formed into a unit in its assessment; and (c) zamindari ghatwalis, created by the zamindar or his predecessors and alienable with his consent. The second of these classes is really a branch of the first. The matter may, however, be looked at broadly. In itself, 'ghatwal' is a term meaning an office held by a particular person from time to time, who is bound to the performance of its duties, with a consideration to be enjoyed in return by the incumbent of the office. Within this meaning the utmost variety of conditions may exist. . . . The superior who appoints him may also, in the varying circumstances of the organisation of Hindustan, be the ruling power over the country at large, the landholder responsible by custom for the maintenance of security and order within his estates, or simply the private person, to whom the maintenance of watchmen is, in the case of an extensive property, important enough to require the creation of a regular office."

The tenure, though peculiar, because of a certain reserved power of selection, nevertheless ranks as hereditary [*Raja Durga Prashad Singh v. Tribeni Singh* (3)]. Colonel Dalton, Commissioner of Chhota Nagpur, in a letter of 11th June 1869 (Record, Pt. II, p. 389) gives a useful account of their origin.

While, therefore, it may well be—and in fact it is ascertained in respect of some tenures in this very case—that the *digwars* or *ghatwals* are subordinate to the zamindar, it is always a question of fact whether they are or are not subordinate; and it is upon this footing that the Courts in India and their Lordships have approached the present case.

That the burden was upon the Respondent to prove that they are part of his zamindari is well-settled. The case of

(3) L. R. 45 I. A. 261 (1919).

Forbes v. Meer Mahomed Tuquee (4), where this Board held that the disputed lands were within the geographical limit of the zamindari and yet not proved to be of it, is strong on this point (see pages 457 and 458).

Now the point made by the District Judge is that the *kabuliyat* covers the whole estate of the Raja, that it refers to a list of villages and undertakes to show village by village the *mofussil* distribution of the *jumma*, that in fact the list (*i.e.*, the *sarsikan* papers) does show the revenue set aside for each, and therefore, in his view, it is not an engagement for a block but a series of engagements for the several villages which are parcel of the zamindari.

The learned Judges in the High Court are of opinion that the engagement was for the block, and that it was only intended to enumerate the villages which paid revenue.

But the Raja had made a previous return of the *bazizamin* or *lakhiraj* lands within the zamindari in 1771. These villages are not included in that return. Further, he undertakes in the *kabuliyat* to set out in his list the areas of both *talabi* and *betalabi* lands. If these mouzahs were in the zamindari they should be in some list.

Then there is a point which the High Court makes upon the description. This rests on the words: "my zamindari of Pargana Punchkoti, etc." There really seems little in this. If the word Pargana is used in its more technical sense, Punchkoti must be taken as the same as Pachete, and then as his zamindari contained other Parganas, they must be read as enumerated here. It is, however, quite possible that Pargana is used loosely

(4) 13 M. I. A. 438 at pp. 467, 468; 14 W. R. 28 (1870).

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for *chakla*, a not very technical word which may embrace several Parganas, and the "etc." may stand for the fraction or kismet of Shergarh, which is divided between three Parganas. Reference upon this head may be made to Hunter's Imperial Gazetteer of India, Vol. 7, p. 277, under title Panchet. Incidentally it may be mentioned that Hunter takes the view that all the villages in this zamindari were mentioned in one or other of the two documents.

The word "etc."—or whatever may be its Indian equivalent—seems to give no assistance in arriving at the answer to the one question: "Is this *kabuliyat* an engagement for the whole block or for a number of villages set out *seriatim*?"

A suggestion made by the High Court which was also pressed at their Lordships' Bar by Counsel for the Respondent Raja was rested upon the fact that the *kabuliyat* apparently contemplates two documents, one to be delivered in the first year which is to show both the distribution of the revenue village by village and the areas of *talabi* and *betalabi* lands, and the other being the annual document which is to be confined to the distribution of the revenue.

The suggestion is that the *sarsikan* papers represent the second kind of list and therefore would not have any mention of lands within the zamindari which paid no revenue and might be called *betalabi*.

It is a possible explanation.

After the *sarsikan* papers, the only early documents are Lala-Kanji's report and the *lotbundi* papers of 1795, 1803 and 1807. As to these latter, the argument for the Appellants is based upon the fact that when the property of the Raja was to be sold for non-payment of revenue, the Collector was directed to take a

convenient unit and that there be put up for sale all the villages in the Pargana within which the three villages in suit are supposed to be topographically situate, and that these three are not included, the Collector's return showing that he had intended to include every village in the Pargana except certain villages already sold.

The argument is of weight, but there is again an explanation to be offered for the Respondent. It is said that the sale was for the purpose of procuring money, and that these are not revenue-producing villages, and that supposing that they were as the Respondent contends within the limits of the zamindari, the rights of the Raja to some possible reversion or some claim to the minerals were in those days so shadowy that they would not be thought of.

This, however, is not the view taken by either of the Courts in India. Both have thought that these villages were omitted because the Government officers did not think that they were in the zamindari.

Now as regards Lala-Kanji's report, both sides rely upon it, but it is more valuable to the Respondent than to the Appellants. It appears in two forms, one abbreviated and one fuller. It was made in 1799 and has been preserved by reason of its being made the appendix to the report of Captain Hannington in 1841.

It is a police report in answer to the enquiry whether besides the *digwars* there were any other police guards in Chakla Pachete—with further enquiries as to the pay of the *digwars* and other police guards.

Lala-Kanji says that besides the *digwars* there are other guards of three classes, *jagirdars*, *ghatwals* who are under the *digwars* and village chowkidars.

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His report states that there were formerly 36 *ghats* under the *digwars*, and that in 23 of them the establishment was kept up and is yet in some places: that 13 were under the Raja who paid them, but that since the fixing of thanas and the Government taking from the zamindar Rs. 1,600 yearly for thana expenses, the *ghatwals* had been dismissed.

Then he says that there were $57\frac{1}{2}$ or $57\frac{1}{2}$ *digwari* villages, the rent of which was fixed in 1771 by Mr. Higginson at Rs. 5,000; but later on he proceeds to say that no rent is paid for these villages except for the one village of Kasthulia. He adds that the *digwars* hold their respective *jagir* villages in lieu of service without payment of rent, and he includes two, if not three, of the villages in suit, in the list appended to his report which is headed "Particulars about the *jagir* mouzahs of the *digwars* in the Pergunnah Pachete." From all this it is sought to be inferred that he treated these villages or thought that Mr. Higginson treated them as within the zamindari.

On the other hand, he distinguishes the *digwars* from the *jagirdars* who paid two-thirds rent and received one-third for their service, and he speaks of the *ghatwals* in 13 *ghats* having been dismissed, which is what one would expect if they held their lands from the Raja by a service tenure. Then the probability would be that those who looked after the other 23 *ghats* did not hold of the Raja.

Mr. Hunter, Collector, reports in 1791 that the only sum appropriated to police establishments is the "resumed *thana-dari* allowance" of Rs. 1,662. Counsel for the Respondent stress the word "sum," but if there were lands so appropriated, it is curious that they were not mentioned.

Further, Captain Hannington—to whom we owe the preservation of Lala-Kanji's report, and who wrote in August 1841, before the Mutiny and before the great local destruction of papers which the Mutiny brought about—in giving an account of the *digwari* or police lands in his District, says:—

"These lands have been held from time immemorial by a species of police termed Digwars or Jagirdars or Ghatwals whose tenures are feudal and hereditary. They are of two classes.

"First, the Digwar with their followers the Ghatwals. These held their lands in lieu of wages and absolutely rent-free. It is to be specially remarked that the Digwari lands were not included in the Permanent Settlement. The Digwars themselves are appointed (regard being, however, had to hereditary claims) and are liable to be dismissed by the Magistrate. On these grounds it is held that the actual property of the soil is vested in the British Government. This is not denied by either the zamindars or the Digwars."

In that report he mentions, incidentally, that it has been ascertained that coal mines exist in one of the *digwar* villages, not however being one of those in suit.

In regard to all this part of the case, it is to be remembered that under Reg. XVIII of 1805, passed for policing the jungle *muhals* of which Pachete was one, the zamindar was made a police Magistrate, and as such would have a hierarchical superintendence of the *digwars* so far as they were required to perform police duties; and care must be taken not to confound this superintendence with what may be called feudal overlordship.

Captain Hannington in the same document speaks of the Raja's having made serious encroachments on the *digwari* lands.

Counsel for the Respondent relied on this statement and suggested that as there was no evidence that these so-called encroachments had ever been set aside, they must be treated as acts of ownership

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and valuable assertions of title by the Raja.

But he seeks to strengthen his case, and there is force in his contention, by reference to the same Bengal Regulations of 1793 on which Counsel relied for the proposition which their Lordships have rejected as not raised in the present case.

The argument is this. The Raja or Maharajah was before cession to or conquest by the East India Company—and the argument preferred conquest to cession—a sovereign power tributary to the Great Moghul, but otherwise in possession of sovereign rights. These three villages must have formed part of his territory and must be taken to have been at some very remote date granted by him to be held of himself by military service or military or police service: therefore the ownership of the land was in him; and when the Government in 1792 expressed its intention of settling with the proprietors of the soil, this would mean that the Government would recognise him as proprietor of the whole area.

As already stated, there is force in this contention. But there is an opposite side. If the Raja was a sovereign, and his territory was conquered, it was conquered from him as a sovereign and not as a landowner, and it by no means follows that when, to use the Raja's own expression, "he was gradually reduced to a zamindar," it would be the intention of the Government to recognise him as landowner throughout the area of his sovereignty; and in particular when it came to lands held on military tenure by public officers, the Government might very reasonably desire that these officers should be responsible to it and be—to use the language already quoted in the judgment delivered by Lord Sumner—Gov-

ernment *ghatwals* created by the ruling power rather than Government *ghatwals* which at the time of the Permanent Settlement were to be included in a zamindari.

When to all this it is added that the legal status of a Raja as a tributary Prince is quite vague and uncertain, probably varying with the power and activity of the Emperor at the moment reigning at Delhi, that it is agreed that these *digwars* have existed from time immemorial and may be coeval with the Raja and may have been created or recognised by a sovereign power superior to both, it follows that this class of argument would merely land their Lordships in the region of speculation. The only safe course, therefore, is to see what actually has been written or done.

Much weight was attached by the High Court and by Counsel for the Respondent in their argument to the opinion of Mr. Millet in his report of 1842. He appears to have been acting as legal adviser to the Bengal Government and to have given a legal opinion upon certain materials submitted to him. He assumed certain facts for the purpose of his opinion, but his assumption only shows at best that there was at that time a general opinion among the Government officials, as there was when resumption proceedings were started in the present century, that in some shape or other the *digwars* were tenure-holders under the Raja.

Mr. Millet's view (or the view of those who instructed Mr. Millet) is opposed to that of Captain Haunynghton and Colonel Dalton.

The other matters which were relied upon for the Raja were a return made in a *mulki* form in 1841, in which the then Raja included in his list of properties the villages in possession of the two *digwars*.

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There is no doubt that there are errors in this return, and the mere fact that it does not appear that the Government made a protest against it, does not come to much. Then there is the placing of these lands on the General Register of revenue-paying lands, called "the A Register," after the Pargana of Shergarh was transferred into the District of Burdwan in 1871. On what grounds the Collector did this does not appear. That it would not come to the knowledge of the *digwars* seems pretty certain. The Collector, however, had no power to adjudicate upon title; and this matter and the payment of small sums to the Raja in some land acquisition proceedings fall into the class of instances when the Government officials apparently took the opposite view to that which had been taken by Captain Hannington and the other earlier officers. They make some evidence against the Secretary of State but none against the other Appellants.

More important perhaps is the action of the Government—though it proved abortive—in taking steps to effect a resumption of these lands as between themselves and the Raja in the years between 1901 and 1908. But except that these are more elaborate and solemn proceedings, the same observations apply to them as to other official proceedings of late date.

Against the expression of the opinion by Government officials upon which the Respondent relies may be set the comparatively early opinion of Captain Hannington and that of Colonel Dalton.

There is no evidence except the encroachment censured by Captain Hannington of any act of ownership or suzerainty on the part of the Raja. He has not taken the waste land of the *mouzas*. He did not choose members of the families to be the *digwars*, nor did he

approve the choice, except during the period when he was made *daroga* or head police officer.

If there was substantial evidence that the possession of the property had been in accordance with the Respondent's contention, the explanations which his Counsel have offered in respect of the *sarsikan* papers and the *lotbundi* papers might be accepted.

But the contrary has been the case. The existence of practicable mines of coal has been known since at least 1860, when as the Respondent himself says in his pleading that the minerals under the village of Garh Parira were let by *digwars* to Mr. Erskine. There have been further leases and assignments of leases and workings in at least one of the villages on and on from that time since. A claim was made by the Respondent in 1907, but he did not follow it up till he brought the present proceedings in September 1914. Presumption should not be made against but in favour of the existing state of things.

Their Lordships are therefore of opinion as indeed were both the Courts in India, that in the ordinary sense of the word these villages were not within the zamindari of the Respondent, or, to put it in another way, both Courts held that they were neither *malguzari* nor *chowkidari chakran*.

The High Court however—and this is the third point to be discussed—decided in his favour upon the theory that they were *thanadari* lands. Whether it is right as a matter of terminology to describe *thanadari* lands as being within the zamindari or outside need not be here discussed.

No doubt the holders of *thānadari* land stand in a certain position to the contiguous zamindar. If the lands are re-

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sumed, they are to be settled with the zamindar; and it may be that they may even be described as settled with the zamindar in a certain sense, and that there is a sort of superiority in the zamindar which might entitle him to the surface of the land in case of escheat. Whether this would give him a claim to the minerals is a further question. But for the purposes of this case their Lordships will assume that such things are possible.

But if so, the Respondent is in the same difficulty in dealing with the actual facts. If the minerals should be his because they are under *thanadari* lands, he has been, as already pointed out, backward in asserting his rights.

However, in the view of the High Court these are *thanadari* lands, and their Lordships must deal with this view. They got little help in this respect from Counsel for the Respondent who preferred the suggestion that they were "like *thanadari* lands."

At first sight the view of the High Court appears contrary to the regulations.

The Regulation of 7th December 1792 is as follows:—

"First. The police of this country is in future to be considered under the exclusive charge of the officers of Government who may be specially appointed to that trust. The landholders and farmers of land, who keep up establishments of Tannadars and police officers for the preservation of the peace, are accordingly required to discharge them, and all landholders and farmers of land are prohibited entertaining such establishments in future." (Colebrooke, p. 168.)

And sec. 8, sub-sec. (4) of Reg. I of 1793:—

"Fourth. The Jumma of those Zemindars, independent Talookdars and other actual proprietors of land, which is declared fixed in the foregoing articles, is to be considered entirely unconnected with and exclusive of any allowances which have been made to them in the adjustment of their Jumma for keeping up *Thannads* or police establishments, and also of the produce of any lands which they may have

been permitted to appropriate for the same purpose: and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace and appointed officers on the part of Government to superintend the police of the country. . . ."

But the learned Judges of the High Court took the view that *thanadari* lands, though made resumable, were not always resumed. This view is a difficult one to support in the face of the observations of this Board in the cases of *Raja Lelanund Sing Bahadoor v. The Bengal Government* (1), *Joykishen Mookerjee v. Collector of East Burdwan* (5) and *Ranjit Singh v. Kalidasi Debi* (6).

But a further difficulty is created by the documents in this particular case.

Mr. Leslie, the Collector, reporting in August 1793, says that at the making of the decennial settlement in his District, no allowance was made for police officers to any of the zamindars except the Pachete Raja who got a deduction from his revenue of Rs. 1,662 for the maintenance of *thanadars*. Mr. Leslie proceeds to say that he has directed the Raja to discharge the *thanadars* employed by him at the end of the present month and to pay to the revenue Rs. 1,662, which it is known he did pay. The sum is slightly differently stated by Iala-Kanji as Rs. 1,600.

If these lands were *thanadari*, why have they not been long ago resumed? If they had been resumed, Government would have acquired an increase of revenue from the Raja, and the Raja would have been able to draw rent from the land.

As their Lordships have already observed in dealing with the earlier part of

(1) 6 M. I. A. 101 at pp. 114-115 (1855).

(5) 10 M. I. A. 34, 44 (1864).

(6) L. R. 44 I. A. 117, 122: s. c. I. L. B. 44 Cal. 841; 21 C. W. N. 609 (1917).

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the case, the long established usage and possession is not reconcilable with the theory that these are *thanadari* lands.

In considering the effect of the *kabuliyat* the principles of the decision in *The Duke of Beaufort v. The Mayor, Aldermen and Burgesses of Swansea* (7), fortified by the observations in the judgments of this Board delivered by the Earl of Halsbury in *Van Diemens Land Co. v. Table Cape Marine Board* (8), and by the Lord Atkinson in *Witcham v. Attorney-General of East Africa Protectorate* (9), may be applied, *viz.*, that should the general words of an ancient grant be uncertain, they may be fairly explained by subsequent usage.

The result is that, in the opinion of their Lordships, these lands are not *thanadari* lands, and the District Judge was right on the first point to be decided, *viz.*, whether these mouzahs were or were not within the Raja's zamindari. Having arrived at this conclusion their Lordships deem it unnecessary and inadvisable to pronounce upon the other two defences raised by the several Appellants. The question whether mines and minerals belonged to landowners or to the Government is a far-reaching one, on which they would be unwilling to embark without having the fullest assistance of Counsel.

In a case which came before this Board several years ago, *The Imperial Japanese Government v. The P. & O. Steam Navigation Company* (10), two points of great public importance were raised by the decision of the Court under appeal, and their Lordships having come to the conclusion that they must advise His Majesty to reverse the decision of the

Court below on the first ground abstained from expressing any opinion on the second ground, while they carefully explained that in so doing they were not to be held to have given any authority thereby to that part of the decision which they did not touch. Their Lordships would desire to be understood to be acting in the same way in the present case.

The Respondent has failed to prove that he has any right to the minerals under these three villages, and the decision of the High Court must be reversed and that of the District Judge restored. This is all that their Lordships have to do. They have not to determine as between the two sets of Appellants which is entitled to the mines, nor who is entitled to them.

The appeals will be allowed with costs here and below for both sets of Appellants; and unfortunately provision must be made for the costs of the abortive hearing in December 1924. On that occasion, owing to the misconduct of the solicitor then acting for the Respondent, he was not represented; and it was not till after their Lordships had heard the Appellants' Counsel for several days and the arguments had been concluded, that it was discovered that the absence of Counsel for the Respondent at their Lordships' Bar was due to the misconduct of his solicitor.

The case has accordingly been set down again and heard anew. As it was due to no fault of the Appellants that the Respondent was not represented at the first hearing, they must have the costs of their attendance at that hearing. But their Lordships think that the Respondent need not be charged with the costs occasioned by his motion to restore his case to the paper, and that in respect of this motion which was heard on two occa-

(7) 3 Exch. 413 (1894).

(8) [1900] A. C. 92.

(9) [1919] A. C. 533.

(10) [1905] A. C. 644.

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sions, each party should bear his own costs. Their Lordships would humbly advise His Majesty accordingly.

Solicitor: *The Solicitor, India Office*, for the Secretary of State.

Solicitors: *Messrs. Sanderson, Lee & Co.* for the New Birbhum Co. and the New Bengal Iron Co.

Solicitors: *Messrs. Downer & Johnson* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2513 OF 1923.

<p>SUBHAWARDY, J. GRAHAM, J. 1926, 24, February.</p>	}	<p>BROJO MOHAN DAS ADHIKARI, Defendant, Appellant, <i>v.</i> GAYA PRASAD KARAN and ors., Plaintiffs, Respondents.</p>
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Indian Evidence Act (1 of 1872), secs. 9, 11 (b), 13 and 32, cl. (3)—Instruments not between parties to the suit in which they are produced—Recitals in, if admissible in evidence.

Recitals of boundaries of lands other than those in suit, contained in documents between third parties who are strangers to the suit, are not admissible and cannot be relied upon in evidence, and such recitals cannot be treated as evidence in the case under sec. 32, cl. (3) of the Evidence Act, nor under secs. 9, 11 or 13 of the said Act, recitals in an instrument being evidence only as against the parties who make them and not as against third persons.

RADHA KRISHNA MARWARI *v.* SARBESWAR NAG (10), PRAMATHA NATH CHOWDHURI *v.* KRISHNA CHANDRA BHATTACHARJEE (11), CHOONI LAL KHEMANI *v.*

(10) 29 C. W. N. 469 (1925).

(11) 28 C. W. N. 1022 (1924).

NILMADHAB BARIK (9), SOROJ KUMAR ACHARJI CHOWDHURY *v.* UMEDALI HOWLADAR (8), SHRINIVASDAS BAVRI *v.* MEHERBAI (12) and BRAJESHWARI PESHAKAR *v.* BUDHANUDHI (1) followed and approved.

CHOONI LAL KHEMANI *v.* NILMADHAB BARIK (9), ABDULLA *v.* KUNJ BEHARI LALL (6), DWARKANATH BAKSHI *v.* MUKUNDU LAL CHOWDHURY (8), ABDUL ALI *v.* SYED REJAN ALI (4), BISHESWAR DAYAL *v.* HARBANS SAHAY (5) and IMRIT CHAMAR *v.* SIBDHARI PANDEY (7).

This was an appeal against the decree of Babu Nani Gopal Mukherjee, Subordinate Judge, 1st Court of Zillah Midnapur, dated the 27th of July 1923, affirming the decree of Babu Jogendra Kumar Dey, Munsif, 1st Court of Contai, dated the 24th of January 1923.

The facts of the case will appear fully from the judgment.

The suit was for establishment of title to land on the allegation that on a partition between the Defendant and his brother the suit land was allotted to the latter who sold it to the Plaintiffs' father. The Defendant's case was that the land was allotted to him on partition. The lower Courts decreed the Plaintiffs' suit. The lower Appellate Court decided the case on subsequent possession relying mainly on four documents between parties who were strangers to the suit. In these

(1) I. L. R. 6 Cal. 268 (1880).

(3) 5 C. L. J. 55 (1906).

(4) 19 C. W. N. 468 (1913).

(5) 6 C. L. J. 659 (1907).

(6) 16 C. W. N. 252; s. c. 14 C. L. J. 467 (1911).

(7) 17 C. W. N. 108 (1911).

(8) 25 C. W. N. 1022; s. c. 35 C. L. J. 19 (1921).

(9) 41 C. L. J. 374 (1924).

(12) L. R. 49 I. A. 36; s. c. I. L. R. 41 Bom. 300; 21 C. W. N. 558; 25 C. L. J. 311 (1916).

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documents one of the boundaries of the lands dealt with was described as the land in suit of which the Plaintiffs' father was stated to be the owner.

The question in this appeal was whether those documents between third parties were admissible in evidence.

Babu Gopendra Nath Das for the Appellant.—Boundary descriptions in documents, Exts. 5 to 8, which are not *inter partes*, are not admissible even under sec. 32, cl. (3) of the Evidence Act. Cited *Pramatha Nath Choudhuri v. Krishna Chandra Bhattacharjee* (11).

Mr. S. C. Bose (with *Babu Santosh Kumar Pal*) for the Respondents.—The documents are admissible under sec. 9 as introductory of the fact in issue or as supporting the fact in issue, *viz.*, whom does the disputed land belong to.

They are also admissible under secs. 11 and 13 of the Evidence Act.

Those documents are admissible under sec. 32, cl. (3) of the Evidence Act.

Cited *Abdulla v. Kunj Behari Lall* (6) and *Imrit Chamar v. Sibdhari Pandey* (7).

Babu Gopendra Nath Das in reply.—The documents cannot be admissible under sec. 9, because the description as to boundaries in a document not *inter partes* is not a fact connected with the fact in issue.

Recitals in documents not *inter partes* are inadmissible in evidence: see *Brajeshwari Peshakar v. Bulhanudhi* (1).

This case has been consistently followed in this Court.

It received support from *Shrinivasdas*

Bavri v. Meherbai (12), *Abdulla v. Kunj Behari Lall* (6), *Radha Krishna Marwari v. Sarbeswar Nag* (10) and *Chooni Lal Khemani v. Nilmadhab Barik* (9).

The only question is if they are admissible under sec. 32, cl. (3). It cannot be said that the boundary descriptions are necessarily against the pecuniary or the proprietary interest of the maker.

The last two cases and that of *Pramatha Nath v. Krishna Chandra* (11) are in favour of the Appellant.

The JUDGMENT OF THE COURT was as follows:—

SUHRAWARDY, J.—In the suit from which this appeal arises the Plaintiffs sought to establish their title to the eastern half of the cadastral survey dag No. 5/48. Their case is that the Defendant and one Padmalochan Das were brothers, that on partition the land in suit was allotted to Padmalochan who mortgaged it to Plaintiffs' father and being unable to redeem finally sold it to him. The Defendant, on the other hand, contends that the land in suit was allotted to him on partition. The record-of-rights is in favour of the Defendant. The onus that lies upon the Plaintiffs becomes heavier on account of this entry in the record. Both the Courts have passed a decree in favour of the Plaintiffs. The lower Appellate Court was not satisfied in the evidence on either side that there was any partition. It thereupon proceeded to decide the question by subsequent possession of the land in suit. In considering the

(6) 16 C. W. N. 252; s. c. 14 C. L. J. 467 (1911).

(9) 41 C. L. J. 374 (1924).

(10) 29 C. W. N. 469 (1925).

(11) 28 C. W. N. 1092 (1924).

(12) L. R. 49 I. A. 36; s. c. I. L. R. 41 Bom. 300, 21 C. W. N. 555; 25 C. L. J. 811 (1916).

(1) I. L. R. 6 Cal. 268 (1880).

(6) 16 C. W. N. 252; s. c. 14 C. L. J. 467 (1911).

(7) 17 C. W. N. 108 (1911).

(11) 28 C. W. N. 1092 (1924).

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evidence it relied mainly upon certain documents between strangers to the suit, viz., Exts. 5 to 8, in which one of the boundaries of the lands dealt with thereby is described as the land in suit of which the Plaintiffs' father is stated to be the owner. In this connection the finding of the learned Subordinate Judge is thus recorded: "Considered along with these deeds the oral evidence adduced by the Plaintiffs is worthy of credit in spite of certain contradictions. I find that the evidence, oral and documentary, produced by the Plaintiffs fully rebuts the presumption arising from the entry in the settlement record." It is therefore necessary to examine the question relating to the admissibility of those documents. The learned Subordinate Judge is of opinion that the documents are admissible under sec. 32, cl. (3) of the Evidence Act. Exts. 5, 6 and 8 are *kobalas* and Ext. 7 is a mortgage deed. According to the view that has been taken of this question which has frequently come up for decision before this Court there is hardly any room for further argument. But the learned Advocate appearing for the Defendant has tried to present another aspect of the question before us. His submission is to the effect that a deed of sale is a statement made by the seller against his interest as he parted with his interest in the land sold. It is therefore admissible under sec. 32, cl. (3); and the document having thus come in, any statement made therein in describing the boundaries of the land sold comes in as evidence whatever may be its evidentiary value. This argument is fallacious and cannot be accepted, for any statement made against the interest of the person making it is not as such admissible as against the rest of the world. Such a statement is admissible in connection with

relevant fact under the Evidence Act. It is said that such statement is relevant in this case under sec. 9 of the Evidence Act. That section apparently has no bearing upon the present question. It deals with relevancy of facts which are introductory of facts in issue or explanatory thereof and necessarily such facts must be connected with facts in issue. There was undoubtedly at one time some divergence of opinion upon this matter. So long ago as 1880 it was held by Garth, C. J., in *Brajeswari Peshakar v. Budhanudhi* (1) that "recital in a deed or other instrument is no doubt in some cases conclusive and in all cases evidence as against the parties who make it; and it is of more or less weight, or more or less conclusive, against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be." The learned Chief Justice referred in the course of his judgment to the case of *Radhanath Bannerji v. Jadunath Singh* (2) and observed that if a recital in a deed was admissible in evidence as against third parties who were in no way privy to the deed, the propriety of the decision seemed to be extremely doubtful. In *Dwarkanath Bakshi v. Mukundu Lal Chowdhury* (3) such statements were held admissible against third parties under secs. 11 (b) and 13, Evidence Act. In *Abdul Ali v. Syed Rejan Ali* (4) the view taken in the above case was disapproved. The view taken in *Dwarkanath Bakshi's* case (3) was adopted by Mookerjee, J., in

(1) I. L. R. 6 Cal. 268 (1880).

(2) 7 W. R. 441.

(3) 5 O. L. J. 55 (1906).

(4) 19 O. W. N. 468 (1913).

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the case of *Bisheswar Dayal v. Harbans Sahay* (5). In the later case of *Abdulla v. Kunj Behari Lal* (6) the same learned Judge resiled from the position taken in the earlier case and held that such statements, though not admissible under sec. 11 or sec. 13 of the Evidence Act, was admissible under sec. 32, cl. (3). The same view was taken by that learned Judge in *Imrit Chamar v. Sibdhari Pandey* (7). I had occasion in certain recent cases to dissent from this view and to hold that sec. 32, cl. (3) does not make the statement in a document between third parties admissible against a party in suit. *Soroj Kumar Acharji Chowdhury v. Umeduli Howladar* (8), *Chooni Lal Khemani v. Nilmadhab Barik* (9) and *Radha Krishna Marwari v. Sarbeswar Nag* (10). *Soroj Kumar's* case (8) has been recently considered and followed in the case of *Pramatha Nath Choudhuri v. Krishna Ch. Bhattacharjee* (11). Greaves and Chakravarti, JJ., held on an examination of the authorities on this point that recitals of boundaries of other lands in documents between third parties are not admissible in evidence either as regards the description of the boundary or as to the nature of the land. It is not therefore necessary to examine minutely the position taken by Mookerjee, J., in the case of *Abdulla v. Kunj Behari Lal* (6) and other cases. Sec. 32 (3) of the Evidence Act makes the statement made by a person against his pecuniary or proprietary interest admissible in evidence. It is argued that the

recital of the boundaries put a limit to the interest of the person making it and therefore it is a statement against the pecuniary interest of that person. As has been observed in the case of *Pramatha Nath Choudhuri v. Krishna Chandra Bhattacharjee* (11) such a statement might have been made with an ulterior object in view. In fact it might have been made not in order to restrict or limit the right of the maker but to extend or enlarge it. It seems to me that it must be a great straining of the language of the law to hold such a statement as a statement against the pecuniary or proprietary interest of the person making it. The view that such a statement made by a person cannot be made admissible in evidence against a stranger is supported by the principle of the decision of their Lordships of the Judicial Committee in *Shrinivasdas Bavri v. Meherbai* (12). I am accordingly of opinion that the documents, Exts. 5 to 8, are not admissible in evidence and should have been excluded from consideration in deciding the issue on the Plaintiffs' title. As there is other evidence also on the record which requires consideration by a Court of fact, this case must be remanded to the lower Appellate Court for a re-hearing of the appeal after excluding the documents, Exts. 5 to 8, from its consideration. Costs will abide the result.

GRAHAM, J.—The only point argued in this appeal is that certain documents, Exts. 5 to 8, three *kobalas* and a usufructuary mortgage deed, were wrongly relied upon as evidence in the Courts below. The documents in question contain the statements of third parties as to boundaries of

(5) 6 C. L. J. 659 (1907).

(6) 16 C. W. N. 252; 2 C. L. J. 487 (1911).

(7) 17 C. W. N. 108 (1911).

(8) 25 C. W. N. 1022; a. c. 35 C. L. J. 19 (1921).

(9) 41 C. L. J. 374 (1924).

(10) 20 C. W. N. 460 (1925).

(11) 28 C. W. N. 1092 (1924).

(12) 28 C. W. N. 1092 (1924).

(12) L. R. 49 I. A. 36; s. c. I. L. R. 41 Bom. 300; 21 C. W. N. 558; 25 C. L. J. 311 (1916).

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other lands and have been relied upon by the Courts below as corroboration. The learned Subordinate Judge has held that the documents are good evidence under sec. 32 (3) of the Evidence Act. In my opinion, he has erred in so holding. The question whether recitals of boundaries of other lands in documents between third parties are admissible in evidence or not has been considered in numerous cases, and there has been some divergence of opinion upon the subject. The trend of recent decisions in this Court has, however, been against treating such recitals as evidence, and I think that we should follow those decisions. In my judgment the law on the point was correctly laid down in the case of *Soroj Kumar Acharji Chowdhury v. Umedali Howladar* (8) which was followed in *Pramatha Nath Choudhuri v. Krishna Chandra Bhattacharjee* (11). Greaves, J., in the latter case quoted with approval the judgment of Chief Justice Sir Richard Garth in *Brajeshwari Peshakar v. Budhanudhi* (1) to the following effect:—"A recital in a deed or other instrument is no doubt in some cases conclusive and in all cases evidence as against the parties who make it. But it is no more evidence as against third persons than any other statement would be." It appears to me that this correctly lays down the law on the point. In the result therefore the appeal must be allowed, the decree of the lower Appellate Court set aside and the case sent back to that Court for a re-hearing of the appeal after excluding Exts. 5 to 8 from consideration.

H. D. C.

Case remanded.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2083 OF 1922.

<p>CHAKI AVARTI, J. 1925, Heard, 4 and 5, February. Judgment, 13, March.</p>	}	<p>DEHENDRA NATH ROY and ors., Plaintiffs, Appellants, v. AHAMED MIA and ors., Defendants, Respondents.</p>
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Bengal Tenancy Act (VIII of 1885), sec. 50 (2) —Presumption under sec. 50, rebuttal of—Previous tenancy—Recognition of purchaser of non-transferable occupancy holding—Stipulation for enhancement of rent upon measurement in future—New tenancy—Kabuliyat, construction of.

Where a purchaser of a non-transferable occupancy holding was recognised as a tenant of the previous jama upon his executing a kabuliyat in which shares separately purchased were amalgamated and there was a stipulation of enhancement of rent at specified rates for different classes of land upon a measurement in future:

Held—That in the circumstances of the case the kabuliyat created a new tenancy, and the tenant was not entitled to the presumption under sec. 50 of the Bengal Tenancy Act.

ABHOYA SANKER MAZUMDAR v. RAJANI MANDAL (1) referred to.

This was an appeal against the decree of A. J. Dash, Esq., Additional District Judge of Faridpur, dated the 9th day of May 1922, affirming the decree of Babu Mahima Ranjan Mitra, Munsif, Third Court, Bhanga, dated the 18th April 1921.

The facts material to this report are as follows:—

Plaintiffs sued the Defendants for recovery of rent in respect of a holding bearing a jama of Rs. 25-10-6 per year and for enhancement of rent of the said

(1) 1 L. R. 6 Cal. 268 (1890).

(8) 25 C. W. N. 1022; a. c. 35 C. L. J. 19 (1921).

(11) 28 C. W. N. 1092 (1924).

(1) 22 C. W. N. 904 (1918).

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holding on the ground of rise in average prices of staple food crops under sec. 30 (b) of the Bengal Tenancy Act. The defence was that the *jama* was a *mokurari* one and the rent was not liable to enhancement, and the Defendants were entitled to the presumption of fixity of rent under sec. 50 of that Act. In the record-of-rights finally published the holding in question was entered as *mokurari raiyati*. To rebut the presumption raised by this entry the Plaintiffs relied upon a *kabuliyat*, Ex. I, dated the 7th Aswin 1301 B. S., executed by Reazaddi Mia and another, predecessors-in-interest of the Defendants in favour of the Plaintiffs' predecessors Jagendranath Roy and others.

The following portions of the said *kabuliyat*, Ex. I, will be found material to this report:—

"That within taraf Ujani . . . appertaining to the *kayemi jote* in the name of late Shib Charan Roy, there is Kismat Dhirai, in which is mudafat Gour Mohon Das and Guru Charan Das, Pattan Ram Krishna Mandal, Rai Chand Mandal, bearing a *jama* of Rs. 25-10-6, an eight annas share whereof has been purchased by one Dradjaddi Mia by a *kobala* and the other eight annas share whereof has been purchased by me Reazaddi Mia in execution of a money decree, and we two brothers are jointly possessing the same. We having prayed for the realisation of rent from us by recording our names in the previous *jama* of the said mahal, you have granted our prayer and have demanded a *kabuliyat* from us; so we are executing this *kabuliyat*, etc. . . .

6. That when you will make a survey of the said village, we shall be present at that time and shall cause a proper *rakamangi* survey to be made; if we be not present for any reason whatsoever,

then we shall be fully bound by and responsible for the *jama bandi* that you shall cause to be made in our absence.

7. That for the land that will be ascertained at the aforesaid survey we shall pay rent by executing a fresh *kabuliyat* on a *jama bandi* at the rate of Rs. 1-9-7 p. per bigha of paddy land, Rs. 2-6-1½ p. per bigha of homestead land, Rs. 1-9-11 p. per bigha of *palan* land and Rs. 2-8 per bigha of garden land."

* * * * *

It may be stated that the area of the land in this *kabuliyat* was given as 39 bighas 16½ cottas.

The Munsif gave the Plaintiffs a decree for rent but disallowed the claim for enhancement of rent. He held that the *kabuliyat* did not rebut the presumption arising out of the entry in the record-of-rights and the Defendants' holding was a *mokurari* one. He relied upon the case of *Abhoya Sanker Mazumdar v. Rajani Mandal* (1).

On appeal by the Plaintiffs, the Additional District Judge of Faridpur affirmed the decision of the Munsif and dismissed the appeal.

The following portion of the judgment of the Additional District Judge will be found material:—

"To rebut the presumption raised by this entry, the Plaintiffs-Appellants rely on Ex. I, a *kabuliyat* of date 1301. It is claimed for them that this contains an admission that the rent may be enhanced. This is clearly so, because we find a clause that when there will be a survey, the rent will be at certain specified rates for different classes of land. Even if all the land be of the lowest class, the rent would be largely enhanced. Although there is no open admission that rent is enhancible, agreement to the terms of the *kabuliyat*

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implies that. At the same time there has been no enhancement of rent either at the time of the execution of this *kabuliyat* or subsequently. There is no evidence of alteration of rent previously and the presumption is therefore that the rent was and is fixed—particularly it was fixed at the time the *kabuliyat* was executed. I have been referred to rulings contained in *Upendra Nath Ghosh v. Dwarkanath Biswas* (2) and *Abhoya Sanker Mazumdar v. Rajani Mandal* (1). Here it is clear that the *kabuliyat* was merely a confirmation of the previous tenancy which required confirmation on account of purchase by the predecessors-in-interest of the Defendants. But if it was a confirmation, it might still be said that a new condition had been imported into the terms of the tenancy.

But it seems to me clear from the wording of sec. 50 of the Bengal Tenancy Act, that provided the tenancy continues, then if the rent or the rate of rent actually realised be unchanged from the time of the Permanent Settlement, then it cannot be enhanced. There is no question of any admission that the rent is enhancible. The fact that no actual enhancement has ever taken place is the criterion. Consequently, I find that the rent is not enhancible. The appeal is accordingly dismissed with costs."

Against the decision of the Additional District Judge Plaintiffs preferred this second appeal.

Babus Hemendra Chandra Sen (for Rai Surendra Chandra Sen Bahadur, Advocate), Surendra Nath Basu (Sr.) for the Appellants.

Babus Prakas Chandra Majumdar and Biraj Mohan Majumdar for the Respondents.

(1) 22 C. W. N. 904 (1915).

(2) 22 C. W. N. 922 (1915).

The JUDGMENT OF THE COURT was as follows:—

Plaintiffs are the Appellants and this second appeal is against the judgment and decree of the Additional District Judge of Faridpur, dated the 9th May 1922, affirming the decision of the Munsif.

The suit out of which this appeal arises was brought by the Plaintiffs for recovery of arrears of rent in respect of a certain holding bearing a *jama* of Rs. 25-10-6 p. per year and for enhancement of rent under sec. 30, cl. (b) of the Bengal Tenancy Act.

Defendant No. 1 alone contested the suit and relied upon the entry in the record-of-rights and pleaded that under sec. 50 of the Bengal Tenancy Act, he was entitled to the presumption that the tenancy was created before the Permanent Settlement and as such not liable to enhancement.

The landlords on the other hand relied upon a *kabuliyat* executed by the predecessor of the Defendants on the 9th Aswin 1301 and they contend that a new tenancy was created by it inasmuch as by this *kabuliyat* the landlords recognised the purchaser of a non-transferable occupancy holding and imposed fresh terms by which future enhancement was provided for.

The Munsif dismissed the claim for enhancement and the learned Additional Judge for the reasons given by the Munsif dismissed the appeal by the Plaintiffs. The judgments of the Courts below are based on the decision in the case of *Abhoya Sanker Mazumdar v. Rajani Mandal* (1).

In this second appeal the learned vakils for the Appellants contended that a new lease was created with the condition that the rent would be liable to enhancement in future. The real and only ques-

(1) 22 C. W. N. 904 (1915).

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tion in this case is what is the true and proper construction of the *kabuliyat*, dated 9th Aswin 1301. Was it merely a confirmatory lease with the old tenancy or a tenancy with new and additional conditions? As the recognition by the landlord of the sale of a non-transferable occupancy right was optional and the addition of new terms would be justifiable on any fresh terms agreed between the parties, it remains to be seen whether there were such additional terms embodied in the contract.

It seems to me clear that there was a contract for variation of the rent at the rates specified for operation in future.

It will appear that at the rates mentioned for the future even on the area then existing there would be an enhancement of the rent. Instead of asking for an immediate increase in the rent, the deed provided that the enhancement would come into force upon the true area when ascertained by a future measurement. I have no hesitation in saying that this is what this contract clearly provided and it was upon this additional term that the landlord recognised the purchaser of the predecessor of the Defendants as a tenant of the occupancy holding purchased by him. The amalgamation of two shares separately purchased was also an additional condition of the new lease.

The passage cited from the judgment of Mr. Justice Teunon in the case of *Abhoya Sanker Mazumdar v. Rajani Mandal* (1), lays down nothing which prevents the ascertainment of the conditions upon which the new tenancy was created in any particular case. Each contract must be construed according to its own terms and in the circumstances of that case. Cases may be helpful in so far as they lay down

(1) 22 C. W. N. 904 (1918).

general principles but cannot be direct authority as to the construction to be put upon the deed before the Court in another case. I am, therefore, of opinion that the appeal succeeds. The judgments and decrees of the Courts below are discharged and the case sent back to the Munsif for the determination of the amount of rent payable by the Defendants. The Defendants must pay the costs of this appeal. As to the costs of the suit the trial Court will be at liberty to make such order as the final determination of the suit requires.

H. C. S.

Appeal allowed.
Case remanded.

[REPORTER'S NOTE.—No appeal under sec. 15 of the Letters Patent was preferred against this judgment.]

CRIMINAL REVISIONAL JURISDICTION

REV. No. 988 of 1925.

C. C. GHOSH, J.

Dr. VAL, J.

1925,

Heard,

18, December.

1926,

Judgment,

4, January.

SRIMATI HEMANGINI
DASI, Petitioner,

v.

THE KING-EMPEROR
Opposite Party.

Calcutta Suppression of Immoral Traffic
(XIII, B. C., of 1923), sec. 4, cl. (1) and
"Living" in brothel, meaning of.

Residence in a brothel for about four days previous to the rescue is living in a brothel within the meaning of sec. 4 (2) of Act XIII, B. C., of 1923. The whole purpose of the section is to rescue girls from brothels and the whole object of the Act will be frustrated if a girl has to be an ordinary resident before the section can come into operation.

This was a Rule granted on the 12th November 1925 against an order of the Honorary Magistrate, Calcutta (Mr. M. N. Chatterji), dated the 12th September 1925.

SRIMATI HEMANGINI DAS v. THE KING-EMPEROR.

The facts of the case will appear from the judgment.

Babu Satindra Nath Mukerji for the Petitioner.

Mr. Ashraf Ali for the Crown.

The JUDGMENT OF THE COURT was as follows :—

DUVAL, J.—The facts of this case are as follows :—

One Hemangini Dasi had a son Hari Charan Das by her husband. After her husband died she left the family and lived with one Satya Dawan by whom she had two daughters. Satya appeared to have deserted her and subsequently died. Hemangini is now living as a prostitute in a brothel. The two girls after Hemangini became a public prostitute were being brought up respectably at Hari Das's house. They are now of the ages of 12 and 10 years respectively.

The police received an anonymous petition dated the 19th May and in consequence under the provisions of the Calcutta Suppression of Immoral Traffic Act, 1923, a search was made and the two girls were discovered living with Hemangini in a public brothel at 14, Rambagan Lane. They were produced before the Honorary Magistrate of the Juvenile Court who has ordered their detention until they attained the age of 18 in a rescue home.

Against this order a Rule has been obtained on the sole ground that they were not ordinarily residing in a brothel at the time of their rescue and so they were not living in a brothel within the meaning of sec. 4 (2) of the Act.

The evidence in the records shows clearly that for at least four days before their rescue they were residing in the brothel, even though it was not their ordinary place of residence; and it is said

that they were there to look after their mother who was ill. She could not have been very seriously ill, as as soon as they were rescued she was well enough to go to the thana.

The only question before us in revision is whether a residence in a brothel for about four days before rescue comes within the meaning of the words "lives in." In my opinion it does. The whole purpose of the section is to rescue girls from brothels. These innocent girls lived ordinarily not far off and admittedly were living with their mother in those undesirable surroundings for several nights before their rescue. The whole purpose of the Act would be frustrated if a girl has to be an ordinary resident before the section can come into operation.

I would therefore discharge the Rule.

On examination of the evidence it appears that arrangements were being made for the girls being married. If there is a *bond fide* arrangement for the marriage of either of them, there will be nothing to prevent their natural brother Hari Das or others (excluding Hemangini) interested in them from applying to the Honorary Magistrate to vary his order.

C. C. Ghose, J.—I agree.

S C. M.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

VISCOUNT FINLAY.

SIR JOHN EDGE.

MR. AMEER ALI.

MR. JUSTICE DUFF

1925,

Heard, 30, June.

Judgment, 23, July.

MA CHIT SU,

Appellant,

v.

THE NATIONAL BANK

OF INDIA, LTD., and

anr., Respondents.

*Administration suit, pending in competent Court
— Sale of property forming part of estate, if may*

MA CHIT SU v. THE NATIONAL BANK OF INDIA, LTD.

be ordered without that Court's leave, upon permission by another Court—Rule of practice.

The Judicial Committee declined to interfere with the rule of practice of the Chief Court of Burma which recognised the power of another Court to grant permission for the sale of property belonging to an estate in respect of which a suit for administration was pending in the Chief Court, though they found it difficult to understand that the legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property forming part of the estate.

BERRY v. GIBBONS (1) referred to.

This was an appeal (No. 123 of 1924) from a decree of the Chief Court of Lower Burma in its Appellate Jurisdiction, dated the 11th July 1922, which affirmed a decree of the said Court in its Original Jurisdiction, dated the 9th June 1920.

The suit was brought by the National Bank of India, Ltd., to obtain specific performance of a contract, alleged to have been made by Maung Myat Thin, to sell to the Bank a house and land situate at No. 3, Phayre St., Rangoon. The property prior to his death in 1906 had belonged to Maung Shwe Oh, the father of Maung Myat Thin and husband of the present Appellant.

The agreement for sale of the property was alleged to have been made on the 9th July 1918 and the suit for specific performance was instituted on the 15th July 1919.

The defences were—

(1) That there was no completed agreement for sale, and

(2) that by reason of a preliminary

(1) L. R. 8 Oh. App. 747 (1878).

decree having been passed in a suit for the administration of the estate of Shwe Oh, the agreement, if in fact made, was invalid.

Both Courts in India decided in favour of the Plaintiff Bank.

The Hon. Geoffrey Lawrence, K. C. and Mr. E. F. H. Besley for the Appellant.

Sir Geo. Lowndes, K. C. and Mr. E. B. Raikes for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

SIR JOHN EDGE.—This is an appeal from a decree of the 11th July 1922 of the Chief Court of Lower Burma in its Civil Appellate Jurisdiction, which affirmed a decree of the 9th June 1920 of the Chief Court in its Original Civil Jurisdiction. The parties to the appeal are Ma Chit Su; a Defendant, who is the Appellant, and the National Bank of India, Limited, who was the Plaintiff, and Maung Myat Thin, the first Defendant, who are the Respondents.

The suit was brought against Maung Myat Thin and the Bank of Bengal for a decree for specific performance of a contract to sell immoveable property in Rangoon. The Appellant, who is the mother of Maung Myat Thin, was on her own application brought on the record on the 1st March 1920 as a Defendant. The trial Judge gave the Plaintiff a decree for specific performance. From that decree Ma Chit Su appealed. The Appellate Court, by its decree, dismissed that appeal, and from that decree of dismissal this appeal has been brought. The questions in this appeal are—(1) Whether there was a completed agreement for the sale of the property; (2) whether the alleged agreement to sell the property was not subject to a condition that any litiga-

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tion relating to the property should be settled before the agreement could take effect; and (3) whether the agreement to sell was within the scope of the authority of Maung Myat Thin.

The facts of the case are as follows:—Maung Myat Thin was the eldest child of Maung Shwe Oh and his wife Ma Chit Su. Maung Shwe Oh died on the 5th June 1906, leaving his wife Ma Chit Su and his nine children surviving him. At the time of his death the property in question in this suit belonged to Maung Shwe Oh and his brother Maung Shwe Goh jointly. They had carried on business in partnership. On the 17th March 1907, letters of administration were, on the application of this Appellant, Ma Chit Su, granted by the District Court of Amherst under the Probate and Administration Act, 1881 (Act V of 1881) to Maung Myat Thin to administer the estate of his late father Maung Shwe Oh. After the grant of the letters of administration the business, which had been carried on by Maung Shwe Oh and Maung Shwe Goh, was carried on by Maung Myat Thin as such administrator and Maung Shwe Goh in partnership. On the 12th June 1913, the partnership was by a preliminary decree dissolved, a compromise was agreed to, and by a consent decree Maung Myat Thin became entitled as such administrator to all the assets of the partnership, including the property in question, and became liable to all the debts of the partnership with certain exceptions which are not material and need not be further referred to. On the 27th November 1913, Maung Shwe Goh executed releases in favour of Maung Myat Thin of all the immoveable property of the partnership, including the property in question.

As such administrator Maung Myat Thin was indebted to the Bank of Bengal

for moneys advanced. As security for the loan the title deeds of the property in question had been deposited with that bank on the 7th May 1901, which thereby acquired an equitable mortgage. Maung Myat Thin was involved in some litigation with members of his family. Early in 1914 an administration suit was instituted in the Chief Court of Lower Burma by Ma Chit Su on her own behalf and on behalf of her eight younger children against Maung Myat Thin and others for the administration by the Court of the estate which was in his hands. It will be remembered that Maung Myat Thin was then the administrator who had been appointed by the District Court of Amherst. On the 22nd November 1916, Maung Myat Thin made a deposition in that suit for administration in the High Court, in which he stated: "So far as I am concerned I consent to its" (the estate) "being administered by the Court. I understand that the administration will be taken out of my hands." He was alluding to his rights as an administrator on his appointment by the District Judge of Amherst in 1907. On the 22nd November 1916, the High Court in the administration suit ordered that certain accounts should be taken and certain enquiries made, and that the suit should stand adjourned for making a final decree until the accounts and inquiries had been taken and made. A final decree was at some time made by the Chief Court, but is not before their Lordships. It is true that the Chief Court had not been asked to appoint a receiver or to issue an injunction to Maung Myat Thin not to continue to act as an administrator under his appointment as an administrator by the District Judge of Amherst. The preliminary decree, which was made by the Chief Court on 22nd November 1916,

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seems to have been a common form of such decrees in suits for administration in the Chief Court. It appears to their Lordships that it is advisable that that form of decree should be revised by the Court, now the High Court, so that there can in future be no question as to a conflict of authority between the High Court in an administration suit and a District Court which had appointed an administrator of the same estate. Such a conflict could not have arisen as it did in this case if the High Court had either appointed a receiver or had issued an injunction; either would have determined any right which Maung Myat Thin had under his appointment as an administrator by the District Judge of Amherst.

On the 27th April 1917, Maung Myat Thin applied to the Court of the District Judge of Amherst for permission to sell the property in question, and on 26th June 1917, that Court granted to him permission to sell that property. That application was made under sec. 90 of the Probate and Administration Act, 1881, as amended by Act VI of 1889.

On the 9th July 1918, Maung Myat Thin, on the introduction of the Bank of Bengal, called on Mr. Smith, the manager of the Plaintiff bank, and they discussed the terms upon which Maung Myat Thin would sell to the National Bank of India, Limited, and that bank would purchase from Maung Myat Thin, the property in question. After that interview Mr. Smith, on behalf of the bank, on the 9th July 1918, wrote the following letter to Maung Myat Thin :—

"National Bank of India, Limited,
"Rangoon, 19th July 1918.

Messrs. Shwe Oh Bros. & Co.

"DEAR SIR,

"With reference to your Maung Myat Thin's call to-day, I hereby confirm the arrangement whereby the Bank proposes to purchase the property No. 3,

Phayre Street and No. 62, 37th Street, subject to a clear title, for Rupees one lac seventy-seven thousand, say Rs. 177,000/-.

"Your confirmation in writing of above arrangement is requested.

"I am,

"Yours faithfully,

"JAMES SMITH,

"Manager."

In reply to that letter Maung Myat Thin sent the following letter :—

"No. 3, Phayre Street,

"Rangoon, 10th July 1918.

"The Manager,

"National Bank of India, Limited,

"Rangoon.

"DEAR SIR,

"We reference to your letter of the 2nd (sic) instant re house No. 3, Phayre Street and house No. 62, 37th Street, I hereby confirm the arrangement for sale of the above properties to your Bank for Rs. 177,000 subject to settlement being effected of any litigation relating to the same properties.

"I am, yours faithfully,

(Signed) "MAUNG MYAT THIN."

The next thing which happened was that the lawyers who were acting for the National Bank of India, Limited, sent a requisition on title to Maung Myat Thin. The third, fourth, fifth, sixth and eighth requisitions, which alone seem to be of any importance in this suit, with the replies, were as follows :—

"3. On 4th August 1900, the property was conveyed to Maung Shwe Oh and Mg. Shwe Goh, who were heirs to Maung Shwe Oh. Have any claims been made by any persons other than Mah Hnin Get and Maung Myat Thin to share in the estate of Maung Shwe Oh deceased?"

Reply.—"A suit for administration of Mg. Shwe Oh's estate is pending in Chief Court. Commissioner is inquiring into accounts, etc., and I believe he will decide who are the heirs to the said estate."

"4. In Mr. Myat Thin's letter, dated 10th July 1918, the sale is confirmed 'subject to settlement being effected of any litigation relating to the properties.' What litigation is referred to in the sentence?"

Reply.—"There is an application pending in Chief Court for execution of decree against Shwe Oh Bros. & Co. by Ma Thein Zin, a decree-holder; also there is the administration suit referred to in answer to question (3)."

"5. Are there any (and if so what) claims being

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made or threatened in respect of the above property? (Give full particulars.)”

Reply.—“Whether any claims will be made or not in respect to this property will depend on the finding of the Commissioner referred to in answer to question (3).”

“6. Are there any (and if so what) persons likely to object to the sale to the National Bank of India, Limited?”

Reply.—“Same answer as No. 5 question.”

“8. A certified copy of the order granting leave to sell must be furnished.”

Reply.—“I shall write to the Bank of Bengal to send the copy which is, I believe, with them.”

On the 7th January 1919, the solicitors of Maung Myat Thin informed Mr. Smith, the manager of the National Bank of India, Limited, that he was unwilling to transfer the property in question to the bank, as his mother was objecting to the sale.

Maung Myat Thin had made full disclosure to the National Bank of India, Limited, of his position and of such right as he had to sell the property in question, and that bank accepted such title to sell as he had, and brought this suit for specific performance. Their Lordships find that by the 10th June 1918, Maung Myat Thin and Mr. Smith, as the manager and agent of the bank with full authority to act on behalf of the bank, had come to a complete agreement for the sale of the property in question to the bank. The condition that the agreement should be subject to a settlement of any litigation relating to the property before the agreement should take effect was a condition for the protection of Maung Myat Thin, and the National Bank of India, Limited, took the risk of any such litigation; there was no substantial litigation which could prevent Maung Myat Thin selling.

Their Lordships have had some difficulty in arriving at a conclusion that Maung Myat Thin had power to sell the property without having obtained the pre-

vious permission of the Chief Court to do so. The suit for an administration of the estate had been entertained by the Chief Court, and was pending in that Court, and it is difficult for their Lordships to understand that the legislature could have intended that when a suit for administration of an estate is before a Court competent to entertain it and to order that accounts should be taken in the suit, any other Court should have power to grant permission for the sale of property, part of the estate; but it appears from the judgments in this suit of the Chief Court that according to some rules of practice of the Chief Court the Chief Court recognised a power of another Court to grant permission for the sale of property of the estate before the Chief Court.

Mr. Justice Young, who was the trial Judge in this suit, and had been the Judge who had made the decree in the administration suit, referred to *Berry v. Gibbons* (1) as an authority that a judgment in England for administration does not prevent executors from exercising a discretionary power vested in them except so far as its exercise conflicts with the order of the Court. The passage in *Berry v. Gibbons* (1) which Mr. Justice Young was considering as applicable to the question before him was evidently a passage in the judgment of Lord Justice James at page 750 of the Report. What Lord Justice James is there reported to have said was:—

“The doctrine of *lis pendens* has no bearing on the case, for a mere administration decree, no receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers.”

The passage in Lord Justice James's judgment to which their Lordships have

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referred must be read with a knowledge of what was then the statute law in England, and has no possible bearing on a case in India to which an Act of the Indian legislature applies.

Their Lordships hesitate to interfere with what appears to be a rule of practice of the Chief Court, and to declare that in this case the Chief Court ought not to have found that the Court of the District Judge of Amherst had power to grant to Maung Myat Thin permission to sell the property in question.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The Appellant must pay the costs of the appeal.

Solicitors: Messrs. Light & Fulton for the Appellant.

Solicitors: Messrs. Sanderson, Lee & Co. for the 1st Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

Full Bench Reference

No. 1 of 1926

IN

APPEAL FROM ORIGINAL DECREE

No. 13 of 1925.

SANDERSON, O. J.	THE SECRETARY OF
CHATTERJEA, J.	STATE FOR INDIA IN
RANKIN, J.	COUNCIL, Appellant,
SUBRAWARDY, J.	v.
PANTON, J.	RAI RADEA KANTA
1926,	AICH BANADUR and
18, May.	anr., Respondents.

Reg. II of 1819, sec. 24—Suit to contest order of Board of Revenue declaring land claimed as part of permanently settled estate liable to assessment of revenue, if barred by one year's rule of limitation—Act IX of 1847, sec. 6.

A suit to contest an order of the Board of Revenue under sec. 6 of Act IX of 1847 declaring the liability of lands, claimed as part of a permanently settled estate, to assessment of revenue, is not barred by

the one year's rule of limitation laid down in sec. 24 of Reg. II of 1819.

This was a Reference to a Full Bench made on the 25th March 1926 by Chatterjea and Panton, JJ., in an appeal against the decree of Mahendra Nath Mukhuty, Esq., Additional Subordinate Judge, Noakhali, dated the 26th September 1924.

The ORDER OF REFERENCE was as follows :—

(CHATTERJEA AND PANTON, JJ.—This appeal arises out of a suit for establishment of the Plaintiffs' title to the disputed lands and for a declaration that they appertain to the Plaintiffs' permanently settled estate Jugidia bearing Touzi No. 11 of the Noakhali Collectorate, as being reformation *in situ* of the lands of certain mauzas belonging to the Plaintiffs, and for other reliefs.

The defence apart from that on the merits, *inter alia*, was that the suit was barred by limitation under sec. 24 of the Bengal Regulation II of 1819. The Court below decided the question on the merits partly in favour of the Plaintiffs. With regard to the question of limitation, that Court relying upon the decision in the case of *Peary Lal Roy Chowdhury v. Secretary of State for India in Council* (1) held that the suit was not barred.

The Defendant, the Secretary of State for India in Council, has appealed to this Court. One of the questions for decision in the appeal is whether the suit is barred under the special limitation provided for in sec. 24 of Reg. II of 1819. On that question the case of *Prafulla Nath Tagore v. The Secretary of State for India in Council* (2) is in favour of the Appellant, while the case of *Peary Lal Roy Chowdhury v. The Secretary of State for India in Council* (1) is against him. There is a

(1) 30 C. L. J. 454 (1923).

(2) 24 C. W. N. 818 (1920).

THE SECY. OF STATE FOR INDIA v. RAI RADHA KANTA AICH BAHADUR.

clear conflict between the two decisions. In the latter case the learned Judges did not refer the point to the Full Bench although they dissented from the earlier decision. But as stated above there is a clear conflict between the two decisions and having regard to the importance of the question we think that it should be referred to a Full Bench. We accordingly refer the following question to the Full Bench, *viz.*, whether a suit to contest an order of the Board of Revenue under sec. 6 of Act IX of 1847, declaring the liability of the lands, claimed as part of a permanently settled estate, to assessment of revenue, is barred by the one year's rule of limitation laid down in sec. 24 of Reg. II of 1819. As the question arises in a first appeal, only the question of law is referred to the Full Bench, and the appeal will be heard on the merits (if necessary) after the decision of the Full Bench on the question of law.

Babus Dwarka Nath Chakravarti and Surendra Nath Guha for the Appellant.

Babus Surendra Lal Mukherjee and Nogendra Nath Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—In this matter two of my learned brothers referred the following question to the Full Bench, namely, “whether a suit to contest an order of the Board of Revenue under sec. 6 of Act IX of 1847, declaring the liability of the lands, claimed as part of a permanently settled estate, to assessment of revenue, is barred by the one year's rule of limitation laid down in sec. 24 of Reg. II of 1819.”

The learned senior Government pleader, who appeared for the Secretary of State for India in Council, stated that he did not feel himself able to contest the correctness of the decision, which was given by a

Division Bench of this Court, in *Peary Lal Roy Chowdhury v. Secretary of State for India in Council* (1).

The result, therefore, is that the answer to the question, which has been referred to this Court, must be that the suit is not barred by the one year's rule of limitation laid down in sec. 24 of Reg. II of 1819.

CHATTERJEE, J.—I agree.

RANKIN, J.—I agree.

SUBHAWARDY, J.—I agree.

PANTON, J.—I agree.

S. C. M.

(ORDINARY ORIGINAL CIVIL JURISDICTION.)

Suit No. 161 of 1921.

C. C. GHOSE, J.

1922,

Heard, 27, January and 13, 14, 15 and 16, February.

Judgment,

20, February.

S. MAHBOOB ELLAHIE
& Co., Plaintiff,
v.
Messrs. Cox & Co.,
Defendants.

Sterling drafts on London, contract to buy from Bank—Custom of the Exchange Banks in Calcutta—Option to grant an extension after due date on a penalty or to declare the contract cancelled—Suit for difference in exchange—Contract, if validly cancelled according to such custom—Cancellation, when effective—Mistake—Surrounding circumstances.

The Plaintiff firm contracted to buy on demand sterling drafts on London from the Defendant Bank for £5,000, £2,500 to be delivered in July 1920 and the balance £2,500 in August 1920. The Plaintiff failed to pay and take delivery on due date. According to the custom of the Exchange Banks in Calcutta the Defendant Bank had the option either of granting extension after due date on payment of a penalty or to declare the contract cancelled. The Plaintiff applied

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for extension of the due date of delivery under the said contract which was not granted and the Defendant Bank exercised the alternative option and declared the July portion of the contract cancelled on 7th September 1920. The August portion of the said contract was likewise cancelled on 8th November 1920 but made operative from 30th November with a view to give the Plaintiff firm the benefit of the rate of exchange. The Defendant Bank by letter, dated 30th November 1920, gave notice to the Plaintiff firm of the cancellation of the August portion but by inadvertence in the said letter referred to the July portion as having been also cancelled on the said date, although the said portion was in fact cancelled as aforesaid on 7th September 1920. The Plaintiff firm accepted cancellation of both portions of the said contract as on 30th November 1920 in terms of the said letter and claimed Rs. 7,124 in respect of the entire contract on the basis of the rate of exchange prevalent on 30th November. The Defendant Bank pleaded custom as to their right of cancellation at any time after the due date and contended that in exercise of the said right the July and August portions were cancelled on 7th September and 30th November respectively and that the July portion was not cancelled on 30th November and the reference to the same in the letter of that date was a mistake and did not alter the fact of cancellation of the said portion as on 7th September 1920:

Held—That the Defendant Bank had proved the existence of the custom and practice of the Exchange Banks in Calcutta, namely, that the Bank had an option to grant to the buyers of sterling drafts an extension of time after due date on a penalty or to declare the contract cancelled.

That the Defendant Bank had acted in accordance with the said custom and that in exercise of the option given to them by such custom cancelled the July and August portions of the contract on 7th September and 30th November respectively.

That the reference to the July portion in the letter of 30th November was a slip or mistake on the part of the writer and that great hardship amounting to injustice would be inflicted on the Defendant Bank by holding them strictly to their letter of 30th November and that the surrounding circumstances were all in favour of the Defendant Bank.

WEBSTER v. CECIL (2), TAMPLIN v. JAMES (3) and ASPINALLS v. POWELL (4) referred to.

By a contract, dated 28th June 1920, the Plaintiff firm agreed to buy and the Defendant Bank agreed to sell sterling drafts on London for £5,000 at 1-8½ shillings per rupee of which £2,500 was to be delivered in July 1920 and the balance £2,500 in August 1920. The Plaintiff firm failed to take delivery on the due date. By letter, dated 23rd August 1920, the Plaintiff applied for extension of time of delivery but the Defendant Bank did not agree to it and acting in pursuance of the custom aforesaid cancelled the July portion of the contract on 7th September and the August portion on 30th November. In the letter, however, of 30th November the Defendant Bank by inadvertence purported to refer to both portions of the contract as having been cancelled on the date of the said letter. The Plaintiff firm on 1st December 1920 wrote back to the Defendant Bank accepting the said cancellation and thereupon claimed Rs. 7,124,

(2) [1901] 30 Beav. 62.

(3) [1879] 15 Ch. D. 215.

(4) [1899] 80 L. T. 595.

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being the difference in exchange on the basis of the rate of exchange prevailing on 30th November which was 1-6½ shillings per rupee. The Bank in para. 4A of the written statement pleaded the custom as follows:— "For very many years past in Calcutta it has been the custom and practice of the Exchange Banks in Calcutta at their option to grant the buyers of sterling drafts an extension after the due date on a penalty, namely, the payment of interest for any period after due date—or to declare the contract cancelled. The Plaintiff was aware of such custom and practice and by letter, dated 23rd August 1920, requested the Defendant Bank to extend the due date of taking delivery of the July portion of the said contract. The Defendant Bank, though giving the Plaintiff a reasonable opportunity to make definite proposals for extension did not agree to grant the said request as aforesaid and declared the contract cancelled on 7th September 1920. The rates on the said date was more favourable to the Plaintiff than the rate on 30th November 1920.

Mr. N. N. Sircar (with him Mr. S. Ghose) on behalf of the Plaintiff firm argued that there was no such custom as alleged and the Defendant Bank did not follow the custom as set out in Ex. (1). The Plaintiff firm did not accept the alleged cancellation of the July portion on 7th September 1920. On 30th November 1920 both portions of contract were cancelled. The Defendant Bank was bound by the terms of the letter, dated 30th November 1920, and by the acceptance thereof by the Plaintiff firm's letter of 1st December 1920, both letters being free from ambiguity [cited *Stewart v. Kennedy* (1)] and that the Plaintiff firm were entitled to the difference in exchange on

30th November 1920, in respect of the entire contract.

Mr. Langford James (with him Messrs. S. K. Gupta and A. P. Basu) on behalf of the Bank argued that the custom pleaded had been sufficiently proved and the Plaintiff was aware of it. The Bank had acted in accordance with the custom referred to in the written statement in cancelling both portions of the said contract. The cancellation of the July portion was effective on 7th September, the Plaintiff firm having promised to pay the Bank Rs. 3,226-1-6, being the difference in exchange in the Bank's favour on the basis of the rate prevalent on 7th September 1920 and the cancellation of the August portion was effective on 30th November. The reference to the July portion in the letter of 30th November was a slip or mistake, and taking unfair advantage of that mistake the Plaintiff firm had put forward the present claim.

The JUDGMENT OF THE COURT was as follows:—

(C. C. GHOSE, J.—By a contract in writing, being contract No. 2963 and bearing date the 28th June 1920, the Plaintiff firm agreed to buy and the Defendants Messrs. Cox & Co. (who are Bankers, being a Company with limited liability incorporated in the United Kingdom) agreed to sell on demand drafts of London for £5,000 at 1-8½ per rupee of which £2,500 were to be delivered in July 1920 and the balance £2,500 in August 1920. The Plaintiff firm failed to take delivery of the July portion of the contract and on the 3rd August 1920 a reminder in a printed form was sent by the Defendant Bank to the Plaintiff firm drawing the latter's attention to the fact that the July portion of the said contract had remained outstanding and enquiring whether the

(1) [1890] 15 A. C. 75 at p. 121.

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Plaintiff firm wished the contract to be cancelled at the day's rate of exchange or whether they wished to take up the contract with penalty and to have the delivery extended. There was no reply to the reminder of the 3rd of August but in a letter to the Defendant Bank, dated the 23rd August 1920, the Plaintiff firm observed as follows:—

"The last of the contracts, *viz.*, for £5,000 on two equal of 28th June 1920 is not of course yet settled and we shall be glad to know if you will please grant an extension of time so as we may be able to clear it off at our convenience and oblige."

On the 31st August 1920 the Defendant Bank sent a reminder in a printed form to the Plaintiff firm as regards the August portion of the contract. No response came from the Plaintiff firm and on the 7th September 1920 the Defendant Bank wrote to the Plaintiff firm enclosing a statement for difference in exchange on the July portion of the said contract showing that a sum of Rs. 3,226-1-6 had become due to the Defendant Bank. On the 10th September 1920 the Defendant Bank asked for the Plaintiff firm's confirmation letter in respect of the said statement for difference in exchange on the July portion of the contract. It appears that Mahboob Ellahie who is stated to be the capitalist partner in the Plaintiff firm had an account current with the Defendant Bank and the latter made on the 7th of September a debit entry of Rs. 3,226-1-6 in the said account current of Mahboob Ellahie in these words: "Difference in exchange on Occhavall M. Dass' Contract No. 2963, dated 28th June 1920, £2,500, July delivered cash 1-2½ and 1-11¼." This debit entry in the account current of Mahboob Ellahie was of course irregular and it was rightly taken exception to by Mahboob

Ellahie in a letter to the Defendant Company, dated the 14th September 1920, which ran as follows:—

"I acknowledge receipt of your favour of 7th and 10th instant, the subject of which drew my special attention. At present the condition of the market is very bad and also I have no foreign drafts in hand so as my firm would have been able to buy demand drafts from you in exchange and I assure you my firm would do best to clear the above contract as soon as possible. It seems quite extraordinary to me how you debited Rs. 3,226-1-6 in my account whereas I did not instruct you to do so and I shall be glad to hear from you soon to have the above amount re-credited in my account so as not to cause any inconvenience."

On the 18th September 1920 the Defendant Bank informed the Plaintiff firm that the debit entry of Rs. 3,226-1-6 of the 7th September had been reversed and asked the Plaintiff firm to send them cash for the amount, being the difference in exchange on the July portion of the said contract. The Plaintiff firm did not reply to this communication but on the 12th October 1920 they requested the Defendant Bank to cancel the contract at the day's rate and to send them a cheque in full settlement on difference in exchange and after debiting the overdue interest payable by the Plaintiff firm. The Defendant Bank at once pointed out that the July portion of the said contract had been cancelled on the 7th September and that a sum of Rs. 3,226-1-6 had become due and payable by the Plaintiff firm and that this sum had not yet been paid to the Defendant Bank. On the 1st November 1920 it appears that two representatives of the Plaintiff firm called on Messrs. Logan and Collins who are employed as Accountant and Sub-Accountant respectively in

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the Defendant Bank and discussed the matter with them. At that interview according to the Defendant Bank the Plaintiff firm stated that they would call on the following day to settle the cancellation of the August portion of the said contract and at the same time pay in a sum of Rs. 3,226-1-6 due to the Defendant Bank in consideration of the July delivery having been cancelled on the 7th September (see letter of the 2nd November from the Defendant Bank. The Plaintiff firm, however, gave in a postscript to their letter of the 2nd November a different version of the interview) and they denied that any settlement was come to at the interview of the 1st November and they maintained that no portion of the contract had been cancelled prior to the 12th October. On the 3rd November the Defendant Bank wrote to the Plaintiff firm in these terms :—

“ We are in receipt of your letter of the 2nd instant and note your remarks re. the above. We beg to state that unless you pay in a sum of Rs. 3,226-1-6 and also the August portion of the contract is taken up by the close of business on Saturday, the 6th instant, we shall cancel same and claim the difference of both portions of the contract through our solicitors without further notice.”

There was no reply to this letter of the 3rd November and on the 8th November 1920 the Defendant Bank wrote to the Plaintiff firm to say that they had cancelled the August portion of the said contract and enclosed a statement for difference in exchange in favour of the Defendant Bank for Rs. 2,966-6-0. This statement shows that in respect of the August portion of the contract the exchange was so much in favour of the Plaintiff firm on the 8th November that the latter had to get a sum of Rs. 259-11-6 from the De-

fendant Bank with the result that the ultimate balance due from the Plaintiff firm was reduced to Rs. 2,966-6-0. The Plaintiff firm took no notice of this communication of the 8th November. On the 30th November the Defendant Bank sent the following letter to the Plaintiff firm :—
Occhavilal M. Dass' Contract No. 2963 of 28th June 1920.

£2,500—July delivery.

£2,500—August delivery.

“ Please note that we are to-day cancelling the above contracts.”

At about this date, the exchange had become so favourable to the Plaintiff firm that they lost no time in accepting the said cancellation and in acknowledging the receipt of the Defendant Bank's letter of the 30th November and in placing the matter in the hands of their solicitors. The Plaintiff firm asked for statement of account and on the 2nd of December 1920 the Defendant Bank furnished statement of account which showed that in respect of the August portion of the contract the exchange had become so favourable on the 30th November to the Plaintiff firm that they had to receive from the Defendant Bank a sum of Rs. 3,167-10-0 on difference in exchange and that the debt due from the Plaintiff firm as a result of the cancellation of the July portion of the contract on the 7th September was entirely wiped out with the exception of a small sum of Rs. 58-7-6. The Plaintiff firm, however, contended that having regard to the Bank's letter of the 30th November the Defendant Bank were bound to calculate the difference in exchange in respect of the entire contract at the rate prevalent on the 30th November (which was 1-6½ shillings per rupee) and to pay to the Plaintiff firm a sum of Rs. 7,124-4-10 in respect of the July and August portions of the said contract.

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The Plaintiff firm have accordingly claimed this sum in their plaint in this suit.

The Defendant Bank in their written statement state that for many years past in Calcutta it has been the custom and practice of the Exchange Banks in Calcutta at their option to grant to buyers of sterling drafts an extension after the due date on a penalty (*viz.*, the payment of interest for any period after the due date) or to declare the contract cancelled in case of default by the buyer. They state that the Plaintiff firm were aware of the existence of such custom and practice and indeed they requested the Defendant Company to extend the due date for taking delivery of the July portion of the said contract. They state further that the Plaintiff firm notwithstanding their promises to pay did not pay the said sum of Rs. 3,226-1-6 nor did they pay the said sum of Rs. 2,966-6-0. Meanwhile the rate of exchange had become so much in favour of the Plaintiff firm that the Defendant Bank as an act of favour made the cancellation of the August portion of the contract operative as and from the 30th November 1920 with the result that on adjustment of accounts a sum of Rs. 58-7-6 only was found due from the Plaintiff firm. The Defendant Bank state that by inadvertence in the letter of the 30th November the July portion of the contract (which had in fact been cancelled on the 7th September and of which cancellation the Plaintiff firm were well aware) had been referred to and that the Plaintiff firm were taking an unfair advantage of such inadvertence.

The following issues were accordingly settled between the parties:—

1. Was the July portion of the contract mentioned in the plaint cancelled by the Defendant Bank on the 7th September 1920?

2. If not, was there any extension granted and if so, up to what date?

3. When was the August portion of the said contract cancelled?

4. Are the Plaintiff firm entitled to claim from the Defendant Bank the sum of Rs. 7,124-4-0 or any portion thereof?

5. Was any mistake made by the Defendant Bank in referring to the July portion of the contract in their letter of the 30th November?

6. Is there a custom or practice as alleged in paragraph 4A of the written statement?

7. Were the Plaintiff firm aware of the said custom and practice?

8. Did the Plaintiff firm promise to pay the sum of Rs. 3,226-1-6 and to settle the cancellation of the August portion as alleged in para. 6 of the written statement?

The onus of proof as regards issues Nos. 1 to 4 was on the Plaintiff firm. They did not call any oral evidence as regards these issues but contented themselves by tendering the correspondence between the parties (Ex. C). On the issues Nos. 5—8 the onus was on the Defendant Bank and they called several witnesses. The Plaintiff firm thereafter called rebutting evidence as regards the last-mentioned issues.

The first witness called on behalf of the Defendant Bank was their Manager Mr. W. D. Woellwarth. He stated that the Plaintiff firm failed to take delivery of the July portion of the contract and that he had no other alternative but to cancel the same as the rate of exchange was going up and the Defendant Bank's losses were increasing every day and they had to stop somewhere. He spoke to the custom and practice referred to in para. 4A of the written statement and said that the cancellation of the 7th of September was

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in accordance with such custom and practice. According to this witness it was entirely at the option of an Exchange Bank to grant an extension of time to the buyer or not and further that even if an extension of time were granted it was entirely at the option of the Bank to cancel the contract on any date the Bank liked, because the rate might be going up the whole time. The Plaintiff firm did not take delivery of the August portion of the contract; the Bank therefore had to send the letter of the 8th November referred to above but they did not sell in the open market against the Plaintiff firm in respect of the August portion with the result that when exchange did improve in favour of the Plaintiff firm the benefit of the improved exchange was given to the Plaintiff firm. The witness stated definitely that at no time was there any intention of going back upon the cancellation of the 7th September and that as a matter of fact the July portion of the contract had never been extended to the 30th November. In cross-examination Mr. Woellwarth pointed out that immediately after the expiry of the due date of the July portion of the contract the Plaintiff firm were asked to take the same up; they failed, however, to take it up and it was allowed to continue uncanceled till the 7th of September when it was definitely cancelled. The next witness on behalf of the Defendant Bank was their Sub-Accountant Mr. J. F. Collins. He referred to the cancellation of the 7th September and to the interview of the 1st November between himself and Mr. Logan on the one side and Balliaddin and Narul Haque on the side of the Plaintiff firm. Balliaddin who is the Manager of the Plaintiff firm acted as the interpreter and in the presence of Narul Haque and apparently after consultation with him Balliaddin pro-

mised at that interview that the difference on the July portion would be paid and that the August portion of the contract would be taken up on the next day, *i.e.*, the 2nd November. That promise, however, was not kept and hence the Defendant Bank wrote the letter of the 2nd November referred to above. As regards the cancellation of the 8th November the witness stated that the matter stood on a different footing because in respect thereof the Defendant Bank had not gone into the market and had not therefore passed the entries through their books. The witness stated that the reference to the July portion in the letter of the 30th November which was drafted by him was a mistake, but the Plaintiff firm knew very well that the July portion had been cancelled on the 7th September. He said as soon as it was discovered that the Plaintiff firm were taking advantage of the mistake in the letter of the 30th November the Defendant Bank fully explained the position to the Plaintiff firm's solicitors. He said that the Plaintiff firm were fully aware of the custom referred to above and that as a matter of fact the July portion of the contract was not kept open after the 7th September. In cross-examination the witness stated that as against the July portion of the contract the Defendant Bank actually bought in the open market; the entry, however, was not made on the 7th September in the books of the Defendant Bank but it was made on the 9th September showing that it was brought into the actual transactions of the Bank; there was no difference in the rates of the 7th September and the 9th September. The witness stated that as against the cancellation of the 8th of November there was no entry in the books of the Defendant Bank, the idea being that having regard to the then improving exchange, the De-

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dant Bank were expecting to wipe out the loss on the July portion by giving to the Plaintiff firm the entire benefit of the improved exchange as regards the August portion. The witness was cross-examined minutely. As to the interview of the 1st November he maintained that at that interview the Plaintiff firm had definitely accepted the cancellation of the 7th September and had promised to pay the sum of Rs. 3,226-1-6 and to take up the August portion, but they failed, however, to carry out their promise. Mr. Logan, the Accountant of the Defendant Bank, was next called and he corroborated the last witness' account of the interview of the 1st November. Mr. Logan spoke to the custom referred to above and corroborated Mr. Woellwarth and Mr. Collins. Mr. Logan was cross-examined at great length about the two cancellations of the 7th September and the 8th November. He explained that in respect of the cancellation of the 7th September the exchange had been fixed and an entry had been made in the Defendant Bank's books, whereas in respect of the cancellation of the 8th November all that had been done was that the rate of exchange had been fixed but no entry had been made in the Defendant Bank's books with result that the possibility of giving the benefit of the improved exchange to the Plaintiff firm had remained open to the Defendant Bank. Mr. Graham who is the Assistant Accountant in the National Bank of India produced before me an extract from the Rules of the Exchange Banks Association in Calcutta (Ex. 1) which ran as follows :—

"If a contract is not taken up during its currency, it is at the Bank's option to cancel it at any time thereafter at the current rate for the day under notification to the other contracting party and further

the other contracting party has no option to cancel such a contract unless and until such party has paid in full the difference claimed by the Bank for such cancellation."

The last witness on behalf of the Defendant Bank was one Keder Nath Khettry. He said that he had been a bullion exchange broker in Calcutta for 18 years and that in contracts of this description if delivery was not taken on the due date by the buyer it was entirely at the option of the Exchange Bank either to cancel the contract or to extend the time charging interest for the period of extension.

In rebuttal of the evidence sketched thus far the Plaintiff firm examined two witnesses, *viz.*, Balliaddin and Narul Hague. The former denied the account of the interview of the 1st November set out above. He said that at that interview he pointed out to Messrs. Logan and Collins that the Defendant Bank had given no notice of the cancellation of the July portion of the contract on the 7th September and had indeed no right to cancel the same and that nothing was settled at that interview. In cross-examination he said that at an interview on the 26th August he informed the Bank that he would take delivery of the July portion and that the Defendant Bank agreed to extend the time for taking delivery. According to this witness the Defendant Bank promised to write mentioning he date up to which extension would be granted but the Bank never wrote. He further said that there was an interview on the 13th September, *i.e.*, after receipt of the letter of the 7th of September (when he found out that the Bank had cancelled the July portion of the contract) between him and Messrs. Logan and Collins. He said that at that interview he taxed Mr.

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Iogan and Mr. Collins for their failure to carry out their promise and he maintained that inasmuch as at no time prior to the 30th November had the July portion been cancelled the Plaintiff firm were entitled to settle the whole contract on the rate prevalent on the 30th of November. The next witness Narul Haque simply corroborated Balliaddin.

In this state of the evidence it has been contended before me on behalf of the Plaintiff firm (1) that the Defendant Bank have not followed the custom set out in Ex. 1, (2) that there was no cancellation of any portion of the contract before the 12th of October—which cancellation, however, was not acted upon by the Defendant Bank, (3) that on the 30th November the Defendant Bank cancelled the entire contract and not merely the August portion, (4) that the Plaintiff firm made no promise whatsoever on the 1st November to pay the said sum of Rs. 3,226-1-6 but they have maintained throughout the position that they did not accept the so-called cancellation of the 7th September, and (5) lastly, that whatever might have been the intention of the Defendant Bank when they wrote the letter of the 30th of November, if the Bank's letter was free from ambiguity and the answer of the Plaintiff firm was similarly free from ambiguity, the Defendant Bank must be held to be bound to the terms of the letter of the 30th November and cannot be allowed to escape from the effect of the acceptance of the Bank's letter by the Plaintiff firm. In support of this last contention reliance was placed on the case of *Stewart v. Kennedy* (1).

On behalf of the Defendant Bank it is argued (1) that they have followed the custom referred to in paragraph 4A of the

written statement, (2) that on the expiry of the due date the Defendant Bank were entitled to cancel the July portion of the contract and that in fact there was such a cancellation on the 7th September, (3) that the cancellation of the 8th of November with reference to the August portion stood on a different footing inasmuch as the exchange had not been fixed although in all other respects it was a proper cancellation, (4) that it is abundantly apparent from the correspondence and from the evidence that the Plaintiff firm were aware of the cancellation of the 7th of September and had made a promise to pay the said sum of Rs. 3,226-1-6, (5) that it is likewise apparent that the reference to the July portion of the contract in the letter of the 30th November was a slip or mistake on the part of the writer thereof and that taking advantage of the said slip or mistake the Plaintiff firm have put forward a dishonest claim for Rs. 7,224-4-10.

On the evidence before me I think it is reasonably clear that the Defendant Bank have acted in this case in accordance with the custom referred to in the written statement and more particularly set out in Ex. I. I think it is straining the language of Ex. I too far to hold that notification of intention to cancel a contract must in all cases precede cancellation. The Bank to my mind have proved the existence of the custom relied upon by them and it appears to me that in exercise of their option to cancel they cancelled the July portion of the contract. Whether a particular cancellation is effective or not must be gathered from all the circumstances connected with such cancellation. And there can be no doubt that the letter of the 7th September with its enclosure was understood by Balliaddin as the July portion of the contract. It was in law and in fact a proper date,

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the 7th September, as showing conclusively that the purchase by the Bank against sale of drafts on London for £2,500 for July had been brought into the Bank's transactions. I hold further that no suspicion can be cast upon the Defendant Bank's books by reason of the entry being under date the 9th September and not under date the 7th September. In my view therefore there is no substance in the contention that the first cancellation of the July portion of the contract, whatever it was, was on the 12th October 1920. The correspondence and evidence which I have attempted to sketch thus far show conclusively to my mind that the position taken by the Bank on the 7th September in respect of the July portion of the contract was not challenged, nor dissented from by the Plaintiff firm at any time between the 7th September and the 18th September. I do not accept as true the evidence of Balliaddin to the effect that he had interview with Messrs. Logan and Collins on the 26th August and 13th September. If he had such interviews on these two dates, then how came it that this fact was not put to Messrs. Logan and Collins in cross-examination. The letter of the 12th October 1920 cannot in my opinion be treated as the first pronouncement on the question of cancellation of the July portion of the contract. I accept entirely the Defendant Bank's account as regards the letter of the 8th November. The idea apparently so far as the Bank was concerned was to keep the matter of the cancellation of the August portion open, because the exchange was then improving and there might be some chance of recouping the loss which the Bank had already sustained on the July portion and which loss the Plaintiff firm had shown no disposition to make good by giving to the Plaintiff firm

the benefit of the improvement in the exchange as regards the August portion. I see nothing unusual or suspicious in what the Bank did. On the question as to what transpired at the interview of the 1st November, having seen the witnesses in the box, I accept the evidence of Messrs. Logan and Collins in preference to that of Balliaddin and Narul Haque. I find as a fact on the evidence on record that the latter, *i.e.*, Balliaddin and Narul Haque made a promise to pay the said sum of Rs. 3,226-1-6. It is said that the Bank did not challenge the correctness of the statement in the postscript to the letter of the Plaintiff firm, dated the 2nd November. This criticism is true so far as it goes, but the Bank apparently thought that it was useless to waste breath over people like Balliaddin and Narul Haque—a view which I am not prepared to describe as unreasonable. The subsequent correspondence shows that the truth of the matter lies rather on the side of the Bank than on the side of the Plaintiff firm. It is said, however, that after all is said and done the Plaintiff firm must succeed in this suit even assuming that there was a mistake in the letter of the 30th November if the mistake was an unilateral one. No doubt the law judges of an agreement between two persons from the mutual communications which take place between them. In this case I find as a fact that the reference to the July portion in the letter of the 30th November was a slip or mistake on the part of the writer thereof. The question is, as has been said in a very old case, whether the law "will be extreme to mark what is done amiss." In my opinion all circumstances sufficient to lay claim to a favourable consideration of the Bank's case are present on the evidence on record and I hold that a

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hardship amounting to injustice would be inflicted upon the Bank by holding the Bank strictly to their letter of the 30th November in the circumstances of this case and that therefore it is unreasonable to hold them to it in respect of the July portion [see *Webster v. Cecil* (2), *Tamplin v. James* (3) and *Aspinalls v. Powell* (4)]. I think the conclusion is irresistible that the Plaintiff firm were anxious to snap at the supposed offer in respect of the July portion in the letter of the 30th November which they must have perfectly well known to have been made by mistake. The result is that in my opinion there is no substance whatsoever in the Plaintiff firm's claim and the suit must be dismissed with costs on scale No. 2.

The Plaintiff firm will be entitled to the costs of the 27th January 1922.

Mr. B. P. Chunder, Solicitor for the Plaintiff Firm.

Messrs. Morgan & Co., Solicitors for the Defendant Bank.

P. D.

(CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER

No. 255 OF 1923.

SUBRAWARDY, J.	}	PANCH KARI MAJUM-
CUMING, J.		DAR, Defendant,
1924,		Appellant,
Heard,		v.
24, November.		G. RIDHARI MAL
Judgment,		MOHARRI, Plaintiff,
26, November.		Respondent.

Civil Procedure Code (Act V of 1908), secs. 13, 44—Decree of Court in Native State transferred for execution to British Court—Objection as to jurisdiction, if maintainable.

The provisions of sec. 13 of the Civil

(2) [1881] 30 Beav. 62.

(3) [1879] 15 Ch. D. 215.

(4) [1889] 30 L. T. 598.

Procedure Code apply to decrees that are transferred to British Courts for execution under the provisions of sec. 44 of the Code. It is open therefore to the British Court to which a decree has been transferred for execution under sec. 44 to go into the question whether the decree was passed without jurisdiction or was obtained by fraud.

VEERABAGHAVA v. MUGA SAIT (2) and *JIVAPPA TIMMAPPA v. JEEBGI MURGAPPA* (3) referred to.

This was an appeal preferred on the 5th of June 1923 against an order of the Officiating Subordinate Judge of Zillah Jalpaiguri (Babu Behari Lal Sarkar), dated the 23rd February 1923, affirming an order of the Munsif, 1st Court at that place (Babu Subodh Chandra Sarkar), dated the 25th June 1922.

The facts of the case will appear from the judgment.

Babu Hemendra Nath Bose for the Appellant.

Babu Atul Chandra Gupta for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal raises a question of some importance which in so far as this Court is concerned is one of first impression.

The Opposite Party, the Respondent in this appeal, obtained a decree against the Appellant in the Mekliganj Court which is within the Native State of Cooch-Bihar. The decree was obtained *ex parte*: the judgment-debtor, the Appellant, is a British subject residing at Jalpaiguri. The Respondent had the decree transferred to Jalpaiguri for execution. The judgment-debtor, the present Appellant, objected to the execution of the decree under sec. 13

(2) I. L. R. 30 M. d. 24 (1914).

(3) I. L. R. 40 Bom. 551 (1916).

PANCH KARI MAJUMDAR v. GIRIDHARI MAL MOHESRI.

of the Code of Civil Procedure on the ground that the Decree had been obtained by fraud and also that the Cooch-Bihar Court had no jurisdiction over him. The first Court decided the case in favour of the Respondent for reasons that it is not necessary to recapitulate. The Appellant appealed to the District Court. That Court held, relying on the authority of *Veeraraghava v. Muga Sait* (1), that the executing Court could not go into the question of the jurisdiction of the Court which passed the decree when the decree was one to which the provisions of sec. 44 applied. On this finding he dismissed the appeal.

The judgment-debtor has appealed to this Court. He contends that the case relied on by the Respondent which was a decision of a single Judge of the Madras High Court has been expressly overruled by a Full Bench of that Court, *Veeraraghava v. Muga Sait* (2), and is therefore no authority. In further support of the view that he would ask the Court to adopt he relies on the case of *Jivappa Timmappa v. Jeergi Murgappa* (3).

We think that the appeal must be allowed. In the Madras Full Bench case of *Veeraraghava v. Muga Sait* (2), it was held that it was open to the executing Court to whom a decree had been sent for execution under the provisions of sec. 44 to refuse execution on the ground that the Court that passed the decree had no jurisdiction to do so. Wallis, C. J., in disposing of the case remarked: "I agree generally with the judgment of Sundara Ayyar, J., that sec. 44 has not the effect contended for and that a British Court ought not to execute a decree of the Cochin Court passed without jurisdiction.

That judgment is the judgment of a foreign Court within the meaning of sec. 13, C. P. C., and it would in my opinion require much plainer words than are to be found in sec. 44 to show that it was the intention of the legislature that decrees of foreign Courts to which sec. 44 applies should be enforced in British Courts without regard to the provisions of that section. Full effect may be given to that section by holding that it was merely intended to alter the procedure by which such foreign judgments can have effect given to in British India. This was decided more than twenty years ago by Farran, J., in *Haji Musa v. Purmanand* (4), which apparently has not been questioned in our Courts until the present case and was known to the legislature when the provisions of the last Code were revised and the present Code enacted." Seshagiri Ayyar, J., states that in his opinion sec. 44 of the Civil Procedure Code is subject to the same limitations as are contained in sec. 13 regarding foreign judgments.

The same view has been taken by the Bombay High Court in the case of *Jivappa v. Jeergi* (3), a case practically on all fours with the present case. We see no reason to differ from those two decisions and we may adopt the reasoning of the learned Judges in those decisions as our own. We are therefore of opinion that the provisions of sec. 13 of the Civil Procedure Code apply to decrees that are transferred to British Courts for execution under the provisions of sec. 44. It was therefore open to the lower Appellate Court to have gone into the question whether the decree was passed without jurisdiction. In this view of the case it would have been necessary to have sent the case

(1) 30 Ind. Cas. 704 (1913).

(2) I. L. R. 39 Mad. 24 (1914).

(3) I. L. R. 40 Bom. 551 (1916).

(3) I. L. R. 40 Bom. 551 (1916).

(4) I. L. R. 15 Bom. 216 (1900).

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back to the lower Appellate Court to decide whether the decree was made without jurisdiction or was obtained by fraud. But the learned vakil who has appeared for the Respondent states that if our decision is against him on the question whether the executing Court could go into the question of the jurisdiction of the Court to pass the decree then there is no necessity to send the case back to the lower Court, for on the facts found by the lower Court and on the authority of the decision of the Judicial Committee of the Privy Council in *Gurdial Singh v. Raja of Faridkot* (5), the decree that he seeks to execute is a nullity.

The appeal therefore succeeds and it must be held that there is no decree that the executing Court can execute. The application for execution must therefore be rejected.

The Appellant is entitled to his costs in all Courts. Hearing-fee one gold mohur. N. G.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE

No. 2426 OF 1923.

CUMING, J.
B. B. GHOSH, J.
1925,
15, December.

SADANANDA MANDAL
and ors., Defendants
Nos. 1 and 2, Appellants,
v.
KUMAR JYOTISH KANHA
Roy and ors., Plaintiffs,
Respondents.

Landlord and tenant—Ejectment—Rent, payment of, as marfatdar—Marfatdar rent receipts, grant of, if amounts to recognition of tenancy—Title as tenant acquired by prescription—Kabuliyat, construction of—Heritability.

It is not always a fact that where rent receipts are granted with the word "marfatdar" it is conclusive that there was no recognition by the landlord of the person

who pays the rent as a tenant, but the Court should determine in each case whether on a consideration of all the facts a legal inference can be drawn that there has been a recognition establishing the relationship of landlord and tenant between the parties.

Where a tenant died in 1902 and rent was paid by his heirs who had no heritable interest from that date up till 1918, and rent receipts were given to them as marfatdars:

Held—That in the circumstances of the case a legal inference could be drawn that the landlord who was entitled to take khas possession on the death of the tenant not having done so but having allowed the heirs to remain in possession and received rent from them, his conduct amounted to recognition of them as tenants.

PRABHABATI DAS v. TAIBATUNNESSA CHOUDHURANI (1) referred to.

That the heirs of the tenant also acquired the right to remain on the land as tenants by prescription.

Where in a kabuliyat the other clauses were not incompatible with the construction that a mere grant for life was intended but there was a clause that "we as well as our heirs and representatives shall be bound and liable in the same manner as we are, by all the terms and the conditions of this kabuliyat:"

Held—That the interest conferred on the lessee was heritable.

This was an appeal against the decree of K. N. Choudhury, Esq., Additional District Judge of Zillah Khulna, dated the 30th of June 1923, modifying the decree of Babu Nagendra Nath Ghosh, Additional Subordinate Judge of that place, dated the 12th of January 1922.

Plaintiff sued the Defendants in eject-

(5) 1 L. R. 22 Cal. 322 (P. C.) (1894).

(1) 17 C. W. N. 1088 (1913).

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ment on declaration of his title to the lands in suit.

The Court of first instance decreed the suit in part, only declaring the title of the Plaintiff, but disallowed the Plaintiff's claim for *khas* possession on the finding that the Defendants had a permanent heritable interest. On appeal by the Plaintiff, the lower Appellate Court allowed the appeal and gave the Plaintiff a decree for *khas* possession.

The following portions of the judgment of the lower Appellate Court will be found material to this report :—

" The next point we have to consider is whether there was recognition of the successors of Sambhuram and Darika, after their death, as tenants in respect of these lands on the part of the Plaintiff or his predecessors. The answer has, in my opinion, to be given in the negative. There is absolutely nothing to prove that the factum of the death of Sambhuram was ever communicated to the predecessors of the Plaintiff, or that after his death his sons, Defendants Nos. 1 and 2, ever applied to them for their substitution, or in other words, for the mutation of their names in their books in place of Sambhuram. There is nothing on the record to show that rent was received from them as tenants. There are some rent receipts filed by the Defendants which show that rent was paid in the names of Sambhuram and Darika by Defendant No. 1 as *marfatdar*. These are receipts granted by two only out of the three co-sharers. There are no receipts showing any payment of rent by the sons of Sambhuram after his death on account of the share of Kali Prosanna Ghosh. The receipts which show payment in the *marfat* of Defendant No. 1 are Exhibits—Ex. A (of 1325 B. S.), Ex. A 3 (of 1324 B. S.), Ex. A 7 (of 1322 B. S.), Ex. A 12

and Ex. A 14 (of 1320 B. S.), Ex. A 15 (of 1319 B. S.), Ex. A 21 (of 1317 B. S.), Exs. A 41 and A 47 (of 1311 B. S.) and Exs. A 94 and A 98 of the same year. In all these receipts the names of Sambhu and Darika appear as tenants and the name of the Defendant No. 1 appears as the *marfatdar*, that is, the person through whom the payment was received. Now, far from showing that the Defendant No. 1 was recognised as a tenant, these receipts do in my opinion clearly show that he was not recognised as a tenant. There is no allegation even of any payment having been made by any of the other Defendants. Nor is it said that these payments were made by the Defendant on their behalf also. It cannot, therefore, be said by any stretch of imagination that there was recognition of Defendant No. 1 or of the other Defendants as tenants on the part of the Plaintiff or his predecessors. Besides, we find from Ex. A 52 that even during the life-time of Sambhuram rent was at least once paid by Defendant No. 1 as *marfatdar*. We find also that rent was paid during the life-time of Sambhuram in *marfat* of other persons, namely, Kailas Shana (see Ex. A 99), Kailas Mandal (see Ex. A 29) and Madhab (see Ex. A 27). It would be absurd to say these payments operated as recognition of these men as tenants. It is not said also by Defendant No. 1 that he made the payments he made on the assertion that he did so as a tenant. I have pointed out that no payments at all have been made by any of the Defendants on account of the share of Kali Prosanna Ghosh after the death of Sambhuram. Having regard to all these facts and circumstances, I feel no hesitation in coming to the conclusion that there never was any recognition of the Defendants as tenants either on the part of the Plaintiff or

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on that of his predecessors and that the payment made by Defendant No. 1 as a *marfatdar* cannot operate to give it the effect of recognition of the Defendants as tenants, and I decide the point accordingly.

" In the *kabuliyat*, Ex. 8 (1), executed to Kali Prosanna there is an additional clause to the effect that 'all the terms and liabilities of this *kabuliyat* will be equally binding on our heirs and successors.' It is upon the strength of this clause that the learned Subordinate Judge has come to the conclusion that the tenancy was meant to be a permanent and heritable one. I may say at once that this conclusion is not acceptable on various grounds. In the first place, there is not, in the body of any of these documents, any word or expression of inheritance or permanence to be found. In the next place, it is, I believe, an ordinary canon of construction of a document that all its terms should be taken as a whole to determine its effect. As regards *kabuliyat*, Ex. 8 (1), it seems to me quite clear that it was never meant to create or convey any permanent or heritable right."

Against the decision of the Additional District Judge Defendants preferred this second appeal.

The other facts of the case material to this report will appear from the judgment.

Dr. Sarat Chandra Basak (with Babu Hemendra Chandra Sen) for the Appellants.

Dr. Dwarka Nath Mitter (with Babu Manindra Nath Banerjee) for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

B. B. GHOSE, J.—This appeal is on behalf of the Defendants and arises out of a suit for recovery of *khas* possession of

161½ bighas of land on the allegation that the Defendants have no title to hold these lands after the death of the two lessees of the land, namely, Sambhuram and Darika. Sambhuram obtained a lease for this property in 1875 from the owner at that time. The proprietary interest appears to have passed subsequently into the hands of three persons and in 1894 Sambhuram and his brother Darika executed three separate *kabuliyats* in favour of each of the three proprietors to the extent of his one-third share of the land, that is to say, 53 bighas odd, and the rent payable for the entire land was also split up into three shares payable to each separately. Sambhuram died in 1902, Darika died in 1918 and the present suit has been brought in the year 1920. The Plaintiff derived his title to the entire land by virtue of a partition between him and his other two co-sharers under which the entire Mouza within which these lands are situate fell to the Plaintiff's share. The Subordinate Judge decreed the suit in part only declaring the title of the Plaintiff as the sole zemindar of the suit lands, but his claim for *khas* possession was dismissed on the finding that the Defendants had a permanent heritable interest. On appeal by the Plaintiff that decree was reversed so far as the claim for *khas* possession had been dismissed. The Additional District Judge made a decree in favour of the Plaintiff for *khas* possession and also for mesne profits directing that the mesne profits should be ascertained afterwards.

The Defendants in their appeal to this Court urged three grounds, firstly, they urged that one of the *kabuliyats*, Ex. 8 (1), executed in favour of Kali Prosanna, one of the co-sharer proprietors, shows that the interest conferred upon the lessees was heritable; secondly, it is urged that

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the landlords having accepted rent from the Defendants since the death of Sambhuram in 1902, had recognised the Defendants as their tenants; and the third ground is that at any rate the Defendants having been in possession of Sambhuram's share since 1902 in the assertion of their rights as tenants on the land have acquired the limited interest of a tenant with regard to that share by adverse possession.

It seems to me that the learned Judge is wrong in his construction of the *kabuliya* executed by Sambhuram and Darika in favour of Kali Prosanna. It is true that the various clauses in the *kabuliya* are not incompatible with the construction that a mere grant for life was intended, but cl. 15 expressly provides: "We as well as our heirs and representatives shall be bound and liable in the same manner as we are, by all the terms and conditions of this *kabuliya*." This clause in my opinion clearly implies that heritability was contemplated and it cannot be said that the tenancy came to an end at the death of Sambhuram and Darika. The Plaintiff's claim for *khass* possession with regard to that portion of the land must therefore fail.

The second and the third contentions are connected together. It is not always a fact that where rent receipts are granted with the word "*marfatdar*," it is conclusive that there was no recognition by the landlord of the person who pays the rent as a tenant, as was observed by Sir Lawrence Jenkins, Chief Justice, in the case of *Prabhabati Dasi v. Taibatunnessu Ghoudhurani* (1), but the Court should determine in each case whether on a consideration of all the facts a legal inference can be drawn that there has been a recognition establishing the relationship of

landlord and tenant between the parties. Here it appears that one of the tenants died in 1902 and rent has been paid with regard to his share, from that date till 1918, although the rent receipts have been given to the Defendants as *marfatdars*. From this a legal inference can legitimately be drawn that the landlords who were entitled to take possession of the share of Sambhuram in the leasehold to the extent of two-thirds did not do so but allowed the heirs of Sambhuram to remain in possession and received rent from them, and such conduct amounts to recognition of the tenants.

The third contention of the Appellants seems to me to be equally cogent. Sambhuram having died in 1902 the landlords were entitled to take *khass* possession with regard to his share in the leasehold. Limitation would ordinarily run as against them from that date with regard to that share. If the Defendants had refrained from payment of any rent or repudiated the right of the landlords they would have obtained a complete title by adverse possession of the share which belonged to Sambhuram; but the Defendants did not claim that right but only claimed to remain on the land as tenants and therefore they acquired only a limited interest as tenants with regard to that share.

The result therefore is that the appeal should be allowed in part and the decree of the Additional District Judge be modified in this way that the Plaintiff's right as zemindar be declared with regard to all the land in dispute; his right to recover possession with regard to the one-third share which belonged to Kali Prosanna, that is to say, with regard to 53 bighas 18½ cottas must be dismissed. Further his right to *khass* possession with regard to the half share of the other two-third proprietary interest, that is to say, an-

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other 53 bighas 18½ cottas must also be dismissed and he will be declared to have the right to khas possession of the remaining one-third share of the property claimed, that is to say, 53 bighas 18½ cottas and he will recover possession of the same. The Plaintiff will also be entitled to recover mesne profits with reference to the share with regard to which he has got a decree for khas possession, that is, one-third share. The costs will be in proportion to the success of each of the parties in all the Courts.

CUMING, J.—I agree.

H. C. S.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. (MIS.) No. 75 OF 1926.

RANKIN, J.	} BISSESWAR ROY GARI, accused, Petitioner, v. THE KING-EMPEROR, Opposite Party.
DUVAL, J.	
1926,	
Heard,	
25, May.	
Judgment,	
26, May.	

Goondas Act (I, B. C., of 1925), sec. 4—Arrest under warrant issued by Local Government with provision for bail Principles on which amount of bail should be fixed and on which bail should be granted and sureties accepted—Improper rejection of bail and refusal to accept surety, effect of—Insufficiency of the amount of bond required and of the sureties to control him, if lawful consideration under such warrant—Proceedings of Commissioner of Police, if judicial proceedings—High Court, when can interfere with arrest under such warrant—Criminal Procedure Code (Act V of 1898), sec. 491—Writ of habeas corpus, when illegal detention in custody is proved.

The Petitioner was arrested under a warrant issued by the Local Government under sec. 4 of the Goondas Act. The warrant directed the Deputy Commissioner of Police, Calcutta, to arrest the Petitioner and it was provided in the warrant that if the Petitioner should give

bail himself in the sum of ten thousand rupees with two sureties each in the sum of five thousand rupees to attend before the Commissioner of Police, Calcutta, and to continue to attend, he may be released. It was alleged that bail was refused on the ground that the Petitioner was not in the opinion of the Deputy Commissioner, good for ten thousand rupees and the sureties instead of being examined as to their sufficiency were rejected on the ground that they were not likely to keep the Petitioner under control:

Held—That refusal of bail on either of the aforesaid grounds alleged would be an illegal abuse of law not merely on general principles as regards the liberty of the subject but on the face of the Goondas Act itself and on the face of the warrant which is notified for use under the Goondas Act which is in terms of sec. 76 of the Code of Criminal Procedure.

On such a warrant the business of the officer who fixes the sum of money is to see that he fixes a reasonable sum of money having regard to all the circumstances and that it is not an excessive one and it is sufficient so far as the person under arrest is concerned that he is willing to execute a bond in that sum.

As regards the surety offered, when the object is to secure the attendance of person arrested, embarking on a consideration of control over the person arrested (waiving aside the mere question of sufficiency) is an illegal abuse of power on the face of the Goondas Act and the warrant.

QUEEN-EMPRESS v. RAHIM BUKSH (1) and ADAM SHEIKH v. EMPEROR (2) referred to.

The Commissioner of Police acting under such a warrant is not acting under

(1) I. L. R. 20 All. 208 (1898).

(2) I. L. R. 25 Cal. 400 (1898).

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the Code of Criminal Procedure. The proceedings are of the executive armed with certain special powers and the High Court can interfere under sec. 491 of the Code of Criminal Procedure by issuing a writ of habeas corpus only when those powers have been exceeded and the person arrested is illegally or improperly detained in public custody.

That in the circumstances of the case no illegal detention was made out which could justify the interference of the High Court.

This was an application praying that the sureties tendered by the Petitioner might be accepted and the Petitioner released on bail on such sureties.

The facts of the case will appear from the judgment.

Mr. A. N. Chaudhuri, Babus Satindra Nath Mukherji and Radhikalal Sinha for the Petitioner.

Messrs. B. L. Mitter (Advocate-General) and Khundkar (Deputy Legal Remembrancer) for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—The Petitioner in this case while in custody under sec. 54, Cr. P. C., was served on the 7th of this month with a warrant under sec. 4 of the Goondas Act signed by the Chief Secretary to the Government of Bengal. The warrant was in the form which had been duly notified under the Goondas Act in the Calcutta Gazette by virtue of sec. 4 of the Act and it required the Deputy Commissioner of Police, Calcutta, to arrest the Petitioner and it was provided by the form of the warrant that, if the Petitioner should give bail himself in the sum of ten thousand rupees with two sureties each in the sum of five thousand rupees to attend before the Commissioner

of Police, Calcutta, and to continue to attend, he may be released. That part of the warrant follows without variation the form which is the second form in the Fifth Schedule to the Criminal Procedure Code. It is a form which is drawn up with reference to sec. 76 of the Code. The terms of sec. 76 are in these words : "Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a special time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed shall take such security and shall release such person from custody." Now, it is the form provided under that section that is used by the Local Government in drawing up the particular form of warrant to be used under the Goondas Act. The Petitioner in the present case complains at the Bar of two things. He says that while he applied for bail and tendered certain sureties as being sufficient sureties, his application for bail was illegally dealt with in two ways. First, he says that he was refused his release on the ground that he himself was not, in the opinion of the Deputy Commissioner of Police, good for Rs. 10,000 and he says, secondly, that instead of his sureties being examined to see whether they were sufficient sureties they were considered from a wholly irrelevant and extraneous point of view, namely, from the point of view whether they were persons who were likely to keep the Petitioner under control. Now, how far these two complaints of illegal abuse have been verified by the evidence is a matter to which I shall come in a moment. I want to leave no doubt that either of these two courses would be an illegal

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abuse of law, not merely on general principles as regards the liberty of the subject but on the face of the Goondas Act itself and on the face of the warrant which is notified for use under the Goondas Act and which was used in this case. The idea that there is to be an enquiry as to whether the person under arrest is good for the sum demanded by the warrant, namely, ten thousand rupees in this case, is, in my opinion, an entirely topsyturvy idea. On this warrant, the business of the officer who fixes the sum of money is to see that he fixes a reasonable sum of money having regard to all the circumstances and that it is not an excessive one and it is sufficient, so far as the person under arrest is concerned, that he is willing to execute a bond in that amount. As regards the question whether the sureties should not be merely sufficient in the ordinary sense but should also be persons who can exercise control over the person arrested, there is a case of *Queen-Empress v. Rahim Buksh* (1). But that is an authority in favour of permitting that requirement to be made in cases where a person is to give security to keep the peace or to be of good behaviour. So far as this Court is concerned, in the case of *Adam Sheikh v. Emperor* (2), that law is objected to and, even in cases under sec. 118, Cr. P. C., it has been declared to be bad law to consider whether a surety is likely to have some control over the person arrested. For the present purpose, we have nothing to do with the keeping up of peace or being of good behaviour. The sole question in this case is a question of giving security to attend before the Commissioner of Police, Calcutta, on a certain day and continue so to do—a mere question of security to ensure the

man's appearance; and I know of no authority that would justify any person in saying that he would waive aside the mere question of the sufficiency of the surety and embark on a consideration of control over the person arrested. That would, in my judgment, be an illegal abuse of power on the face of the Goondas Act and the warrant. Now, the question arises whether on this petition these matters have been made clear in such a way that this Court can interfere. On the question whether this Court can interfere in revision the Petitioner, in my judgment, is under a great difficulty. I am not convinced that the Commissioner of Police acting under this warrant is acting under the Criminal Procedure Code. The section in the Goondas Act says that for certain purposes the warrant shall be deemed to be a warrant issued by a Presidency Magistrate. Now, if this matter be looked at as an application for revision, the first thing is that the applicant has not been to the person who is deemed to be the Presidency Magistrate. He has not applied in this case to the Chief Secretary to the Government of Bengal. Secondly, it has been held in this Court already that the Secretary to the Government in such cases as this is not in the position of a subordinate or inferior Court. That is the decision in *Bhimraj Bania v. Emperor* (3). Thirdly, I find it difficult to say that the present purpose would come within either of the two purposes mentioned in sec. 4 of the Goondas Act. We have not got to consider here the question of the enforcement of the attendance of the person against whom the warrant is issued at such a place and at such a time. If seems to me, there-

(1) I. L. R. 30 All. 206 (1894).

(2) I. L. R. 35 Cal. 400 (1908).

(3) I. L. R. 51 Cal. 460 (1923).

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fore, that this Court has got to look at the proceedings not from the point of view of proceedings in a Court but from the point of view that they are proceedings of the executive armed with certain special powers and the question is whether or not the powers have been exceeded, so that this Court can interfere; in other words, the question must in this case be looked at as one coming within sec. 491, Cr. P. C. The question is whether the Petitioner is a person illegally or improperly detained in public custody. If he is, then this Court has power to issue a writ of *habeas corpus*. I now come to see whether this petition discloses grounds which would entitle this Court to interfere in the matter by a writ in the nature of *habeas corpus*, and I find, looking over the petition carefully, that, while as a petition asking us to exercise our revisional jurisdiction, it might have been of some use to somebody, there is only one section that is of the smallest use at all to the Petitioner on any question under sec. 491, Cr. P. C. There is no mention anywhere in the petition as to an enquiry having been made into whether the accused himself is good for Rs. 10,000. There is not a word of this kind in the petition from beginning to end. It is quite clear that this Court cannot act on this petition on that ground at all. Para. 9 of the petition says: "That the Deputy Commissioner, C. I. D., before whom these four sureties were produced said that the said four sureties are not fit to keep the said accused under control and is not accepting these sureties and is not releasing your Petitioner on bail." Now, if a case could be made or had been made to the effect not merely that this observation had been made by the Deputy Commissioner but that the Deputy Commissioner had refused to enquire into the

sufficiency of the sureties or had been satisfied with the sufficiency but had rejected them, it may be that on this petition a case could be made out of illegal detention. I do not think that the paragraph—by itself scanty and very difficult to be relied upon—would be sufficient to justify this Court in interfering under sec. 491, Cr. P. C. The detention is illegal except when in accordance with the terms of the warrant. The accused has failed to furnish the above bail. The direction to the Superintendent of the Jail authorizes him to keep the arrested man in custody until he is able to furnish the above bail. But in the present case, in my opinion, no ground has been made out for our interference. The application is accordingly rejected.

DUVAL, J.—I agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD WRENBURY.

LORD PHILLIMORE.

LORD CARSON.

1925,

Heard,

29, 30, January.

Judgment,

21, March.

HOPE PRUDHOMME
AND COMPANY,
Appellants,

v.

HAMEL AND HORLEY,
LIMITED, Respondents.

Principal and agent—Difference between legal agent and so-called agents who are specially favoured or favouring buyers—Agent selling as principal with a view to make undisclosed profit, if may claim indemnity from principal for loss.

The extension which modern business has given to the terms "agent" and "agency" adverted to.

In many trades—particularly, for instance, in the motor-car trade—the so-called agent is merely a favoured or favouring buyer, one who under an overriding contract undertakes to do his best

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to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders, but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is by a special provision in the overriding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

Held, however, upon the evidence in the case—*That the Respondents were Appellants' "agents" in the legal sense of the term and not favoured buyers, loosely called agents.*

That, as agents, they had no authority to sell as principals, and could not claim indemnity as agents from the Appellants, their principals; neither could they claim as a link in a chain of buyers and sellers for the damages recovered by the ultimate buyer, because there was no contract of sale between the Appellants and themselves.

This was an appeal (No. 76 of 1924) from a decree, dated the 12th March 1923, of the High Court at Madras in its Appellate Jurisdiction which varied a decree, dated the 13th May 1921, of the said Court in its Ordinary Original Civil Jurisdiction and awarded damages to the Respondents on a counter-claim.

This counter-claim alone formed the subject-matter of the present appeal.

The Respondents thereby claimed from the Appellant damages for the failure of the Appellant to fulfil a contract for the sale to the Respondents of 300 tons of ground-nuts.

The goods were deliverable at Marseilles at 59 francs per kilo. and the Appellant booked freight for them on the ss. "Seapool." That vessel was requisitioned by

the Government and no other freight could be procured.

The goods were re-sold by the Respondents to S. Harvey & Co., who was a broker for Mr. Gravier of Marseilles.

Gravier sued on his contract and obtained damages from the Court of Trade, Marseilles, against Harvey & Co. and that decision was confirmed by the French Court of Appeal at Aix. The Respondents who were liable to Harvey & Co. claimed indemnity from the Appellants.

The Appellant's defence was that he had never contracted to sell the goods in question to the Respondents and was not a party to the French litigation.

Both Courts held this defence established as the Respondents were in fact selling agents of the Appellant and had purchased the goods themselves without his knowledge and re-sold them at a higher price in the hope of making a secret profit.

The Appeal Court, however, were of opinion that the Respondents had established a claim to indemnity as agents.

In their view the Appellant had elected to adopt the contract of re-sale made by the agent and to claim the benefit of the profit thereon.

The case turned entirely on the evidence which was discussed at length in the judgment of the Judicial Committee.

Mr. E. B. Raikes for the Appellants.

Messrs. Neilson, K. C. & O'Hagan for the Respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD PHILLIMORE.—The Appellants who are the Plaintiffs constitute a French firm of merchants carrying on business at Madras as exporters of ground-nuts, castor seeds and other country produce.

The Respondents, the Defendant Com-

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pany, are merchants in London who, from August 1913, down to the date of the present suit, were intermediaries for the placing of the Appellants' merchandise at European Continental ports, especially Marseilles.

The suit was brought for the price of a cargo of castor seeds sold by the Appellants to the Respondents. The Respondents set up certain defences to some of the items in the Appellants' claim, but there was no answer to the bulk of it, and their real ground for refusing to pay was that they had a counter-claim against the Appellants for a larger amount in respect of the non-delivery of a cargo of ground-nuts, which should have been despatched in December 1916, or January 1917, to Marseilles.

It was this counter-claim that formed and forms the real matter in dispute. The trial Judge decided against the counter-claim, but the High Court at Madras in its Appellate Jurisdiction reversed this decision and gave judgment for the counter-claim—hence the present appeal.

The particular transaction over which the dispute arose began by a telegram of the 12th October 1916, despatched by the Respondents to the following effect:—

"Immediate reply bid ordinary three hundred December, January 59.

Hamel."

The expansion of this telegram is to be found in a paragraph of a letter of the same date, which reads as follows:—

"We are much obliged for your offer of 100 tons of ordinary at F. 59.50, for December/January shipment, c.i.f. Marseilles, which offer we put before our friends, but regret to say that we have not been able to place at your price. On the other hand, we have succeeded in getting a counter-offer (but for 300 tons, instead of 100) at F. 59, which we are cabling you to-night and hope you will be able to accept. If you can do so and can offer us further quantities at the same price, we think we could place them or machine-decoricated kernels at Fs. 2 more."

The telegram in response was not produced at the trial, but there is no doubt that it was an acceptance, dated the 14th, and on the same day the Appellants wrote to the Respondents as follows:—

"In accordance with the cables exchanged between us, we beg to confirm the following sale:—

Quantity.—300 tons (three hundred tons only).

Quality.—Groundnut kernels ordinary, usual quality.

Brand.—H. P.

Price at Frs 59 per 100 kilos. (frances fifty-nine only).

C. P. I. per steamer from Kernels Ports to Marseilles.

Shipment.—December, and/or January, 1916, and 17

Buyer.—

Payment.—As usual.

Terms.—As usual.

Commission.—As arranged."

This letter was upon a printed form with such words as "quantity, quality, etc.," printed with spaces to be filled up in writing. What is especially to be noticed is that as against the word "buyer," there is a blank and against the word "Commission," the words "as arranged." The Respondents on the 18th despatched the following note:—

"Contract (Purchase) Note No. 028.

Article.—Coromandel kernels new crop.

Quantity.—300 (three hundred) tons, packed in bags.

Quality.—As stipulated in Ref. 031.

Price.—Fcs. 59 (frances fifty-nine), less 1 per cent. per 100 kilos., cost, freight and insurance, including war risk, Marseilles.

Shipment.—From Coromandel Coast during December 1916 and/or January 1917.

Payment.—As arranged.

Terms.—Marseilles C. Contract, 1909.

Your telegram of 14th October 1916.

Our telegram of 12th October 1916."

In compliance with this arrangement, the Appellants took up space on the ss. "Seapool"; and if they could have kept this they would have been able to ship to Marseilles in accordance with the contract. But, it being in the middle of the war, the Government requisitioned the "Seapool," and the Appellants did not succeed in procuring any other ship and failed to send the cargo forward.

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The goods were the subject of a sale made on the 16th October by the Respondents through a firm of Sydney Harvey and Co. of London at 61 francs per 100 kilos. to the ultimate buyer, one Gravier, of Marseilles. Gravier took proceedings before the tribunal of commerce at Marseilles to recover damages from Sydney Harvey and Co. for non-delivery.

The Appellants were informed of these proceedings by the Respondents, but in general terms only, and supposed that they were proceedings either against themselves or against the Respondents as their agents, and believing that they had a good defence under French law, namely, that they had been prevented from fulfilling this contract by *force majeure*, gave instructions for this defence to be raised; and, when it failed before the tribunal of first instance, they furnished papers and documents for the appeal which the Respondents had already started to the Cour d'Appel at Aix. The defence of *force majeure* failed also in that Court, and the Appellants were required by the Respondents to pay the amount which Gravier had recovered from Sydney Harvey and Co., and for which the Respondents were liable.

This is the outline of the action which was taken with regard to the proceedings in France, but it will be necessary for their Lordships to go into rather more detail later on in this judgment.

Till a late date the Appellants were under the impression that the Respondents had acted as their agents in the transaction and would make no profit out of it except a commission of 1 per cent., which would be deducted from the price of 59 francs per 100 kilos. But in fact the Respondents had acted as principals; reselling the stuff at a price of 61 francs

per 100 kilos. to Gravier through Sydney Harvey and Co., who were in form the sellers to him, but were to have 1 per cent. commission; the result being that the Respondents passed on their 1 per cent. commission which the Appellants were going to allow them to Sydney Harvey and Co., and took for themselves a profit of 2 francs per 100 kilos. by their bargain with Gravier.

When the Appellants found this out, they repudiated all liability; and, if the Respondents were really agents, this repudiation was no doubt right, for, if they were agents, they were making an undisclosed profit and had no authority to sell as principals and therefore could not claim indemnity as agents from the Appellants, their principals; neither could they claim as a link in a chain of buyers and sellers for the damages recovered by the ultimate buyer, because there was no contract of sale between the Appellants and themselves.

Hence the main contest in the case has been upon the question whether the Respondents were entitled to treat themselves as buyers and sell for whatever profit they could get, or whether they were agents.

Both Courts in India have held that they were agents; but the Appellate Court has considered that the Appellants nevertheless fail, because they ratified and accepted the transaction. A consideration of this point will come later in their Lordships' judgment.

Notwithstanding the view taken by both Courts in India, the Respondents have insisted, as they had a right to do, in an elaborate and useful argument, that in the legal sense of the word they were not agents but principals.

There is great force in the observations

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which were made to their Lordships upon the extension which modern business has given to the terms "agent" and "agency." In many trades—particularly, for instance, in the motor-car trade—the so-called agent is merely a favoured and favouring buyer, one who under an overriding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders; but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is by a special provision in the overriding contract forbidden to sell too cheaply or required not to spoil the market by asking too much.

It would be quite possible that, in the present case, the position of the Respondents, though frequently described by both parties as that of agents, was, notwithstanding, merely that of agents according to the modern business extension of the phrase, so that they would be entitled to treat themselves as buyers from the Appellants and to sell at the best price they could get; in which case any damages which they would have to pay to the buyers from themselves on account of the non-delivery of the cargo would be damages which they in their turn could recover as damages from the Appellants.

By virtue of a clause in one of the earlier documents, which will be mentioned shortly and which is in conformity with the usual practice in produce markets where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the damages to be recovered all along the chain.

Accepting these submissions from the

Respondents, their Lordships must now proceed to analyse the documents which constitute this contract, and for this purpose they are prepared to accept the Respondents' submission that attention must not be limited to the four or five documents which constitute the contract No. 626, but that the initial letters by which the business between the Appellants and Respondents was originally started must also be considered.

In the first letter, August 29th 1913, the Respondents, after mentioning the source of their introduction, write as follows:—

"We understand you are largely interested in the export of ground-nuts, both undecorticated and decorticated, and, further, that you are not represented in our market. . . ."

"We are desirous of taking up the business as selling Agents, and would be pleased to hear whether you feel inclined to negotiate sales through us.

"We are selling fair quantities of Chinese and Bombay ground-nut kernels, and we are, therefore, in touch with the best buyers.

"We would be interested in other articles exported from Madras, as Seeds, Ricemeal, Tanned Skins (Sheep and Goat) and Cow Hides.

"Terms.—We would open the usual D/P credit, through a first-class Bank, you drawing on us at 80 d/s 95 per cent. against c.i.f. sales, and 80 per cent. against value of consignments, less freight, and, in the latter case, our selling commission of 1½ per cent.

"We are agreeable to providing our own remuneration on c.i.f. transactions or, if preferred, we would do the selling for a commission of 1½ per cent., each side paying their own cable and incidental expenses. Balances *pro* or *con* to be settled by 3 d/s drafts. . . ."

The Appellants replied on September 18th as follows:—

"We thank you for your offer to be our agents for ground-nuts, both decorticated and undecorticated; oil cakes; castor seeds and other Indian produce and seed, and accept your proposals on the terms given below against each respective article.

* * * * *

"We shall now go to details the principal terms and conditions for different articles we can offer you.

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"Ground-nuts.—This is always done on the fair average quality, and we accept your drawing terms of bill at 90 d/s for 95 per cent. against c.i.f. or c.f. sales with usual D/P credits, as it is customary to pay freight on delivered weight we shall deduct the same in our invoice also. . . ."

Then oil cakes and castor seeds are mentioned, and the letter proceeds:—

"For all these articles we would prefer to deal with you as principal to principal on c.i.f. or c.f. basis, as the case may be, and you fix your own remunerations, each party paying their own cable and incidental expenses. Balance of account to be adjusted *pro* and *con* by 3 d's draft, as we accept to do business with you, and to meet your wishes we cable you as per copy enclosed, and trust we shall soon hear from you with a view to business."

There appears to be a letter of the 5th September which has not been produced, and then the Respondents wrote again on the 19th September, the material parts of this letter being as follows:—

"We were pleased to receive your yesterday's cable notifying that you had written us full particulars respecting the business proposed in our letter of the 5th instant.

"We now await same with interest, and trust it will not be long before some mutually satisfactory business result between us.

* * * * *

"Conditions of sale:—

For ground-nuts in shell and ground-nut kernels would be the usual Marseilles terms, which are doubtless familiar to you.

Other articles would usually be sold. . . .

"If desired, we will send you *pro forma* contracts.

"It is, of course, understood that, in the event of allowances for inferiority of quality, damages, late shipment or non-fulfilment of contract, same would be refunded by you on receipt of official award, should an amicable settlement be impossible. Kindly confirm. . . .

"Prices mentioned are net.

"Consignments.—We shall be interested to hear whether you can secure any parcels of Tanned Skins (Goat and Sheep) and Tanned Hides (Buffalo and Cow), Wool, Aloe Fibre, etc., etc., to send to our care for sale.

"The outlets are quite familiar to us. . . ."

Then comes a letter from the Appellants to the Respondents of the 10th October:—

"We thank you for your favour of the 18th ultimo, contents of which we have perused with interest.

"Terms.—Those enumerated appear to be in order."

Then terms as to castor-seed are mentioned.

"Prices.—Your proposal that these should be c.i.f. or c. and f. nett is acceptable to us.

* * * * *

"We would like to draw your attention to the fact that very often buyers will not bid full prices for cabling, they reserving a margin to protect themselves in the event of values weakening pending receipt of reply. We hope, therefore, that, should orders prove to be at impracticable prices, you will not ignore same, but respond, wherever possible, with best counter-offer.

"We would also ask you to support us with as many offers as possible. When you find it impossible to offer, we would advise quotations. These will enable us to keep buyers posted and help us to secure orders for cabling. . . ."

* * * * *

There is also a letter from the Appellants to the Respondents of the 16th October containing the words—

"We of course agree that allowances, if any, imposed for inferiority of quality, damages, late shipment, or other causes, will be refunded by us on receipt of award, should an amicable settlement be impossible."

It is not necessary to mention any other documents at this stage.

Business began to be done, but it appears from a letter from the Respondents of the 12th December that as a rule the prices asked were too high; and when the documents in respect of another contract No. 424 came to the knowledge of the Respondents, they discovered the reason why the prices had ruled so high, and in their letter of 12th December they expressed themselves as follows:—

"Contract No. 424.—For the 200 ground-nut kernels, c. and f. Marseilles, at 15. February/March shipment, we notice you provide 1 per cent. commission for us. We had been under the impression, until receipt of the Contract Note referred to above, that prices were net, as proposed in your letter of 14th September and confirmed in ours of 10th October last.

"We have doubtless lost a good deal of business, as the difference in your and our prices has, on several

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occasions, represented the 1 per cent. commission. In order to avoid any misunderstanding in future, we have asked you to reserve us 1 per cent. commission on all transactions, and no doubt our request will have your attention.

"Subject to your approval, we propose the 1 per cent. commission on Contract No. 424 shall be divided between us, in view of the fact that we both had to cut our margin of profit in order to put the business through."

On the 12th December, the day that this letter was written, there is a telegram which is significant as to the general business relations of the parties :—

"25 tons.

"Please offer.

"Ground-nuts in shell, Marseilles.

"100 tons January/February.

"Read price midway.

"12/3½d. c. and f.

"Ground-nuts in shell, Marseilles.

"100 tons February/March.

"Read price midway.

"12/3½d. c. and f.

"Ground-nuts in shell, Marseilles.

"100 tons March/April.

"Read price midway.

"12/3½d. c. and f.

"The whole order to be executed or not at all.

"Please look after our commission.

"1 per cent.

"In future."

During all this time, letters, owing to the war, were much delayed in transit. That of December 12th was answered on the 31st December 1913 :—

"Contract No. 424.—We note your remarks and are sorry to learn of the misunderstanding, which doubtless stood in the way of business. We note you are agreeable to forego half of the commission on the first transaction, and in future it is agreed that all our offers will include a commission for your good selves of 1 per cent."

Now, turning to the first letter, that of 29th August 1913, it may be observed that c.i.f. sales are to be cases where the Respondents had already found a purchaser, and consignment sales where they are to take their chance of finding one.

The paragraph beginning "We are agreeable," may be open to two constructions; but their Lordships are of opinion

that it refers to c.i.f. transactions only and offers two alternatives in the case of c.i.f. transactions, viz. :—We will provide our own remuneration—which means we will buy from you and get what profit we can from our buyers; or, we will treat ourselves as agents and sell for you on a commission of 1½ per cent. It does not refer to consignment sales. The answer of the 18th September is to the effect that the Appellants would prefer to deal as principal to principal, and let the Respondents fix their own remuneration.

So far the documents, it is contended, appear to point to a relation of seller and buyer. But, notwithstanding, for some reason which is not explained, it is clear that the Appellants were providing for a 1 per cent. commission, which would be an agency commission for the Respondents, and that, when the discovery was made, the Respondents accepted the arrangement, so that the Appellants would naturally believe that the Respondents were selling at the price quoted by the Appellants, taking their 1 per cent. out of the purchase money and remitting the rest.

Why the Appellants had allowed them 1 per cent. only instead of 1½ per cent., and why the Respondents were agreeable to accept this in future, is not explained. It may be that, as sales were hanging fire, the Respondents were content with the smaller commission, just as they proposed to divide the 1 per cent. commission on contract No. 424.

As a result, however, in their Lordships' opinion, the documents antecedent to the particular contract in question support the general relation as being one of agency in the legal sense of the term and not one of sale and purchase.

It was suggested on behalf of the Res-

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pondents that the 1 per cent. was to be considered as in the nature of a discount or special favour to the Respondents as agents in the modern commercial sense only, leaving them still to make a profit as sellers. But, admitting that this would be a possible theory, their Lordships can find no trace of anything in the correspondence which would give it a foundation in fact.

Their Lordships now come to the consideration of the particular contract. The letter of the 14th October 1916 from the Appellants gives the price as francs 59, and under the head of the term "commission" the words "as arranged." The document of the 18th October 1916, called "contract (purchase) note" gives the price as francs 59, less 1 per cent. per 100 kilos. That 1 per cent. is unquestionably the Respondents' commission. The printed word "buyer" in the Appellants' letter of the 14th October 1916 is followed by a blank. It is common ground that the Appellants did not at that time know to whom the Respondents had sold, though, in fact, the Respondents' contract with Sydney Harvey and Co. had been made on the 16th. These facts all point to "agency."

Counsel for the Respondents drew their Lordships' attention to the contract for the sale of castor seeds, in which a similar form was filled up with the names of the Respondents as buyers and a blank after the word commission; and he suggested that this was the real nature of the business, and that, if other contract notes had been printed in the record, they would be found to take the same shape; but if words mean anything, the distinction between the contract note in the case now under discussion and the castor seeds case and possibly others, shows that some business was done on one set of terms and

ler upon others. It is to be noticed that, in the castor seeds case, the price was not c.i.f., but f.o.b.

In the correspondence in this case as it was, up to the last moment, the Respondents spoke of themselves as agents. Even after the Appellants had seen a copy of the award of the tribunal of commerce and noticed that Gravier had bought at an increased price, the Respondents still wrote that they had acted as agents for the Appellants. They did so as late as the 2nd December 1918, and it was not till the Appellants on the 7th December took the point that, as agents, the Respondents were not entitled to make secret profits, that they set up the case that they had always dealt as principals and not agents.

Their Lordships agree with both the Courts below that the Respondents were in the strict sense agents, and that, unless they can show that the Appellants, with knowledge of what they had done, adopted and ratified it, they have no case.

The Appellate Court thought they had so ratified it. Their Lordships find this very difficult to understand. What motive could the Appellants possibly have for adopting a contract which, at the time they are supposed to have so done, meant a certain loss?

First of all, it is necessary to ascertain when the Appellants got to know the facts. The Chief Justice relies on a letter of the Respondents of the 22nd March 1917, which, it is said, if carefully looked into, would show that there was a chain of buyers and sellers, and that there were buyers in London who in their turn were sellers at Marseilles, from which the Appellants should have learnt that they were not and could not be directly parties to the proceedings before the tribunal of commerce.

It may be that they should have uncer-

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stood this and should have remembered it when they wrote the later letters. But this knowledge would not inform them that the Respondents had acted as principals and were making a profit. This information only came out bit by bit; the sequence is as follows :—

On the 13th February 1918, the Respondents wrote to the Appellants and sent them a copy of the award of the tribunal of commerce, which was dated the 22nd January. When this was received by the Appellants does not precisely appear, but the first comment upon it is in a letter of the 16th April, in which they write as follows :—

"SS. 'Scapool.'

"We thank you for your remarks and for the copy of the arbitration award in this connection.

"On perusing the award, we are in the first place struck with the fact that we are no party to the proceedings, which are held in connection with Mr. Jules Gravier and Sydney Harvey and Co., who, we presume, were buyers from you of the 300 tons relating to our contract No. 626. We may say that this is the first and only information we have received to the effect that the arbitration proceedings were not between Mr. Jules Gravier and your good selves, for we were all along under the impression that Mr. Gravier had brought his claim against you; in fact, it was with this idea that we addressed him with a request that matter be settled out of Court. As the parcel was sold by you to Messrs. Sydney Harvey and Co., and as they re-sold the lot at a profit of Frs. 2, theirs is merely a contingent liability with which we have really no concern. . . .

"We therefore take it that, had the arbitration proceedings been held as between Mr. Gravier and ourselves or you as our agents, the arbitrators would have been in duty bound to give due consideration to the facts which precluded the shipment of the lot sold, and that under such circumstances we would have been fully exonerated from all blame and responsibility in the matter.

"We are, however, quite ready and willing to give Messrs. Sydney Harvey and Co. every assistance we can to enable them to fight their case successfully, and with this end in view we beg to enclose certified documents connected with the case, as per details below, but, as we have already stated, Messrs. Sydney

Harvey and Co.'s dispute with Mr. Jules Gravier is a contingent liability and we are no party to the same."

The Respondents wrote back on the 29th May :—

"SS. 'Scapool.'

"We are much obliged for your favour of the 16th April and for the enclosures regarding the appeal on the above, which we have put forward to Messrs. Sydney Harvey and Co., asking them to post them down to the lawyer in Marseilles.

"Regarding what you write about the proceedings taken between Mr. Jules Gravier and Messrs. Sydney Harvey and Co., we were under the impression that right away at the commencement, we told you that we had sold to Mr. Gravier through our brokers Messrs. Sydney Harvey and Co., and are sorry if we omitted this.

"In any case, the trouble would have reverted back to you through ourselves as your agents, because, had Mr. Gravier taken proceedings against Messrs. Sydney Harvey and Co., they in their turn would have claimed their loss back from you, and it is usual in cases of this sort for there to be one case for the whole transaction.

"Regarding what you write about the profit of 2 francs, this is not a profit made by Messrs. Sydney Harvey and Co., who merely acted as brokers.

"We added the 2 francs to your figure in order to cover our expenses for Finance, Commission, etc., and to leave a small profit for ourselves as the 1 per cent. which you allow us we had to pay Messrs. Sydney Harvey and Co. as their brokerage.

"We hope that, with the documents in hand, the lawyer in Marseilles will be successful in the appeal, and we will advise you in due course of the result."

The critical letter in answer is that from the Appellants of the 18th July :—

"SS. 'Scapool.'

"We note carefully your remarks on the position. Regarding the difference of Frs. 2¹, this had nothing to do with us, for we are dealing with you as agents, and we do not think it fair to ourselves that you yourselves should have appointed another medium to handle this business. However, we await results of the appeal, when we shall revert to this subject."

The Chief Justice thinks that this is a letter "urging" the Respondents "to go on with the appeal" and accepting the position. Their Lordships do not find anything in it about urging an appeal. They consider that it is a reasonable letter, meaning this: "You have done

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something that you ought not to have done; it may be, however, that on this particular occasion it will do us no harm, for we trust that the French Court of Appeal will accept the defence of *force majeure*; so we will wait till that appeal is heard, and then we will take up the whole matter with you." This they subsequently did by desiring to know whether the Respondents had not on other occasions taken a secret profit to which they were not entitled.

It is said that they urged an appeal. That was in their letter of the 31st May, written before disclosure, when they approved of the measures which, as they were informed, had been taken to institute an appeal. As the Respondents kept writing to them that they were liable, what more natural than that the Appellants should get every ground of defence against Gravier's claim put forward?

Coutts Trotter, J., thinks that their letter of December 7th showed that they elected to abide by the contract; but their Lordships take an opposite view. The Appellants were protesting against the decision of the French Court of Appeal, refusing to agree to the Respondents' offer to accept a rather smaller sum in settlement, taking the point that the Respondents must have mis-managed the case to bring about such a result, and further plainly saying that the Respondents as their agents were not entitled to make secret profits; and there the matter ends.

Their Lordships can find nothing to lead them to suppose that the Appellants did such an absurd and purposeless thing as to ratify this action of their agents, when they already knew of its disastrous results.

Their Lordships will humbly advise His Majesty that this appeal should be allow-

ed, and the judgment of the Court of first instance be restored with costs here and below.

Solicitors: *Messrs. Sanderson, Lee & Co.* for the Appellants.

Solicitors: *Messrs. Donald McMillan & Mott* for the Respondents.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 238 OF 1924.

CUMING, J.

PAGE, J.

1926,

Heard, 17 and

18, March.

Judgment,

18, March.

SHEIKH INTAZ,

Defendant No. 2,

Appellant,

v.

DINANATH DE SARKAR

and others, Plaintiffs,

Respondents.

Bengal Cess Act (IX of 1880, B. C.), sec. 95—Return of cess filed by co-sharer landlord, if admissible in favour of another co-sharer—Bengal Cess Manual, Rule 57.

The effect of sec. 95 of the Cess Act is to prohibit the admissibility of road-cess returns when tendered in favour of the person filing it. Provided this prohibition is not offended against, such a return may be adduced in evidence, if otherwise it is admissible under the Indian Evidence Act, e.g., by or against a third party who was no party to the preparation of the return.

PROMODE CHANDRA v. BINAYAK DAS (1) explained.

R. 57 in the Bengal Cess Manual (per CUMING, J.) has not the force of law, and if made under sec. 182 of the Cess Act is ultra vires, and (per PAGE, J.) cannot be looked at for the purpose of construing sec. 95 of the Act.

This was an appeal preferred on the 21st December 1923, against the decree

(1) 27 C. W. N. 548 (1922).

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of N. K. Bose, Esq., Additional District Judge, 2nd Court, Zillah Mymensingh, dated the 13th of September 1923, modifying the decree of Babu Jogesh Chandra Sen Gupta, Munsif, 1st Court of Kishoreganj, dated the 19th of September 1922.

The facts of the case will appear from the judgment.

Babu Upendra Kumar Roy (for *Babu Ali Kinkar Chakraborty*) for the Appellant.

Mr. Gopal Chandra Das and *Babu Salyendra Kishore Ghose* for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

CUMING, J.—This appeal arises out of a suit for recovery of *khas* possession of certain land on the declaration of the Plaintiffs' title thereto. The Plaintiffs' case was that the property in dispute belonged to Defendant No. 1 who is the father of Defendants Nos. 2, 3 and 4. He mortgaged this property to the Plaintiffs in 1904. They brought a suit on their mortgage bond, obtained a decree, in 1918 put the property to sale in execution of this decree and purchased it and obtained possession through the Court, that the Defendants, however, in collusion with each other had not allowed the Plaintiffs to take possession.

Defendant No. 1 apparently did not contest the suit. Defendants Nos. 2, 3 and 4 who are the sons of Defendant No. 1 contended that the lands in suit did not belong to Hanif, the father of Defendant No. 1, but belonged to Mohali, the mother of Defendant No. 1 and that she made over these lands to Defendants Nos. 2, 3 and 4 by a *heba beel-ewaj*.

The trial Court decreed the suit in part, and ordered that the Plaintiffs' title be

declared to the 14 annas of the property claimed and he gave a decree for *khas* possession thereof.

On appeal to the District Court the District Court held that the Plaintiffs were only entitled to 8 annas of the lands in dispute and he modified the decree of the trial Court accordingly.

Defendant No. 2 has appealed to this Court and it is contended that the learned Judge was wrong in admitting into evidence a certain document, Ex. 3, which is an old cess return filed by the co-sharer landlord of the Defendants. His case is that the road-cess returns are not admissible in evidence at all and they cannot be used against any person who was not a party to them. In support of his contention he relies upon sec. 95 of the Cess Act (Act IX of 1880, B. C.). Sec. 95 provides that—"Every return filed by or on behalf of any person in pursuance of the provisions of this part shall bear the signature and address of such person or his authorized agent and shall be admissible in evidence against such person but shall not be admissible in his favour." In other words, the landlord who furnishes a return to the Collector cannot use any statement in the said return in his favour. I do not for one moment challenge the correctness of this statement. But obviously this does not help the learned vakil in his contention. It does not say that a cess return cannot be used by or against a third party who is no party to the preparation of the return.

The learned vakil then relies upon r. 57 in the Bengal Cess Manual which states as follow that—"Under sec. 95 of the Act no return made under the Act is admissible as evidence against any one except the party submitting it." The learned vakil contends that this rule was made by the Government under sec. 192 and has

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the force of law. The simple answer to this contention is that there is nothing to show that this rule was made under sec. 182 of the Cess Act. This is merely a rule which finds place in the Cess Manual which is intended for the guidance of the Revenue Officers. These rules are not headed as rules made under sec. 182. They are headed as rules and orders issued under or with reference to Cess Act. Further if it does purport to be made under sec. 182 of the Act, it is clearly *ultra vires*.

The learned vakil in support of this contention has then relied on the case of *Promode Chandra Roy Choudhuri v. Binayak Das Achariya Choudhuri* (1). In this decision there is the following passage :—" Now so far as the road-cess returns are concerned it is quite clear having regard to the provisions of the Cess Act that they are not admissible in evidence at all ;" and the learned vakil would ask us to hold from that statement that these returns made under the Cess Act are not admissible in evidence for any purpose whatever. I do not, however, think that that was what the learned Judges intended. It will appear from a consideration of the facts in that case that the returns in question although filed by the tenant Defendant were actually used by the Court in favour of the Plaintiff landlord, the person in whose favour the Cess Act has specifically provided that they shall not be used. I think the learned Judges must have meant that so far as that case was concerned they were not admissible for the purpose for which the learned Judge of the lower Court used them, because apparently the only use he made of them was in favour of the Plaintiff landlord, in whose favour they ought not to have been used under

sec. 95 of the Cess Act. I do not think for one moment that the learned Judges could have meant that they were not admissible in evidence for any purpose whatever, for the learned Judges state that " having regard to the provisions of the Cess Act they are not admissible in evidence at all." The Cess Act merely provides that they are not admissible in evidence in favour of the person submitting them. That these cess returns are admissible in evidence on behalf of a third party who is not a party to them is clear from the case of *Imrit Chamar v. Sirdhari Pandey* (2) with special reference to page 11 where the learned Judges point out that sec. 95 of the Bengal Cess Act has no application to that case, because it was not the case of a maker of the document, in other words, of the landlord using it in his favour but it was sought to be used in evidence by one stranger against another as has been done in the present case. There is no substance therefore in this contention. It is admitted that if sec. 95 is not a bar, the document is otherwise admissible in evidence.

The second point raised by the learned vakil is that the lower Appellate Court has given a go-by to a certain decree in a title suit brought in 1913 by some of the heirs of Tokia in respect of the same land, in which title suit it was found that the *jote* in question belonged to Mohali Bibi. It is hardly correct to say that the learned Judge has given a go-by to a piece of evidence. What he does is to remark that the Plaintiffs were not parties to the suit. This is a perfectly correct statement and probably for that reason he did not attach very much weight to this decision. After all it is a question of weight to be attached to a particular piece of evi-

(1) 27 C. W. N. 548 (1922).

(2) 15 C. L. J. 7 at p. 11 (1911).

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dence, because it does not appear that the learned Judge entirely disregarded it. He considered it but did not attach very much weight to it.

The result is the appeal is dismissed with costs.

The cross-objection not being pressed is dismissed without costs.

PAGE, J.—The only point of substance in this appeal is whether certain road-cess returns filed under the Road Cess Act (Act IX of 1880, B. C.) were admissible in evidence.

The suit was brought by the mortgagee of the land in dispute who purchased the property in execution of a mortgage decree which he had obtained. The Plaintiffs contended that the property in suit formed one of the parcels of the property mortgaged. In support of their claim they filed certain road-cess returns filed by a third person for the purpose of proving that the property in dispute was the subject-matter of the mortgage. It is conceded that the road-cess returns were admissible in evidence unless their adduction by the Plaintiff is prohibited by sec. 95 of the Cess Act which runs as follows:—"Every return filed by or on behalf of any person in pursuance of the provisions of this part shall bear the signature and address of such person or his authorized agent and shall be admissible in evidence against such person, but shall not be admissible in his favour." The learned pleader on behalf of the Appellant contended that the meaning and effect of sec. 95 was that a return filed pursuant to sec. 95 was admissible against the party making it, but for all other purposes was wholly inadmissible in evidence. He referred in the course of his argument to r. 57 set out in the Bengal Cess Manual, 1919. I decline to refer to such a document for the purpose of construing

an Act of the legislature. The construction which the Court places upon a statutory enactment must depend upon the meaning which the Court attributes to the words which the legislature has used. The learned pleader in further support of his contention referred to the case of *Promode Chandra Roy Choudhuri v. Binayak Das Achariya Choudhuri* (1) and in particular cited a passage from the judgment in that case in which the learned Judges observed that "the road-cess returns in question were tendered as exhibits in this case not on behalf of the Plaintiffs landlords but on behalf of the Defendants tenants. Now so far as the road-cess returns are concerned it is quite clear having regard to the provisions of the Cess Act that they were not admissible in evidence at all; and therefore so far as the Defendants' case is concerned we must leave out of consideration the road-cess returns." In my opinion, when read in connection with the context in which they appear these observations cannot be regarded as an expression of opinion that except as against the person making the returns, road-cess returns for all other purposes are inadmissible in evidence. It appears from the case as reported that the road-cess returns in *Promode Chandra Roy Choudhuri's* case (1) were tendered by the tenants. It may be so, but they were used and used solely by the learned Judges of the lower Court in that case as evidence in favour of the landlords who had made the returns. Both the lower Courts had decided the case in favour of the landlords upon the ground that although the quinquennial register was not of sufficient weight to rebut the presumption arising from the entry in the record-of-rights the quinquennial register taken together with

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the road-cess returns was enough to turn the scale in favour of the landlords. What the learned Judges in that case must be taken, I think, to have held, and intended to hold, was that it was not open to the lower Courts, having regard to the terms of sec. 95 of the Cess Act, to consider what weight ought to be attached to the road-cess returns, because for the purpose for which they were used the road-cess returns were not a matter which under sec. 95 it was permissible for the Courts to take into consideration. In my opinion the effect of sec. 95 of the Cess Act is to prohibit the admissibility of the return when tendered in favour of the person filing it; and it has, and was intended to have, no other effect whatever. Provided that such a return does not offend against sec. 95, in my opinion, the return may be adduced in evidence if otherwise it is admissible under the Indian Evidence Act. See *Hem Chandra Chaudhury v. Kaliprasanna Bhaduri* (3), *Chalho Singh v. Jharo Singh* (4).

In my opinion, there is no substance in this appeal which must be dismissed.

N. G.

[CIVIL APPELLATE JURISDICTION.]

FIRST APPEAL NO. 155 OF 1923.

<p>GREAVES, J. MUKERJI, J. 1925, Heard, 23, 24, and 27, April. Judgment, 13, May.</p>	}	<p>BIBI JABEDA KUATUM, Defendant, Appellant, v. SYED MAHOMED MOZA- FAR ALI HUSSAIN, Plaintiff, Respondent.</p>
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Wakf property—Matwali, if can grant permanent lease without leave of kazi—Suit for khas possession and enhancement of rent of lands comprised in tenure created long ago of which rent has

(3) L. R. 30 I. A. 177: a. c. I. L. R. 30 Cal. 1038 (1903).

(4) I. L. R. Cal. 995 (1911).

remained unchanged for seventy years—Duty of Court to presume lawful origin of grant—Recognition of matwali for the time being limited to new tenancy created by him—Representation in Court sale by matwali that tenure permanent not such as to create estoppel—Onus on tenant to prove lease creating right to hold in perpetuity at fixed rent—*Istimrari mukarrari*, meaning of.

The Plaintiffs sued for khas possession on declaration that the Defendants had no right to enjoy the jote in suit purchased by them at a rent execution sale as a permanent and heritable tenure with rent fixed in perpetuity on the ground that it appertained to the wakf estate of which he was the matwali and any permanent settlement thereof by any matwali on which the Defendants based their title was illegal. The Plaintiff also asked for enhancement of rent in the alternative. It appeared that the tenure had existed since the year 1843, that the rent had remained unchanged during three matwaliships for a period of about seventy years and that applications for enhancement of rent had failed:

Held—That unless authorised by a kazi no matwali can create a leasehold interest to endure beyond his life, that the lessee acquires no title by adverse possession against the succeeding matwali and that if the succeeding matwali recognises the interest, the consent is only referable to a new tenancy created by him and there is no adverse possession until his death or until a new matwali takes his place.

That it was not within the scope of the matwali's agency to make a representation on behalf of the Deity at Court sales that the tenure sold at his instance was a permanent tenure, so as to give rise to estoppel if the lease was in fact granted without the authority of the kazi.

That the Defendants by admitting

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their tenancy admitted that the lands were part of the permanently settled estate and as such liable to rent which they acknowledged they were liable to pay and it was therefore for them to show that they held a lease of their lands which entitled them to hold in perpetuity at a fixed rent.

That in the circumstances of the case the Court should presume that the grant was in its origin lawful.

The cases lay down that the meaning of the term *istimrari mukarrari* is not necessarily permanent and heritable but that the nature of the grant is to be determined from the circumstances which in the present case justified the Court to infer that the grant was permanent and heritable.

This was an appeal against a decree of the Subordinate Judge of Zillah Dinajpur (Behary Lal Sarkar, Esq.), dated the 29th March 1923.

The facts of the case will appear from the judgment.

Sir P. C. Mitter, Babus Bijoy Kumar Bhattacharjee and Khagendra Nath Mitter for the Appellant.

Sir B. C. Mitter and Babu Jotindra Mohan Chaudhury for the Respondent.

THE JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by Defendants Nos. 1-4 against a decision of the Officiating Subordinate Judge of Dinajpur.

The suit out of which this appeal arises was originally instituted by the Receiver of a *wakf* estate for a declaration that the father of the Defendants had no right to enjoy the property in suit, which consisted of 1440 bighas of *niskar* land, at a permanent and invariable rent, for a declaration that neither Syed Sadaruddin-Al-Musari or any other *matwali* of the *wakf* estate

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had any right to permanently settle the land in suit and that if Syed Sadaruddin had so settled it, the Plaintiff is not bound by the settlement and asking that it should be set aside, that the Defendants might be ejected and the Plaintiff given *khas* possession and a decree for mesne profits. There was an alternative prayer for enhancement of rent if a decree for ejectment was not passed.

The Plaintiff became *matwali* of the *wakf* subsequent to the institution of the suit in the year 1925 and he was substituted as Plaintiff in place of the Receiver.

The Plaintiff states in his plaint that according to his information, long after the Permanent Settlement, during the time of Syed Sadaruddin-Al-Musari, the father of Syed Abdulla-Al-Musari, the last *matwali*, a non-permanent, non-heritable tenure was created without consideration and for a fixed term of the land in suit and that one Gaffuruddin Muktear, father of the Defendants, purchased at a rent execution sale in the year 1902 a *jote* (being the lands in suit) at a *jama* of Rs. 387-11 as.-14½ gandas which was described in the sale-certificate as *istimrari*.

The Defendant in his written statement claims that the *jote* is a transferable and heritable permanent tenure with the rent fixed in perpetuity and that the *jama* has never been altered and that this had been admitted unconditionally by the *matwalis* who had treated the *jote* as a transferable and heritable *istimrari jote* with the rent fixed in perpetuity. They further claimed to have been in possession for more than 12 years as *bond fide* transferees for value and that the suit was barred by Arts. 134, 142 and 144 of the Limitation Act and by estoppel arising from the conduct of the Plaintiff and his predecessors. They further claim that Gaffuruddin Ahmed made a *wakf* of the

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property by executing a *towliatnama* of which Defendant No. 2 is *matwali* and that the suit is not maintainable against him as he is not sued as *matwali* of the *wakf*.

By a *sanad* of the Emperor Shah Alaui, dated the 9th April 1772, the *towliat* of the shrine of Ousub-ul-Aqutali together with the *wakf* mehals appertaining thereto, which included the lands in suit, was granted to Syed Sadaruddin and it was thereby provided that the *matwali* was not competent to grant *istimrari* or *mukarrari* or to lease at a low *jama* anything appertaining to the Perganna. Similar *sanads*, which, however, did not include this last provision, were granted to Syed Sadaruddin by the Nawab Nazim of Murshidabad on the 1st September 1772 and by the East India Company on the 14th September 1773. The learned Judge in the Court below declared the Plaintiff's title to the land in dispute and passed a decree for *khas* possession and for mesne profits for the three years 1325-1327. He states in his judgment that it was admitted that the tenure formed the part of the endowment of the *wakf* and he finds that the endowment was founded in the 14th or 15th century. He further finds that the tenure was held at an unvaried rent for more than 100 years and that it was allowed to descend from father to son and that it was treated by most of the *matwalis* as *istimrari mukarrari*. He finds that there was nothing to show that the tenure was created with the leave of the Court or of the *kazi* and he holds that a *matwali* cannot permanently transfer a property by way of lease. The following points were urged before us on behalf of the Appellants :—

(1) That they or their predecessors have acquired a title by adverse possession having been in possession of the tenure

at any rate since 1860 or thereabouts and it is urged that the claims of any *matwali* were barred under the Limitation Act of 1859, which is said to govern the case, sec. 10 and Art. 134 of the present Limitation Act having no application.

(2) That the present Plaintiff is estopped by the representations of his predecessors made in sale-proclamations when the tenure was sold for arrears of rent that the tenure was *istimrari mukarrari*.

(3) That the onus is on the Plaintiff to show that the tenure was created after the *sanad* of the 9th April 1772 and that as the Plaintiff has not discharged his onus, there is nothing to show that it was not created prior to 1772.

(4) That from the recognition by previous *matwalis* of the tenure as *istimrari mukarrari* during a long period of years the Court should assume a legal origin and that it was created with the leave of the *kazi*.

(5) That as a *wakf* has been made of the tenure the *matwali* of this *wakf* should have been sued and that in his absence no valid decree could be passed.

(6) That under the provisions of sec. 10 of the Bengal Tenancy Act a tenureholder can only be ejected on breach of a condition.

Before dealing with these contentions it will be convenient to state what evidence there is on the record as to the existence of the tenure and who were the *matwalis* of the *wakf* from the date of the *sanad*. As already stated the first *matwali* was Sadaruddin to whom the *sanad* was given in 1772. There is no evidence one way or other as to whether the tenure was in existence prior to the grant of the *sanad* and there is no evidence either as to the dealing of Sadaruddin with the *wakf* estate. Sadaruddin was suc-

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ceeded by Syed Gaffaruddin, but there is no evidence as to the date of his succession or as to his dealings with the *wakf* estate.

He was succeeded by Karimuddin but the date of his succession does not appear. It is clear, however, that the tenure was in existence during, at any rate, a portion of the time that he was *matwali*, but whether he created it is not established by the evidence; it is clear, however, that it must have existed in the year 1843, for in the year 1850 (see Ex. T.) Karimuddin sued as *matwali* for the rent of an *istimrari jote* which is the land in dispute for the years 1843 to Bhadra 1257 (1850) at the rate of Rs. 387-11 annas odd per annum (the equivalent of Rs. 363-8 sicca rupees). In those proceedings the Defendants relied amongst other documents on two acquittances of the years 1806 and 1807 which are referred to in the decree Ex. D. These documents are not before us but the Appellants rely on them as showing that the *istimrari jote* existed at any rate from the year 1806. In another decree passed in the year 1859 (Ex. G) in favour of the same *matwali* the land is described as the ancestral *istimrari jote* of the Defendants, the annual rental being Rs. 363-8 sicca rupees and in the sale-certificate (Ex. 8) in execution of Ex. G the land is described as *istimrari*.

The successors of Syed Karimuddin were Sudaruddin, Serajuddin and Safiuddin who continued as *matwalis* to 1904 or 1905. Their successors were Syed Abdul Waziz and Syed Abdulla who were succeeded by the present *matwali*.

This much therefore is clear that the tenure has existed since 1843, that so far as can be ascertained the rent has remained unchanged and that it remained unchallenged during three *matwaliships* and for a period of nearly 70 years. It

will now be convenient to deal with the points raised by the Appellants.

With regard to the first point I do not think that any question of limitation or adverse possession can arise. These contentions are I think clearly untenable in view of the decision of the Judicial Committee in *Vidya Varuthi Thirtha v. Balusami Ayyar* (1). That case deals with a Hindu *math* but the Board states that the principles there laid down apply equally to Mahomedan endowments and it is clear from that case that unless authorised by the *kazi* no *matwali* could create a leasehold interest to endure beyond his life, that the lessees acquired no title by adverse possession against the succeeding *matwali* and that if the succeeding *matwali* recognised the interest, the consent is only referable to a new tenancy created by him and that there is no adverse possession until his death or until a new *matwali* takes his place.

With regard to the second point the Appellants contend that there is estoppel as at the Court sales the *matwali* represented the deity, but I do not think that it was in the scope of the *matwali's* agency to make a representation of this nature, if the lease was in fact granted without the authority of the *kazi* and consequently I think no question of estoppel arises.

The third point raises questions of some difficulty. The Respondents contend that when as here the position of landlord and tenant exists, the onus of proving the existence of a tenure is on those who set it up and that this is always so, the only exceptions being in the case of raiyats or *lukhirajdars*.

What the Respondents in effect say is this: By admitting you are a tenant, you admit that these lands are part of the

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permanently settled estate and as such liable to rent which you acknowledge you are liable to pay and that it is therefore for you the tenant to show that you hold a lease of these lands which entitles you to hold them in perpetuity at a fixed rent.

The Appellants on the other hand rely on the cases of *Hurryhar Mukhopadhyay v. Madhab Chandra Baboo* (2) and *Bipradas Pal Chaudhuri v. Kamini Kumar Lahiri* (3), the principles laid down in which, they say, are not to be confined to cases of *lakhiraj* land and they cited authority to show that a *lakhirajdar* was a lease-holder, *Gokul Sahu v. Jadu Nandan Roy* (4), and reliance was also placed on sec. 3 (3) of the Bengal Tenancy Act. It was further contended that the existence of a tenancy was admitted in the plaint and that it was for the Respondents who sought to eject the Appellants to show that it had determined. I am inclined to agree with the Respondents' contention as to the onus but I do not think that this disposes of the suit or that it is possible to ignore the fact that the tenure has existed since, at any rate, 1843 at a uniform rate of rent and that it has not been questioned by three generations of *matwali*.

I now come to the fourth contention raised by the Appellants. In this connection we were pressed with the decision in *Chokaliangam Pillai v. Mayandi Chettiar* (5). In that case the manager of a Hindu temple had granted a permanent lease in 1813 which was continued by a fresh grant in 1832, the lessees being described as persons with an hereditary right to

cultivate. There was no evidence to prove the purpose of the lease but it had existed unchallenged from 1832 down to 1893 when the suit was brought.

The Court in that case presumed a lawful origin having regard to the long period during which the lease existed.

The Respondents contend that assuming this can be done in the case of a Hindu temple, having regard to the rights of the managers to grant permanent leases in cases of necessity, no such assumption can be made in favour of grantees from a *matwali* who can only make such a grant with the leave of the *kazi*. I do not think, however, that such a presumption is impossible in the case of a Mahomedan endowment and I think that the Court under the circumstances of the present case should make the assumption that the grant was in its origin lawful having regard to the fact that the lease has existed unchallenged since, at any rate, 1843, that the rent has remained unchanged, that applications for enhancement have been made and failed and that no *matwali* has challenged it for a period of over 70 years. The Respondents contend that *istimrari mukarrari* does not necessarily mean permanent and heritable but that it means permanent during the life of the grantee and that in the years 1859 and 1860 it was used in the sense of a grant for life and we were referred to the case of *Narsingh Dyal Sahu v. Ram Narain Singh* (6) and *Ram Narain Singh v. Chota Nagpur Banking Association* (7). These cases lay down that the meaning of the term is not necessarily permanent and heritable but that the nature of the grant is to be determined from the circumstances and I think we should from the circumstances here infer

(2) 14 M. I. A. 152; s. c. 8 B. L. R. 596 (1872).

(3) L. R. 48 I. A. 499; s. c. L. L. R. 48 Cal. 27; 26 C. W. N. 465 (1921).

(4) I. L. R. 17 Cal. 721 at p. 725 (1890).

(5) I. L. R. 19 Mad. 485 (1895).

(6) 1 L. R. 80 Cal. 883 (1903).

(7) I. L. R. 48 Cal. 883 (1915).

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that the grant was permanent and heritable.

I do not think that the fifth contention raises any difficulty and if necessary the title and plaint could have been amended. As to the sixth point in my opinion sec. 10 of the Bengal Tenancy Act has no application as the argument based on it assumes that the tenure is permanent; if it was not validly created in my opinion it is not permanent. It follows from what has been stated before that the rent is not enhanceable.

In the result, the appeal succeeds and the suit will stand dismissed except as to the prayer for declaration of title and the claim for rent for the years 1924 to 1927.

The Defendants contend that the rent for the year 1924 has in fact been paid. There is no decision on this point and, accordingly, the matter will go back to the lower Court in order that this question may be decided.

As to the rents for the years 1925 to 1927 they have admittedly not been paid and there will, accordingly, be a decree in favour of the Plaintiffs for rent for these years. But a question arises as to whether the rents for these years were tendered or not and whether, therefore, the interest is payable. This question has again not been decided and this matter must also go back for the decision of the lower Court. The Judge in the Court below will finally dispose of these questions as to rent.

The Appellants will be entitled to their costs both of this Court and of the Court below.

The costs of the remand will be decided by the Court below.

MUKERJI, J.—I agree.

S. C. M.

MOZAFAR ALI HUSSAIN.

(CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE

No. 457 OF 1924.

CUMING, J.

PAGE, J.

1926,

Heard,

5 and 6, May.

Judgment,

6, May.

JIBAN KRISHNA

MULLIK, Plaintiff,

Appellant,

v.

NIRUPAMA GUPTA and

anr., Defendants,

Respondents

Contract, enforcement of, by third party—Contract between durputnidar and seputnidar that the latter will pay ceptui rent to putnidar out of seputni rent payable to durputnidar, if may be enforced by putnidar—Equitable rule, applicability of, where third person is cestui que trust.

As a general rule a contract cannot be enforced except by a party to the contract. That rule, however, is subject to this exception: If the contract, although in form it is with A, is intended to secure a benefit to B so that B is entitled to say he has a beneficial right as cestui que trust under that contract, then B is entitled to enforce the contract in a Court of equity.

A mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract will not make that person a cestui que trust.

Where there was a contract between a durputnidar and a seputnidar that the latter would pay the durputni rent to the putnidar out of the seputni rent payable to the durputnidar and the seputnidar paid the durputni rent to the putnidar for a number of years:

Held, in a suit by the putnidar against the seputnidar for the durputni rent, that the instrument creating the seputni was not executed for the benefit of the Plaintiff in any sense and so far as the Plaintiff was concerned the only effect of the instrument was that the seputnidar agreed

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with the durputnidar to pay a portion of the rent due under the seputni to the Plaintiff as a nominee of the durputnidar, and as such the equitable rule had no application and the Plaintiff was not entitled to sue the seputnidar.

DEB NARAYAN v. CHUNI LAL (1), TOUCHE v. METROPOLITAN RAILWAY WAREHOUSING COMPANY (2), IN RE EMPRESS ENGINEERING CO. (3), GANDY v. GANDY (5), GREGORY v. WILLIAMS (4), KHAWAJA MUHAMMAD KHAN v. HUSAINI BEGAM (6) and DWARIKA NATH v. PRIYA NATH (7) referred to.

The general terms used in TOUCHE v. METROPOLITAN RAILWAY WAREHOUSING COMPANY (2) must be taken with some qualification as laying down the general law.

This was an appeal against a decree of the Subordinate Judge of Zillah Nadia (Mr. Osmal Ali), dated the 30th January 1924, reversing a decree of the Munsif of Meherpur (Mr. Bama Charan Chakravarti), dated the 29th March 1923.

The facts of the case will appear from the judgment.

Dr. Radha Binode Pal and Babu Panchanan Ghoshal for the Appellant.

Mr. Gunqda Charan Sen and Babu Arun Kumar Roy for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

PAGE, J.—The suit in respect of which

this appeal arises was brought by a *putnidar* against a *seputnidar* for arrears of rent. The *putnidar* had created a *durputni* in favour of one Umesh Chandra Biswas under which Umesh became liable to pay rent at the rate of Rs. 244 per annum. Subsequently, Umesh executed a document by which he created a *seputni* in favour of the Defendants under which a *jama* of Rs. 344 was fixed. It was further provided that “by virtue of the *seputni* right you shall be in title and possession of the same and out of the settled *seputni jama* of Rs. 344 you shall pay Rs. 244, the *durputni* rent, to the *putnidar* and shall take the rent receipt in my name and you shall pay me the said rent receipt and the remaining Rs. 100 as per *kist* in the schedule below.” It is unnecessary to consider the other provisions in the document creating the *seputni*.

The trial Court decreed the claim in part. But the lower Appellate Court allowed an appeal by the Defendant and dismissed the suit.

The question which we have to determine in this appeal is whether the Plaintiff has made out any claim to recover from the Defendant the moneys in suit as rent or otherwise.

Dr. Pal on behalf of the *putnidar* contended that the Plaintiff was entitled to recover the sum claimed either in the form of rent or by virtue of the instrument under which the *seputni* was created upon three grounds.

He contended that the Plaintiff was entitled to recover the arrear of rent as the assignee of the rent from the *durputnidar*. But it was neither found by the lower Courts, nor has it been contended before us that there was any assignment of the rent to the Plaintiff by the *durputnidar*. It is enough to say that there is no substance in the contention that any assign-

(1) I. L. R. 41 Cal. 137: s. c. 17 C. W. N. 1143 (1913).

(2) L. R. 6 Ch. App. 671 (1871)

(3) L. R. 16 Ch. Div. 125 (1880)

(4) 3 Mer. 532 (1817).

(5) L. R. 20 Ch. Div. 57 (1885).

(6) L. R. 37 I. A. 152: s. c. I. L. R. 32 All. 410: 14 C. W. N. 865 (1910).

(7) I. L. R. 41 Cal. 137: s. c. 22 C. W. N. 279 (1910).

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ment of the rent by the assignor to the Plaintiff was proved.

The learned vakil further contended that inasmuch as the Defendant had paid Rs. 244, which was payable as rent under the *seputni*, to the *putnidar* over a period of years the Court ought to hold that there was an implied contract that the said rent should be paid by the Defendant to the Plaintiff in future. We are unable to accede to this view. The mere payment of a sum of money by A to B cannot be made the foundation of a legal obligation on the part of A to pay to B a like sum in like circumstances in the future. Moreover, there was no consideration passing to the Defendant from the Plaintiff to found any such agreement. In our opinion this contention also fails.

Thirdly, Dr. Pal contended that inasmuch as under the document by which the *seputni* was created an obligation was undertaken by the *seputnidar* to pay Rs. 244 to the Plaintiff, that obligation conferred a benefit upon the *putnidar* which in equity entitled the Plaintiff to enforce the obligation against the Defendant. In support of his contention the learned vakil referred to the case of *Deb Narayan v. Chuni Lal* (1). In that case in the course of his judgment Jenkins, C. J., observed that—"There is a valuable exposition of the law by Lord Hatherley in the first of these last two cases [that is, *Touche v. Metropolitan Railway Warehousing Company* (2)] which was adopted by Lord Justice Cotton in the second. The Lord Chancellor said: 'The case comes within the authority that where a sum is payable by A. B. for the benefit of C. D., C. D. can claim under the contract as if it had been made with himself.'"

Jenkins, C. J., added: "That appears to me to be a principle which is of distinct use in the consideration of this case." Now, if the broad proposition laid down by Lord Hatherley is to be accepted without qualification it would support Dr. Pal's contention. But these observations of Lord Hatherley must be taken with reference to the context in which they appear; and in *Touche's* case (2) it is clear that Walker was treated as holding the sum which he received from the Company under the agreement between himself and the Company as the trustee for the Plaintiff. Lord Hatherley's observations in *Touche's* case (2) were considered in *In re Empress Engineering Co.* (3). In that case Jones and Pride were solicitors who claimed in the liquidation of the Company for work done in connection with the promotion of the Company upon instructions received by one of the promoters. In the course of the argument Jessel, M. R., observed, in reference to *Gregory v. Williams* (4) that—"In the case Sir W. Grant appears to have considered that there was a declaration of trust. I know of no case where, when A simply contracts with B to pay money to C, C has been held entitled to sue A in equity." Referring to *Touche v. Metropolitan Railway Warehousing Co.* (2), Jessel, M. R., observed that—"In that case the Lord Chancellor finds, as a fact, that Walker was to receive the money as a trustee for the Plaintiff. If you can make out that Jones and Pride are *cestuis que trust*, that alters the case. It appears to me that they are not. The promoters were liable to Jones and Pride who are simply their creditors. A being liable to B, C agrees with A to pay B.

(1) L. R. 41 Cal. 127; s. c. 17 C. W.N. 1143 (1913).

(2) L. R. 6 Ch. App. 671 (1871)

(3) L. R. 6 Ch. App. 671 (1871).

(8) L. R. 16 Ch. Div. 125 (1880).

(4) 2 Mer. 582 (1817).

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That does not make B a *cestui que trust*." In the course of his judgment Jessel, M. R., after holding that inasmuch as the agreement by the promoters with the solicitors was made as agents for the Company, which then was non-existent, such a contract could not subsequently be ratified by the Company after incorporation, and the Company was under no liability to the solicitors, added: "Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will make that third person a *cestui que trust*. As a general rule that will not be so. A mere agreement between A and B that B shall pay C (an agreement to which C is not a party either directly or indirectly) will not prevent A and B from coming to a new agreement the next day releasing the old one. If C were a *cestui que trust* it would have that effect. I am far from saying that there may not be agreements which may make C a *cestui que trust*. There may be an agreement like that in *Gregory v. Williams* (4) where the agreement was to pay out of the property and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person." In *Gandy v. Gandy* (5) the equitable principle again came under consideration by the Court of Appeal, and the true rule was laid down by Cotton, L. J., in the following terms: "Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract, and either of two persons contracting

together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception; if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract, then B would, in a Court of equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated." His Lordship proceeded to refer to *Touche v. Metropolitan Ry. Co.* (2) and after citing the passage from Lord Hatherley's judgment which I have cited observed: "Now, if that is intended to lay down the rule as a general proposition of law in the general terms there used, it is not consistent with the other cases referred to in *In re Empress Engineering Co.* (3); but it may be that on the facts of the former case it was considered that the contract between Walker and the Company was entered into by Walker as a trustee for and on behalf of the Plaintiffs; and, if so, that is in accordance with what I understand to be the law." His Lordship then added that the observations of Jessel, M. R., in *In re Empress Engineering Co.* (3) which I have cited above "show that the general terms used by Lord Hatherley must be taken with some qualification as laying down the general law." The rule laid down by Cotton, L. J., in *Gandy's* case (5) is illustrated by *Khawaja Muhammad Khan v. Husaini Begam* (6) and the

(2) L. R. 6 Ch. App. 671 (1871).

(3) L. R. 16 Ch. Div. 125 (1880).

(5) L. R. 80 Ch. Div. 67 (1885).

(6) L. R. 37 I. A. 152; s. c. I. L. R. 82 All. 410; 14 O. W. N. 865 (1910).

(4) 8 Mer. 582 (1817).

(5) L. R. 80 Ch. Div. 67 (1885).

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cases of *Deb Narayan v. Chuni Lal* (1) and *Dwarika Nath v. Priya Nath* (7) must be taken to have been based upon the same ground. Applying the equitable rule to the facts of this case it is clear from a consideration of the terms of the instrument by which the *seputni* was created that that instrument was not executed for the benefit of the Plaintiff in any sense, and that so far as the Plaintiff was concerned the only effect of the instrument was that the *seputnidar* agreed with the *durputnidars* to pay a portion of the rent due under the *seputni* to the Plaintiff as a nominee of the *durputnidar*. The equitable rule should only be applied in rare cases and under exceptional circumstances, and can have no application in a case such as the one under appeal.

For these reasons in my opinion the appeal fails and must be dismissed with costs.

CUMING, J.—I agree.

H. C. S. Appeal dismissed with costs.

CRIMINAL APPELLATE JURISDICTION.

APP. NO. 61 OF 1926.

SCHIRAWARDY, J.	{	UMED SHE KU and ors.,
DUVAL, J.		Appellants,
1926,		v.
27, April.		THE KING-EMPEROR,

Charge of murder and in the alternative of causing disappearance of evidence of murder—Penal Code (Act XLV of 1860), sec. 302 and sec. 201, alternative charges under, if legal—Witness cognizant of commission of offence but withholding information until compelled to disclose is not described as accomplice in charge to jury but otherwise sufficient directions given—Misdirection, if any.

An alternative charge under secs. 302 and 201, I. P. C., is legal. Under the

(1) I. L. R. 41 Cal. 187; s. c. 17 O. W. N. 143 (1913).

(7) I. L. R. 41 Cal. 137; s. c. 22 O. W. N. 279 (1916).

ruling of the Judicial Committee in *BEGU SING v. EMPEROR* (3), a person though not charged under sec. 201 can be convicted thereunder in a trial on a charge under sec. 302. That being so, there cannot be any illegality in charging him under both the sections alternatively.

Where in his charge to the jury the Sessions Judge in referring to the evidence of two prosecution witnesses who kept quiet for sometime although they had knowledge of the commission of the offence and gave information only when threatened with prosecution told them about the suspicion arising from the delay in the production of the evidence and also placed before the jury the explanation of the delay given by the witnesses and further advised them to place proper value on their evidence:

Held—That there was no misdirection merely on the ground that the Sessions Judge did not tell the jury that the witnesses in question were no better than accomplices.

This was an appeal preferred on the 9th February 1926 against an order of the Sessions Judge of Murshidabad (A. L. Blank, Esq.), sentencing the Appellants to various terms of imprisonment.

The facts of the case will appear from the judgment.

Babus Satindra Nath Mukerjee and Kiran Kumar Bhattacharya for the Appellants.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Appellants in this case have been convicted under sec. 201, I. P. C., and sentenced to various terms of imprison-

(3) L. R. 52 F. A. 191 (1925).

UMED SHEIKH v. THE KING-EMPEROR.

ment—Appellant No. 1 to one year, Appellants Nos. 4 and 6 to six months and Appellants Nos. 2, 3 and 5 to three months each. The charge was under sec. 302, I. P. C., for the murder of one Tamij and in the alternative under sec. 201, I. P. C., for concealing or disposing of the evidence of commission of that offence. The jury unanimously found the accused not guilty under sec. 302, I. P. C., but found them guilty under sec. 201, I. P. C. The learned Judge, though he convicted them under sec. 201, I. P. C., was doubtful as to what was the real act committed by them on the deceased and in awarding punishment to the accused he assumed that they caused grievous hurt under grave and sudden provocation and accordingly awarded apparently lenient sentences on the accused.

In this appeal two points have been taken and pressed on our attention. The first is that the alternative charge under secs. 302 and 201, I. P. C., is illegal and in support of this the learned vakil has cited the decisions in the cases of *Tarap Ali v. Queen-Empress* (1) and *Sumanta Dhopi v. King-Emperor* (2). Whatever might have been the law previously, the point is now firmly settled by the recent decision of their Lordships of the Judicial Committee in the case of *Bagu v. King-Emperor* (3). The view taken in the above cases of this Court is that the alternative charge under secs. 302 and 201, I. P. C., is illegal inasmuch as the person who commits the offence under sec. 201, I. P. C., is an accessory and he cannot be tried both as principal and accessory. The decision of the Judicial Committee has set all dispute on this

point at rest by observing that under secs. 226 and 237, Cr. P. C., such a course was not only permissible but proper. In the case before their Lordships the accused persons were originally charged under sec. 302, but convicted under sec. 201, I. P. C. It was held that though they were not charged under sec. 201 they could be convicted under sec. 201 on a charge under sec. 302, I. P. C. The learned vakil for the accused attempts to distinguish that case on the ground that there were no alternative charges there. We do not think that any distinction can be drawn on this ground. If an accused person charged under sec. 302, I. P. C., can be legally convicted under sec. 201, I. P. C., there can be no illegality in charging him under both the sections alternatively. In fact one of the grounds which the learned Counsel for the Appellants at their Lordships' Bar urged was that the Appellants had no opportunity of meeting the case under sec. 201 as there was no charge in respect of that offence. The objection must therefore be overruled.

The second ground on which it is said that the Judge misdirected the jury is that he did not tell them that the evidence of P. Ws. Nos. 11 and 12 was no better than that of an accomplice and should be treated with great caution. The evidence of those two witnesses is that about midnight they saw the accused carrying the dead body of the deceased but they did not give this information for some time until they were threatened with prosecution for keeping back the knowledge of the fact when they gave out what they knew about it. Several decisions of this Court have been cited to show that a person who has knowledge of the commission of an offence but keeps quiet for some days is no better than an accomplice : *Ishan Chandra v. Queen-*

(1) I. L. R. 23 Cal. 638 (1895).

(2) 20 O. W. N. 105 (1915).

(3) I. L. R. 52 I. A. 191 (1925).

UMED SHEIKH v. THE KING-EMPEROR.

Empress (4) and *The Queen v. Chand Chanlalinee* (5). It should be observed that in all these cases the Judges were considering the value of the evidence of the witnesses—the cases being open to them on questions of fact. The learned Judge in his charge did warn the jury with regard to the evidence of those witnesses. He told them about the suspicion arising from the delay in the production of their evidence and he also placed before the jury the explanation which those witnesses gave for the delay, namely, the influence of the landlord, and he further advised the jury to place proper value on their evidence. We do not think that there is any substance in this ground either.

Lastly, it is argued that the learned Judge did not place before the jury some discrepancies in the evidence. He placed before the jury in his charge the important discrepancies in the prosecution evidence. Many other discrepancies have been placed before us, but they are not enough to induce us to hold that the Appellants were prejudiced by misdirection or non-direction. The appeal accordingly fails and is dismissed. The accused will surrender to their bail.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD SHAW.
LORD CARSON.
SIR JOHN EDGE.
MR. AMEER ALI.

1925,

Heard,
19, February.
Judgment,
19, February.

LAL RAJINDRA
NARAIN SINGH *alias*
LALLU SAHIB,
Appellant,

v.

MCST. SUNDAR BISI,
Respondent.

Civil Procedure Code (Act V of 1908), sec. 60

(4) I. L. R. 21 Cal. 328 (1893),

(5) 24 W. R. 55 (Cr.) (1875).

(n)—Maintenance receivable out of immoveable property—Decree against maintenance holder—Execution—Whether right can be attached and sold—Equitable execution by appointment of Receiver, proper remedy.

A right to receive maintenance out of certain properties, provided for in a compromise decree, is not attachable or saleable in view of sec. 60, cl. (n) of the Civil Procedure Code. The proper remedy lies in the appointment of a Receiver for realising the rents and profits of the property, paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liquidation of the judgment-creditor's debt.

This was an appeal (No. 48 of 1924) from a decree of the High Court at Allahabad, dated the 2nd May 1921, which reversed a decree, dated the 10th August 1920, of the Subordinate Judge of Jaunpur.

The appeal arose out of execution proceedings in which the Respondent as decree-holder sought to realise the decretal sum from certain properties of the Appellant, the judgment-debtor.

The said decree was made on the 17th February 1898. In execution thereof the Respondent applied for attachment and sale of 16 villages in the Jaunpur District.

The judgment-debtor objected on the ground that his only interest therein was under a compromise decree of the 20th May 1915 whereby the villages were given to the objector and his male descendants by way of maintenance and without power of alienation.

The compromise further provided that the villages should after the life of the Appellant be reserved for the maintenance of his descendants and widow.

In effect the Appellant contended that his rights in the villages could not be

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attached and sold in execution of the decree under sec. 60, cl. (n) of the Code of Civil Procedure, 1908.

The application for attachment was dismissed by the Subordinate Judge, as he considered that the judgment-debtor's interest was a right to future maintenance and that the case was governed by *Ghulab Kunwar v. Bansi Dhar* (1). On appeal the High Court (Walsh and Wallach, JJ.) set aside the decree of the Subordinate Court and ordered execution to issue.

In their view the villages in suit were saleable, and they held that the compromise could not be construed as containing a right to future maintenance.

By way of direction to the execution Court they intimated that the appropriate remedy was by appointment of a Receiver who would collect the income from the villages and make an allowance therefrom to the judgment-debtor for maintenance.

Messrs. DeGruyther, K. C. and F. B. Raikes for the Appellant.

Mr. Narasimham for the Respondent.

Their LORDSHIPS' JUDGMENT was delivered by

LORD SHAW.—The Board is of opinion that the conclusion reached by the High Court by their judgment of 2nd May 1921 was correct. It is to be regretted that the High Court did not itself, in the exercise of its powers, appoint a Receiver of this property which the judgment-creditor seeks to attach and bring to sale.

Their Lordships do not agree with the High Court on the subject of the actual legal position of the right of maintenance conferred upon the judgment-debtor. That right of maintenance arose under a compromise which was made between the judgment-debtor and his brother. The

compromise agreement is not produced, but its terms are said by the parties to be recorded in a decree pronounced by the Subordinate Judge of Jaunpur on 20th May 1915. The substance of this agreement is that the judgment-debtor, one of the two brothers parties to the compromise, was declared to have a right of maintenance in certain villages enumerated, the right being conferred expressly "without power of transfer."

In the present case the Subordinate Judge, in his judgment of 10th August 1920, correctly limits the issue between the parties to this maintenance question. No other point was brought before the Board. Speaking of the Plaintiff, the Judge says:—"He now wants to execute that decree against the property in 16 villages, which the judgment-debtor has got from his younger brother, Raja Lal Bahadur Singh, for his maintenance. His prayer is that this right of maintenance be proceeded against and a Receiver appointed to realise rents and profits of the above-named 16 villages and the decretal amount be paid out of the said realisation as far as possible. To this the judgment-debtor objects on the ground that the right of maintenance is not attachable under sec. 60 of the Civil Procedure Code."

Their Lordships are of opinion that the right of maintenance is in point of law not attachable and not saleable. They think that sec. 60 of the Civil Procedure Code, Head N, precludes an application for that purpose.

The proper remedy lies, in a fitting case, in the appointment of a Receiver for realising the rents and profits of the property, paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance, if any, to the liqui-

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dation of the judgment-creditor's debt. The High Court point out in their judgment :—" The appropriate remedy is what is known as equitable execution or indirect execution, namely, by the appointment of a Receiver who takes the place of the debtor and acts as an officer subject to the directions of the Execution Court in collecting and disbursing the debtor's income in accordance with the directions of the Execution Court towards the discharge of the claim of the decree-holder." These views appear to the Board to be sound.

Their Lordships think that the judgment of the High Court should be modified in the sense described, and that the case should be remitted to the High Court to make the appointment of the Receiver on the terms just quoted.

In the circumstances their Lordships think that there should be no costs of this appeal; and they will humbly advise His Majesty accordingly.

Solicitors : *Messrs. T. L. Wilson & Co.* for the Appellant.

Solicitor : *Mr. H. S. L. Polak* for the Respondent.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

DIVORCE CASE No. 6 of 1925.

SANDERSON, C. J.	}	Mrs. MARY REBERIO,
PANTON, J.		Petitioner,
GRAHAM, J.		v.
1924,		MR. V. S. REBERIO,
25, June.		Respondent.

The Indian Divorce Act (IV of 1865), sec. 14, proviso—Fact of husband causing or conducing to the wife's adultery, if may be considered in granting divorce.

The proviso to sec. 14 of the Indian Divorce Act is similar to the proviso to sec. 31 of the English Matrimonial Causes Act and as under the latter the fact that

the husband caused or conduced to the adultery of the wife can be taken into consideration by the Court in granting a divorce to the wife.

This was a Reference for confirmation by this Court of a decree, dated the 22nd December 1925, of the District Judge of Hughly, granting dissolution of marriage between the parties.

The facts of the case will appear from the judgment.

Mr. R. C. Bonnerjee and *Babu Suchindra Nath Banerji* for the Petitioner.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is a case which has been referred to the High Court by the learned District Judge for confirmation of a decree which the learned Judge made in favour of the Petitioner dissolving her marriage with the Respondent.

The learned Judge found that the husband had deserted the Petitioner for nearly six years and had not maintained her and her child and that he had been guilty of habitual cruelty and adultery. The learned Judge then said that *prima facie* the Petitioner was entitled to the relief asked for.

It appears, however, that the Petitioner admitted that she had given birth to a child about a year ago and that the child was not her husband's.

The question, therefore, arises, under the proviso to sec. 14 of the Divorce Act, whether the Court, in the exercise of its discretion, should have granted a decree.

The proviso to this section is similar to the proviso to sec. 31 of the Matrimonial Causes Act. In respect of that proviso, it has been held in several cases that the fact that the husband caused or conduced

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to the wife's adultery by his own wilful neglect or misconduct may be taken into consideration.

One of the cases is *Symons v. Symons* (1), and at p. 175, Sir Francis Jeune is reported to have said as follows:—"After very careful consideration, I have come to the conclusion that it is safe and proper to hold that the circumstances which may be considered in exercising this discretion should include the case of a husband causing or conducing to his wife's adultery by his own wilful neglect or misconduct;" and again, at page 177 the learned President is reported to have said: "On principle, there appear to me to be strong reasons for holding that such wilful neglect or misconduct by a husband should constitute matters, possibly not always conclusive, but fit to be taken into consideration in exercising the discretion whether a divorce shall be granted against him."

In this case, the learned Judge found that the Respondent deserted the Petitioner for at least four years, that she went to live with her brother until his death, after that, with her mother until she died, and that after her mother's death she was absolutely destitute. He referred to other matters and concluded by saying: "There can be no doubt that the husband by his own conduct is largely, if not wholly, responsible for his wife's guilt. On the facts of the case, I am inclined to believe that the Petitioner was forced by necessity and circumstances created by her husband to become unchaste."

I am not prepared to disagree with the finding at which the learned Judge arrived; and, in view of that finding, I am of opinion that the Court should exercise its discretion in this case in favour of the

Petitioner and confirm the decree for dissolution of marriage which has been made by the learned District Judge.

PANTON, J.—I agree.

GRAHAM, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION]

LETTERS PATENT APPEAL

No. 41 OF 1925.

CCMING, J.

B. B. GHOSE, J.

1926,

Heard,

7, January.

Judgment,

21, January.

PANCHUBALA DEBI,
Defendant, Appellant,

v.

JOTINDRA NATH
GOSWAMI and ors.,
Plaintiffs, Respondents.

Permanent lease of property, if can be clogged with condition that certain heirs will not succeed—Such stipulation by lessee not operative and opposed to general principles of inheritance—Right of lessor to khas possession when such excluded heir is in possession—"Putra p utradi kr. m.", if excludes females.

The Plaintiff granted a permanent lease of a certain property and the lessee executed an ekrarnama to the effect that his daughter and daughter's sons would not be entitled to succeed as heirs. After the death of the lessee and his widow, his daughter (the Defendant) remained in possession of the property and the Plaintiff sued for khas possession by ejecting her:

Held—That the clause in the ekrarnama regarding the exclusion of the daughter and daughter's sons was inoperative and did not give the landlord the right of re-entry in the event of the nearest heir being the daughter or daughter's son.

A subject has no right to impose on land or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable to his case.

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Even assuming that the clause in question was operative the grantor would have no right of re-entry on the failure of other heirs, for the right to possession on the failure of heirs does not revert to the grantor but escheats to the Crown.

Per B. B. GHOSH, J.—Although the words "putra poutradi krame" literally signify descendants of the male sex they ordinarily mean and include female heirs where by law the estate would descend to such heirs and are apt for conferring an estate of inheritance to either male or female heirs.

This was an appeal under cl. 15 of the Letters Patent against the decree of (Hakravarti, J., dated the 18th of March 1925, passed in Appeal from Appellate Decree No. 668 of 1923.

The Plaintiff sued for *khas* possession of certain property in the possession of the Defendant of which he had granted a permanent lease to her father on the ground that at the time of the lease the lessee had in a registered *ekrarnama* stipulated that no daughter or daughter's son would succeed as heir and the Defendant who was the daughter of the lessee in possession after his death and the death of his widow was liable to be ejected.

The *ekrarnama* in question was in terms following :—

"To-day you have let out to me for the purpose of residence by a registered patta a plot of *bastu* land measuring 5 cottas at an annual rent of Rs. 2 together with three *pucca* rooms on the first and ground floors and three thatched rooms standing therein, situate within the boundaries mentioned below, out of your ancestral rent-free lands in village *jote* Kalyan, *putty* of Mouja Goswami Malipara, Thana Polba, District Hooghly, I and my sons, grandsons, etc., shall conti-

nue to enjoy and possess the said land and rooms by residence, etc. But my daughter or my daughter's son shall not be able to reside therein as an heir, and they will not be entitled to the said property. To this effect I execute this *ekrar*. Finis. Dated the 4th June 1901."

And the lease was as follows :—

"You having prayed to take settlement of one plot of *bastu* and *ud-bastu* land measuring about 5 cottas at an annual rent of Rs. 2 for the purpose of residence, situate within the boundaries mentioned below, out of our ancestral *brahmotter* rent-free lands in village *jote* Kalyan, *putty* of Mouja Goswami Malipara, Thana Polba, District and Sub-Registry Hooghly, we, having granted your prayer and taken *kabuliyat* from you, execute this patta and promise that you shall pay the settled rent in equal *kists*, Ashar, Aswin, Pous and Chait, and also pay the road-cess and public cess which are assessed or any other cess that may be assessed in future separately from the said rent. Whenever you pay any money, you shall take *dakhilas* for that. If you make any plea of payment without *dakhilas* it shall be rejected. You shall not be able to transfer the said property by gift, sale, mortgage, etc. On paying the settled rent you do continue to enjoy and possess by residing therein through sons, grandsons, etc. And you shall reside there by repairing the three *pucca* rooms on the first and ground floors and three thatched rooms which are on the land. The said rent shall not be increased or decreased. You shall possess the trees which are standing on the said land. If I or any of our heirs ever put forward any claim it shall be rejected. To this effect I execute this patta. Finis. Dated the 4th June 1901."

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The Plaintiff succeeded both before the Munsif and the Subordinate Judge. A second appeal by the Defendant was dismissed by Chakravarti, J., who delivered the following judgment :—

CHAKRAVARTI, J.—The Defendant is the Appellant. The only question raised was as to the construction of a lease and an agreement. It is admitted that the two must be read together as part of the same transaction. In that view it is quite clear that the lease was limited to the grantee and to his son and grandson. The daughter and the daughter's heirs were expressly excluded from the enjoyment of the leasehold interest. It is a matter of contract by which the right was created. I do not see why that contract should not be binding upon the parties. It is unnecessary to discuss the question at any length as the learned Advocate for the Appellant did not make any serious attempt to show that the conclusions of the lower Appellate Court were wrong. It was suggested in the argument that there was no condition of re-entry in the lease. I should only point out that this is not a case of forfeiture for breach of any condition in the lease. But here the question is as to the limitation provided in the lease. If the lease was intended to be operative only with reference to certain limited persons the question is as to the construction to be put on the words creating the limitation. It is not disputed that the daughters were expressly excluded by the deeds when read together. In this view the appeal fails.

But considering that the Defendant has to remove from the house with the consent of the learned Advocate for the Respondent I allow six weeks' time from this date to the Defendant to vacate the

premises and to remove the materials of the structures.

The cross-objection preferred by the Respondent is not pressed.

Both the appeal and the cross-objection are dismissed. In the circumstances I make no order as to costs.

[Against this judgment the Defendant preferred the present appeal under the Letters Patent.]

Babu Narendra Nath Chaudhury for the Appellant.

Babu Debendra Narayan Bhattacharjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This is an appeal against a judgment and decree of my learned brother Mr. Justice Chakravarti and raises an interesting point of law. The facts of the case are briefly these : The Plaintiff granted to one Abinash Chandra Banerjee a permanent lease of a certain property. At the time of the execution of the document an *ekrarnama* was executed which provided that the grantee's daughter and daughter's sons should not be entitled to succeed as heirs.

The grantee died sometime ago and was succeeded by his widow. She died in 1919 and the grantee's daughter then remained on in possession.

The grantor now seeks to eject her on the ground that under the terms of the patta and *ekrarnama* she is not entitled to inherit the property.

This contention found favour with the trial Court and both the Courts on appeal.

The Defendant in third appeal has contended that the clause in the *ekrarnama* which is read as part of the lease excluding the daughters and daughters' sons of the grantee is inoperative on the ground that it was not open to the Plaintiff to

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provide in the lease that the property should descend in a different order of succession to the normal one and that it was not open to him to grant an interest contrary to the usual order of succession. He relies on the case of *Thakur Rajendra Bahadur Singh v. Rani Raghubans Kunwar* (1).

The Plaintiff on the other hand contends that the lease read with the *ekrarnama* is not a permanent lease. It is really a lease for a term of years, *viz.*, the life-time of the male heirs of the grantee. Looking at the lease and the *ekrarnama* I have little difficulty in coming to the finding that the lease purports to create a permanent heritable right in the land. It contains the usual word by which such rights have always been held to be created. It states that on paying the settled rent the lessee will continue to enjoy and possess by residing there through sons, grandsons, etc., (*putra poutradi krame*). There is the further stipulation that the rent is not to be decreased or increased. In other words, that it is fixed. There are certain clauses restraining alienation by gift, sale or mortgage but as there is no re-entry clause in this lease these restrictions are inoperative. Then in the *ekrarnama* we find the clause around which the main controversy has centred, namely, the provision that the daughter and daughter's sons shall not succeed. The argument put forward is that the clause prevents the lease from being a permanent one. I do not think that it does. All it provides is that certain heirs shall not succeed, *viz.*, the daughter and daughter's sons. It does not provide that in event of the nearest heir being the daughter or daughter's son, the property reverts to the grantor.

(1) L. R. 45 I. A. 134; s. c. I. L. R. 40 All.

23 C. W. N. 101 (1918).

There may be other persons who if the daughter and daughter's sons are excluded would be entitled to succeed. At the highest this clause would exclude certain persons, but it by no means follows that this clause must mean that if the next heir is the daughter or daughter's son, the property reverts to the grantors.

The lease is therefore in my opinion an ordinary absolute hereditary *môkarari* tenure.

The question to be answered in the present case then is : Does the clause regarding the exclusion of the daughters and daughters' sons give the landlord the right of re-entry in the event of the nearest heir being the daughter and daughter's son? I am of opinion that it does not for two reasons—

(1) The clause is inoperative. See the decision of the Privy Council in the case of *Thakur Rajendra Bahadur Singh v. Rani Raghubans Kunwar* (1), where it is held that a subject has no right to impose on land or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable to his case.

(2) Supposing for the sake of argument that the clause excluding the daughters and daughters' sons is operative, the grantor would have no right of re-entry on the failure of other heirs. The right to possession on the failure of heirs does not revert to the grantor but escheats to the Crown. [See the case of *Sonet Koer v. Himmat Bahadur* (2).]

I find that the Plaintiff is not entitled to eject the Defendant.

The result is that the appeal must succeed, the order of Mr. Justice Chakra-

(1) L. R. 45 I. A. 134; s. c. I. L. R. 40 All. 470; 23 C. W. N. 101 (1918).

(2) L. R. 3 I. A. 92; s. c. I. L. R. 1 Cal. 391 (1876).

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varti must be set aside and the Plaintiff's suit entirely dismissed. The Appellant is entitled to her costs in all the Courts.

GHOSH, J.—This appeal raises a question of nicety which does not appear to be directly covered by authority. Plaintiffs sued for *khas* possession by ejecting the Defendant from the property in suit on the basis of their title as heirs of Matilal and Doyal Goswami. The father of the Defendant, one Abinash, obtained a lease of the property from those two persons by exchange of patta and *kabuliyat*, dated the 4th of June 1901. On the same date Abinash executed an *ekrarnama* in favour of the lessors. Abinash died in 1914 while in possession of the leasehold leaving a widow and the Defendant, his daughter, who has a son. The widow remained in possession of the property till her death in 1919 and after her death the Defendant who was the legal heir of her father has been in possession of the property. The Plaintiffs seek to eject the Defendant on the ground that by virtue of certain terms in the *ekrarnama* executed by her father the Defendant is not entitled to succeed to the disputed property as his heir and she is therefore a mere trespasser from whom the Plaintiffs are entitled to recover *khas* possession. The trial Court made a decree in ejectment which was confirmed by the Subordinate Judge with a slight variation which is not necessary to mention. On second appeal to this Court the decree in ejectment has again been affirmed by my learned brother Mr. Justice Chakravarti. The contention of the Defendant against that decision is that the provision in the *ekrarnama* is not valid in law and the Plaintiffs are not entitled to enforce it nor can they claim any benefit under it. In order to appreciate the point it would be convenient to give extracts of the relevant portions of the

patta and *ekrarnama*. The patta provides: "On paying the settled rent you will continue to enjoy and possess (the premises) by residing therein through sons, grandsons, etc., (*putra poutradi krame*) The said rent shall not be increased or decreased." The *ekrarnama* contains the following provisions:— "I and my sons, grandsons, etc., shall continue to enjoy and possess the said land and rooms by dwelling therein, etc. But my daughter or my daughter's son shall not be able to reside therein as my heirs and they shall not be entitled to the said property." There can hardly be any doubt on a proper construction of the documents, which it is admitted must be read together, that the lease is a permanent heritable one. Although the words "*putra poutradi krame*" literally signify descendants of the male sex, they ordinarily mean and include female heirs where by law the estate would descend to such heirs, and are apt for conferring an estate of inheritance to either male or female heirs. The question then is whether after the grant of a permanent heritable interest the grantor and the grantee can validly enter into a covenant that a certain class of heirs shall not be entitled to succeed to the property. The Appellant relies on the case of *Rajendra Bahadur Singh v. Raghubans Kunwar* (1) in support of his contention that such a stipulation is not valid. In that case the Privy Council laid down that "a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable in his case." Their Lordships quote with approval the observation of Sir Edward Chamier, "that it is settled law that a

(1) L. R. 45 I. A. 134; S. C. I. L. R. 40 All.
470; 23 C. W. N. 101 (1918).

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subject cannot make his property descendible in a manner not recognised by the ordinary law." The general principle on which this rule is based was discussed in the well-known case of *Tagore v. Tagore* (3). Their Lordships say: "Whilst, however, rules of entail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

"The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

"Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the state, not merely for the benefit of individuals, but for reasons of public policy" (Domat, 2113). Their Lordships further observe: "This was well expressed by Lord Justice Turner in *Soorjomonee Dasi v. Dina Bandhu Mullick* (4)—'A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.' " On the principle laid down in these cases it must be held that it was not competent in Abinash to exclude one class of his heirs from inheriting this leasehold property, altering the rule of succession under the Hindu law, by the covenant in the *ekrarnama* and this must be held to be void and not enforceable under the law. The Defend-

ant is therefore entitled to the property under the ordinary law of succession.

The next question urged on behalf of the Appellant is that assuming that the daughter was not entitled to succeed by reason of the agreement, the Plaintiffs have no right to claim ejectment. There is no stipulation that on failure of heirs of Abinash the property would revert to the lessor. In this case it was not found that if the daughter and her son were excluded from the line of heirs of Abinash, there were no other heirs. But even if there are no other heirs of Abinash Plaintiff cannot claim *khas* possession, as on the authority of the case of *Sonet Koer v. Himmat Bahadur* (2), decided by the Privy Council, the Crown will take the property by escheat. This objection also seems to me to be of substance. The appeal must therefore succeed on both the grounds taken and the suit dismissed with costs in all Courts.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 2071 to 2080 OF 1923.

<p>SUBRAWARDY, J. MUKERJI, J. 1925, 22, December.</p>	}	<p>PRİYAMBADA DEBI, Defendant, Appellant, v. PRĪYA NATH BANERJEE and ors., Plaintiffs, Respondents.</p>
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Bengal Tenancy Act (VIII of 1885), sec. 109, scope of, as to bar of suits involving subject-matter decided under sec. 105—Settlement record that land rent-paying—Application by landlord under sec. 105 for settlement of fair and equitable rent decreed ex parte—Suit by tenant for declaration that land l. k. h. j.—Maintainability of suit—Decree, if can declare decision of Revenue Court not binding.

In the course of settlement proceedings

(3) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377

13 W. R. 359 (1872).

(4) C. M. I. A. 555 (1857).

(2) L. R. 3 I. A. 92; s. c. I. L. R. 1 Cal. 391 (1876).

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certain holdings were recorded as rent-paying and liable to assessment of rent. Thereafter the landlord applied under sec. 105, Bengal Tenancy Act, to have fair and equitable rent settled in respect of these holdings. These proceedings were decided *ex parte* against the tenants. The landlord then sued the tenants for rent whereupon the latter sued for a declaration that they were *lakhirajdars* in respect of the lands in suit, that the lands did not appertain to the *jama* as alleged by the landlord and that the decision of the revenue officer was not binding on them:

Held—That the suit was not barred by sec. 109, Bengal Tenancy Act. To attract the operation of sec. 109, Bengal Tenancy Act, it is essential to establish that the civil suit had for its object a matter which had already formed the subject of an application under sec. 105. The matter of the Plaintiffs' suit which was for a declaration that the entry in the record-of-rights describing their holding as liable to assessment of rent was wrong was not before the revenue officer or the subject of any application made before him when he decided the case under sec. 105.

NAWAB BAHADUR OF MURSHIDABAD v. AHMAD HOSSAIN (2).

The decision of the Full Bench in PURNA CHANDRA CHATTERJI v. NARENDRO NATH CHOWDHURI (3) is not intended to give such a wide meaning to the words of sec. 109, Bengal Tenancy Act, as to lay down that any matter which though not directly the subject-matter of an application before the revenue officer under sec. 105 was indirectly or impliedly involved in the determination of that application should be taken as a matter which was

(2) I. L. R. 44 Cal. 783 : s. c. 21 C. W. N. 1004 (1916).

(3) 29 C. W. N. 755 (F. B.) (1925).

the subject of the application made before the revenue officer.

But the Plaintiffs were not entitled to a declaration that the order passed under sec. 105, Bengal Tenancy Act, by the revenue officer was not binding upon the Plaintiffs as that was a matter which was the subject of the application before the revenue officer.

This was an appeal preferred on the 29th of June 1923, against the decree of Babu Jagadish Chandra Sen, Subordinate Judge of Zillah Burdwan, dated the 5th of April 1923, affirming the decree of Babu Bhupendra Nath Mukherjee, Munsif, 2nd Court, Burdwan, dated the 31st of July 1922.

The facts of the case will appear from the judgment.

Babu Silaram Banerji for the Appellant.

Babu Rajendra Chandra Bakshi for the Respondents in Nos. 2077 and 2080 of 1923.

Babu Ramendra Mohan Majumdar for the Respondents in No. 2078 of 1923.

The JUDGMENT OF THE COURT was as follows :—

The four suits from which the present appeals arise were brought by the Plaintiffs tenants against the Defendant landlord for a declaration that they were *lakhirajdars* in respect of the lands in suit, and for a further declaration that the lands did not appertain to the *jama* as alleged by the Defendant, and that the decisions of the revenue officer were not binding upon them. It appears that during the settlement proceedings these holdings were recorded in the record-of-rights as rent-paying, and liable to assessment of rent. Thereafter the Defendant applied under sec. 105, Bengal Tenancy Act, to have fair and equitable rent settled in respect of these holdings. The Plain-

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tiffs tenants did not appear in those proceedings which were decided *ex parte* against them. The result of those proceedings was that the lands were included as *mal* lands of the holdings in suit. Thereafter the Defendant brought suits for rent against the Plaintiffs which led to the institution of the present suits. These suits have been decreed by both the lower Courts and the Defendant appeals.

Two grounds have been urged by the learned vakil on behalf of the Appellant. Firstly, it is argued that the suits are not maintainable in view of the provisions of secs. 105 and 109 of the Bengal Tenancy Act. With reference to this contention, it is urged that as the Defendant applied under sec. 105, Bengal Tenancy Act, and decrees were passed upon that application, it must be taken that the question as to whether the holdings were liable to assessment of rent was necessarily raised and decided by the revenue officer. In view of the decision in *Parbati v. Toolshi Kapri* (1), it was not maintained that the order passed by the revenue officer was a decision within the meaning of sec. 107, but it is argued that the question as to whether Defendant's holding is rent-paying or rent-free is a matter which has already been the subject of an application made under sec. 105, Bengal Tenancy Act. This question does not require a very elaborate consideration, as it is settled by previous decisions of this Court. In the case of *Nawab Bahadur of Murshidabad v. Ahmad Hossain* (2) the facts were similar to these. In that case the Plaintiff brought a suit for declaration that he had *mourashi mokarrari raiyati* holdings under the Defendant whereas these holdings were recorded erroneously

in the settlement record as rent-paying tenures and the decree against them under sec. 105, Bengal Tenancy Act, was obtained by collusion and suppression of notices and was therefore void. The same plea on behalf of the Defendants was raised in that case as in the present case, namely, that the suit was barred under sec. 109 of the Bengal Tenancy Act. In overruling the objection the learned Judges observed: "To attract the operation of sec. 109 of the Bengal Tenancy Act, it is essential to establish that the civil suit has for its subject a matter which has already formed the subject of an application under sec. 105. It is plain that in so far as the Plaintiffs seek for a declaration that they are *mourashi mokarrari raiyats* and not tenure-holders and that the lands held by them constitute not one tenure but distinct *raiya*ti holdings, the suit is clearly maintainable. These matters do not form the subject for determination under sec. 105; indeed the settlement officer had enquired into the point at an antecedent stage, namely, when the record-of-rights was under preparation. The only matter for investigation in the proceedings under sec. 105 was the question of fair and equitable rent of the lands shown in the record-of-rights as held by the tenants as a tenure under their landlords. But in so far as the Plaintiffs seek a declaration that the Defendant is not entitled to realise Rs. 84 as rent in respect of the land in suit, the suit is clearly barred by sec. 109, for this question directly relates to a matter which had formed the subject of an application under sec. 105."

The scope of the Plaintiffs' suit is for a declaration that the entry in the record-of-rights describing their holding as liable to assessment of rent is wrong. This was a matter which was certainly not before

(1) 18 C. W. N. 604 (1913).

(2) J. L. R. 41 Cal. 783; s. c. 21 C. W. N. 1004 (1916).

PRIYAMBADA DEBI v. PRIYA NATH BANERJEE.

the revenue officer or the subject of any application made before him when he decided the case under sec. 105. The application that was made before the revenue officer was undoubtedly on the basis of the record-of-rights. But it did not invite the revenue officer to determine the issue as to whether the lands in suit were rent-free or rent-paying. It is argued on the authority of the Full Bench decision in *Purna Chandra Chatterji v. Narendra Nath Choudhuri* (3) that the matter which though not directly the subject-matter of an application before the revenue officer under sec. 105 was indirectly or impliedly involved in the determination of that application should be taken as a matter which was the subject of the application made before the revenue officer. We do not agree that the Full Bench decision intended to give such a wide meaning to the words of sec. 103 which have been characterised in that decision as plain words of the section. The point before the Full Bench was whether the matter which was the subject of an application before the revenue officer could form the subject of a suit, when the application before the revenue officer failed on account of non-prosecution or for other reasons, though there was no decision by the revenue officer upon that application. On the point raised before the Full Bench it was decided that irrespective of the fate of the application before revenue officer, the same matter could not form the subject of a subsequent suit. Reliance has been placed in support of the view urged on behalf of the Appellant on the decision in the case of *Apurba Krishna Roy v. Syama Paramanik* (4). But the facts of that case are different from those of the present case. There an application was

made under sec. 105 by the landlord for settlement of fair rent and the tenants appeared and objected to the Plaintiff's claim on the ground that the property was *nishar lakhiraj* of the Defendants; but they did not prosecute the defence and the application was ultimately decided *ex parte* in favour of the landlord. The learned Judges held that the decision of the revenue officer, though *ex parte*, was in the circumstances of that case a decision under sec. 105, Bengal Tenancy Act, and in coming to that conclusion they referred to the proceedings before the revenue officer and his judgment in the case. In the case before us neither the proceedings nor the orders of the revenue officer have been produced. The only paper placed before us and produced on behalf of the Defendant in the case is the tabular statement of the result of the proceedings before the revenue officer, which is said to be the decree passed in accordance with sec. 105, Bengal Tenancy Act. That paper simply shows the amount of rent fixed in respect of the holding. We are, therefore, in ignorance as to the real issue raised before the revenue officer. Presumably the issue as to whether the lands were rent-paying or not could not have been raised, because it was an *ex parte* proceeding and the Plaintiffs' suit was based upon the record-of-rights in which the holdings were recorded as being liable to assessment of rent. In *Apurba Krishna's* case (4), after holding that the order of the revenue officer was a decree within the meaning of sec. 107, the learned Judges proceeded to point out that the suit in that case was also barred under sec. 109, Bengal Tenancy Act, and the reason they assigned for the view is that the tenants appeared before the revenue officer and raised the issue by their de-

(3) 29 C. W. N. 755 (F. B.) (1925).

(4) 24 C. W. N. 223 (1919).

(4) 24 C. W. N. 223 (1919).

PRIYAMBADA DEBI v. PRIYA NATH BANERJEE.

fence, and therefore it must be taken that that issue was the subject of the application before the revenue officer. That case, therefore, does not support the view urged by the Appellant. As we have observed, the present case is covered by the decision in *Nawab Bahadur of Murshidabad v. Ahmad Hossain* (2) and we are not disposed to differ from that decision.

This point does not arise in Title Suit No. 746 of 1921 from which S. A. No. 2078 of 1923 arises.

It is argued in the second place on behalf of the Appellant that the Courts below have admitted certain documents which were inadmissible in evidence. Therefore the conclusion that Defendant's holdings are rent-free is based upon matters which are not in evidence in the case. The documents objected to are certain *kobalas*, mortgage deeds, two partition decrees, etc., which were not *inter partes*; and, therefore, it is urged, they are not admissible in evidence against them. This contention has no value, as these documents are admissible under sec. 13, Evidence Act, and in them the Plaintiffs and the predecessors of the Plaintiffs claimed the lands in suit to be *lakhtiraj*. In some cases, the learned Judge has used the documents in favour of the Plaintiffs but observed that their value must be very little. In others, the learned Subordinate Judge has relied upon these documents coupled with other evidence in the case in support of his view. In second appeal we are not able to define the amount of weight to be attached to the evidence and we find that in these cases there are other important pieces of evidence which together with the evidence afforded by these documents was

sufficient for the lower Court to arrive at its finding. This ground therefore also fails.

Lastly, it is said that the decree passed by the trial Court and upheld by the lower Appellate Court should be modified, inasmuch as it declared that the order passed under sec. 105, Bengal Tenancy Act, by the revenue officer was not binding upon the Plaintiffs. This contention must be upheld. The Plaintiffs are not entitled to have a declaration that the order passed by the revenue officer was inoperative, for in that case the suit would involve a matter which was the subject of the application before the revenue officer, and it has been so held in the case of *Nawab Bahadur of Murshidabad v. Ahmad Hossain* (2). The learned Judges there pointed out the anomalous position of the parties by virtue of two decisions in favour of either party; but they held that the Plaintiffs were not entitled to any declaration in respect of the decree of the revenue officer. The result therefore is that these appeals fail; but the decree of the trial Court will be modified by expunging from it the words relating to the declaration that the order passed under sec. 105, Bengal Tenancy Act, is not binding upon the Plaintiffs.

In the circumstances of these cases we order that each party should bear his own costs except in Appeal No. 2078 of 1923 in which the Respondents are entitled to their costs.

S. C. M.

(2) I. L. R. 14 Cal. 783; 21 C. W. N. 1004 (1916).

(2) I. L. R. 44 Cal. 783; 21 C. W. N. 1004 (1916).

(CIVIL REVISIONAL JURISDICTION.)**RULE No. 246 OF 1926.**

CUMING, J. **KUMAR SARAT KUMAR**
PAGE, J. **Roy, Petitioner,**
 1926, v.

Heard, 27, May. **THE COMMISSIONER OF**
Judgment, **INCOME TAX, BENGAL,**
 2, June. **Opposite Party.**

Income Tax Act (XI of 1922), secs. 31, 33, 66—Question of law in review proceeding—Refusal by Commissioner to state case because application was time-barred—Application for review dismissed without stating case—High Court, power of, under sec. 66 of Income Tax Act and under sec. 45 of Specific Relief Act to order Commissioner to state case and refer it to High Court—Specific Relief Act (I of 1877), sec. 45.

The High Court cannot under sec. 66 (3) of the Income Tax Act require the Commissioner to state a case where the application to the Commissioner was refused because it was time-barred.

The High Court has no power under the section to order the Commissioner to state a case when a question of law arises before the Commissioner in a review proceeding under sec. 33. But (semble) the High Court may possibly pass such an order in a properly constituted application under sec. 45 of the Specific Relief Act.

ALCOCK, ASHDOWN & Co. v. CHIEF REVENUE AUTHORITY OF BOMBAY (1) referred to.

This was a Rule granted on the 5th of March 1926 against an order of the Commissioner of Income Tax, Bengal, rejecting the application of the Petitioner, so far as it regarded the prayer for a reference of the case to the High Court, on the ground of limitation.

The facts of the case will appear from the judgment.

Babus Rupendra Kumar Mitter and

(1, L. R. 50 I. A. 927; s. o. I. L. R. 47 Bom. 742; 28 C. W. N. 762 (1923).

Dharma Das Sett (for **Babu Parmanand Lahiri**) for the Petitioner.

Mr. Pankridge and Babu Satindra Nath Mukerji for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

CUMING, J.—This is a Rule on the Commissioner of Income Tax, Bengal, to show cause why he should not state a case for the opinion of the Court.

The facts appear to be these:—

The applicant filed certain returns relating to his income with a view to assessment of income-tax before the Income Tax Officer at Rajshahi. That officer finally made an assessment. This was objected to by the assessee and he appealed to the Assistant Commissioner. The appeal was decided on the 18th September 1925. On the 9th December the applicant filed an application for review under sec. 33 of the Income Tax Act. He also prayed in the alternative that the Commissioner would refer certain points of law to the High Court. The Commissioner rejected the application so far as it regarded the prayer for a reference of the case to the High Court on the ground that it was time-barred. He, however, appears to have considered the case and refused to interfere in review. Mr. Rupendra Mitter who has placed the case before us with his usual clearness and fairness does not press the point that the application to the Commissioner to refer the case was not time-barred. He, however, contends that the proceedings before the Commissioner in review under sec. 33 were proceedings in connection with an assessment, that a serious point of law arose in those proceedings and that hence the Commissioner was bound to refer it to the High Court. He contends that the word "may" in sec. 66 (1) must be read as "must" and hence that the Com-

KUMAR SARAT KUMAR ROY v. THE COMMISSIONER OF INCOME TAX, BENGAL.

missioner had no alternative but to refer the matter to the Court. In support of his contention he relies on the case of *Alcock, Ashdown and Company v. The Chief Revenue Authority of Bombay* (1). No doubt in dealing with that case the Privy Council held that supposing there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court and that if he did not appreciate that there is such a serious point it is in the power of the Court to control him and order him to state a case. It may be noted here that this decision was under sec. 51 of the old Act.

The present section is sec. 66 which materially differs from sec. 51 of the old Act. There was no provision in the old Act under which the Commissioner could be called on to state a case.

In sec. 66 (3) there is a specific provision that if the Commissioner refuses to state a case when called on to do so the Court may require him to do so.

So far, however, as regards the refusal of the Commissioner to state a case is concerned this application to him to do so was refused on the ground that it was time-barred. It has not been contended here that it was not so time-barred.

Therefore, so far as the provisions of sec. 66 (3) are concerned we think the Income Tax Commissioner was right in refusing to state a case and we cannot interfere.

If he refused to state a case on the ground that it was time-barred and admittedly it is time-barred, the Court would have no reason to interfere, for sec. 66 (3) is limited to cases where the Commissioner refuses to state a case on the ground that no point of law arose.

With regard to Mr. Mitter's contention that as in the proceedings in review before the Commissioner a serious point of law arose he was bound to refer it to the Court, the answer is that possibly in a properly constituted application under sec. 15 of the Specific Relief Act, the Court might order the Commissioner "to state a case." No such application is before us and the Income Tax Act itself makes no provision by which in such a case we could compel the Commissioner to state a case. The case of *Alcock, Ashdown and Company v. Chief Revenue Authority of Bombay* (1) arose on an application under sec. 45 of the Specific Relief Act. There is no such application before us, the present application being under sec. 66 of the Income Tax Act. The result is that the Rule must be discharged with costs, 4 gold mohurs.

PAGE, J.—I agree that the Rule should be discharged, and that the present case is free from difficulty. But as some wider questions of principle were canvassed before us it is desirable I think that attention should be drawn to the present state of law in respect of appeals from assessments to income-tax. In England an assessee who is aggrieved by the determination of the Commissioner as being erroneous on a point of law is entitled to require the Commissioner to state a case for the opinion of the High Court and from the decision of the High Court an appeal lies to the Court of Appeal, and thence to the House of Lords. In India, however, as appears from certain recent decisions, *Tata Iron and Steel Co. v. The Chief Revenue Authority, Bombay* (2), *Alcock, Ashdown and*

(1) L. R. 50 I. A. 327; s. c. J. L. R. 47 Bom. 742; 28 C. W. N. 762 (1923).

(2) L. R. 50 I. A. 212; s. c. 28 C. W. N. 307 (1923).

(1) L. R. 50 I. A. 327; s. c. J. L. R. 47 Bom. 742; 28 C. W. N. 762 (1923).

KUMAR SARAT KUMAR ROY v. THE COMMISSIONER OF INCOME TAX, BENGAL.

Co. v. The Chief Revenue Authority, Bombay (1), *Emperor v. Probhat Chandra Barua* (3) and *Prabhat Chandra Barua v. Emperor* (4), an assessee is in a much less favourable position. In certain specified circumstances, no doubt, he may require the Commissioner of Income Tax to refer a question of law to the High Court under sec. 66 (2) of the Income Tax Act, and if the Commissioner refuses to state the case on the ground that no question of law arises the assessee may apply to the High Court for an order compelling the Commissioner to state a case. As the law stands at present, however, there is no way in which an assessee is able to challenge the decision which the High Court has given on a reference. In this Court it is the practice that income-tax references are normally heard by a Division Bench of two Judges. But there is no provision in the Income Tax Act or elsewhere to prevent such references being heard by a single Judge. Indeed, if two Judges who compose the Bench differ in opinion under the provisions of cl. (36) of the Letters Patent, upon which recently I had occasion to animadvert in *Profulla Kamini Roy v. Bhābani Nath Roy* (5), the judgment of the senior Judge is taken to be the decision of the High Court. And yet there is no appeal from the decision of the Division Bench either to the High Court under the Letters Patent or to the Judicial Committee of the Privy Council. Indeed, the learned Standing Counsel went to the length of contending that if the Commissioner refuses to state a case on any ground other than that no ques-

tion of law arises out of the orders specified in sec. 66 (2), the High Court has no jurisdiction to entertain an application for an order compelling the Commissioner to state a case. In that event the assessee will be utterly powerless to challenge the correctness of the assessment which the Revenue Authorities have made upon him. It is unnecessary for us in the present case to determine whether this contention of the learned Standing Counsel is well-founded or not. But it is not inopportune that the conditions which in India limit the right of appeal from an assessment of income-tax, as disclosed in the recent decisions to which I have referred, should be understood and appreciated.

In the present case the assessee obtained a Rule calling upon the Commissioner of Income Tax to show cause why he should not be ordered to refer the question of law arising out of an order passed by the Assistant Commissioner under sec. 31 on the 18th September 1925. The Court is moved to exercise the powers vested in it under sec. 66 (3) of the Income Tax Act (Act XI of 1922). The application of the assessee to the Commissioner to state a case referring to the High Court the question of law was not preferred until the 9th December 1925 and, therefore, was time-barred. It appears, however, that on the same date and in the same document the assessee also applied to the Commissioner for a review of the said order of the 18th December 1925 under sec. 33 of the Act. The Commissioner appears to have reviewed the order under sec. 33. But he has failed to state a case referring to the High Court the question of law that arose therein, namely, whether income derived from certain sources which had been taken into account at the time of the Permanent

(1) L. R. 50 I. A. 227; s. c. I. L. R. 47 Bom. 743; 28 C. W. N. 762 (1923).

(3) I. L. R. 51 Cal. 504 (1924).

(4) I. L. R. 52 Cal. 546; s. c. 29 C. W. N. 398 (1924).

(5) I. L. R. 52 Cal. 1018 (1925).

KCMAR SARAT KUMAR ROY v. THE COMMISSIONER OF INCOME TAX, BENGAL.

Settlement was assessable to income-tax. Now, it may well be, though in this case it is not necessary to decide, that in a proceeding duly instituted under the Specific Relief Act, the Court in its discretion might order the Commissioner to refer to the High Court this question of law which admittedly arose in the course of the review proceedings [*Alcock, Ash-down and Co. v. Chief Revenue Authority, Bombay* (1)]. But in my opinion the Court has no jurisdiction to pass such an order in the present Rule which has been passed upon sec. 66 (3) of the Income Tax Act.

The Rule therefore must be discharged.
POSTSCRIPT.

Since the enactment of sec. 8 of the Indian Income Tax (Amendment) Act (XXIV of 1926), which came into force after the Rule in this case was granted, some of the defects in the Act to which I have adverted have been rectified.

H. C. S. Rule discharged with costs.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 137 OF 1926.

CUMING, J.

PAGE, J.

1926,

30, April.

JEWRAJ KHAREWALLA,

Petitioner,

v.

[ALBHAI KALYANBHAI
& Co., Opposite Party.

Provincial Insolvency Act (V of 1920), sec. 31—Ad interim protection order, refusal to grant, pending the hearing of a petition for insolvency—High Court, if may revise order—Civil Procedure Code (Act V of 1908), sec. 115.

The Provincial Insolvency Act has made no provision for an ad interim protection pending the hearing of a petition for insolvency.

Per PAGE, J.—Refusal to grant an ad interim protection in the exercise of the

(1) L. R. 50 I. A. 227; a. c. L. L. R. 47 Bom. 742, 28 C. W. N. 762 (1923).

Court's inherent powers, if it has such powers, does not bring the order in question within the ambit of sec. 115, C. P. C.

Per CUMING, J. (PAGE, J., reserving his opinion)—The act has specifically laid down that protection cannot be granted in such a case.

This was a Rule granted on the 15th February 1926 against an order of the District Judge of Alipur (Mr. S. C. Mallik), dated the 2nd February 1926, refusing to grant *ad interim* protection to the Petitioner pending the decision of his application to be adjudicated an insolvent.

The facts of the case will appear from the judgment.

Babus Rajendra Chandra Guha and Kamini Kumar Sarkar for the Petitioner.

Mr. J. N. Majumdar and Babu Romesh Chandra Pal for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This is a Rule issued by my learned brothers Mr. Justice B. B. Ghose and Mr. Justice Panton against an order of the learned District Judge of Alipur refusing to grant *ad interim* protection to the Petitioner pending his adjudication as an insolvent. It would appear that the Petitioner applied to the District Judge to be declared an insolvent and asked the District Judge that pending the decision of his application to be adjudicated an insolvent, he should be protected against arrest at the instance of his creditors Nos. 1, 2 and 3. The learned District Judge rejected that application on the ground that the Provincial Insolvency Act made no provisions for such an *ad interim* protection, nor was there any law under which an *ad interim* protection could be granted.

This Rule must obviously be discharged.

JEWRAJ KHAREWALLA v. LALBHAI KALYANBHAI & Co.

ed, for the learned District Judge is clearly quite right in the view he has taken. The learned vakil who has appeared for the Petitioner has been unable to point out to us any section of the Provincial Insolvency Act under which this *ad interim* protection could be granted to the Petitioner. The learned vakil has drawn our attention to sec. 5 of the Act. He seems to argue, if I understand him rightly, that sec. 5 gives the Court power to grant a Petitioner *ad interim* protection. He has not been able to satisfy me how sec. 5 does grant the Court power to grant *ad interim* protection. He would seem to argue that possibly the Court had in its inherent powers the power to grant *ad interim* protection. Without discussing whether or not a Court has in its inherent powers the power to grant *ad interim* protection, it is quite clear that the Provincial Insolvency Act has specifically laid down that in such a case as the present one protection cannot be granted. As the order of the learned District Judge is perfectly legal and right and he was quite correct in holding that he had no power under the law to grant *ad interim* protection, no case arises for our revision under sec. 115, C. P. C.

The Rule must therefore be discharged with costs. Hearing-fee, two gold mohurs.

PAGE, J.—I agree that the Rule should be discharged. There is no provision in the Provincial Insolvency Act in respect of orders to prevent the arrest of a Petitioner pending the hearing of a petition for insolvency. Even if the Court has jurisdiction to make an order of this description in the exercise of its inherent powers, having regard to the express provisions with relation to protection orders and release from arrest set out in the Provincial Insolvency Act (as to which I

desire to reserve my opinion), the fact that the lower Court has not passed an "*ad interim* protection order" in the exercise of its inherent powers, in my opinion, does not bring the order in question within the ambit of sec. 115, C. P. C.

S. N. B.

Rule discharged.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 376 OF 1925.

SANDERSON, (J. J.)
PEARSON, J.
1925,
23, July.

THOMAS J. H. ARNUP,
Petitioner,
v.
KENDARNATH GHOSH,
Opposite Party.

Statement made by complainant to Deputy Commissioner of Police, if admissible in evidence at the trial—Magistrate's refusal to consider such statement, effect of—Conviction set aside on ground of admissible evidence not having been considered by Magistrate—Usual course of re-trial—Special circulars not warranting order for re-trial—Delay in the disposal of case, mischievous effect of, amounting to denial of justice—Evidence Act (I of 1872), secs. 155 (3), 145—Penal Code (Act XLV of 1860), sec. 323.

The Petitioner, a sergeant of the Calcutta Police, was convicted by an Honorary Presidency Magistrate under sec. 323, I. P. C., for causing hurt to the complainant, the driver of a taxi-cab, and sentenced to pay a fine of Rs. 50. It appeared that the Magistrate refused to consider certain statement by the complainant to the Deputy Commissioner of Police on the ground that they were inadmissible in evidence:

Held—That the statements in question which were at variance with those made before the Magistrate were admissible in evidence and as they were important from the point of view of the defence and the Magistrate had not taken them into consideration in convicting the accused, the conviction and sentence should be set aside.

THOMAS J. H. ARNUP v. KEDARNATH GHOSE.

Held—That such a delay as took place in the case was inexcusable having regard to the simple nature of the case and it might easily amount to a denial of justice.

Having regard to the circumstances of the case and especially to the fact that the trial extended over more than a year, the High Court did not direct a re-trial.

Per PEARSON, J.—The evidence was admissible under sec. 155, sub-sec. (3) of the Evidence Act subject only to this that the provisions of sec. 145 of the Evidence Act had been complied with in the matter of putting the specific parts of it which were to be relied upon to the witness in cross-examination.

The delay which occurred in the case was only inviting evidence which could not be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses gave evidence the greater the probability of confusion and of the truth being obscured, particularly in a case where the accused happened to be a police officer and the alleged offence arose out of his conduct during the course of his duties.

This was a Rule granted on the 19th May 1925 against an order of the Honorary Presidency Magistrate, Calcutta (T. N. Goswami, Esq.), dated the 23rd March 1925, convicting the Petitioner under sec. 323, I. P. C., and sentencing him to pay a fine of Rs. 50.

The facts of the case will appear from the judgment.

Mr. Sen, Advocate and Babu Satindra Nath Mukherjee for the Petitioner.

Babu Panna Lal Chatterji for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

SENDERSON, C. J.—This Rule was

granted by my learned brother Mr. Justice Panton and me calling upon the Chief Presidency Magistrate and the Opposite Party to show cause why the conviction of and the sentence passed on the Petitioner should not be set aside on grounds Nos. 1, 8 and 9 stated in the petition.

The Petitioner was convicted by an Honorary Presidency Magistrate for assault under sec. 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 50. That decision was given on the 23rd of March 1925.

The Petitioner is a sergeant in the Calcutta Police attached to the Kumartoli outpost and the assault is alleged to have been committed on the 19th of February 1924.

The case for the complainant Kedarnath Ghose, who is a taxi-cab driver, shortly stated was as follows:—He was driving a taxi-car near a tea-shop in Ahiritolla Street when some person from the tea-shop summoned him to stop. He stopped and the man, who called him, asked him to wait 2 or 3 minutes while he had some tea. The complainant, therefore, drew up his taxi and waited. The Petitioner came upon the scene and asked him to move his car. The complainant gave him the explanation, which I have already mentioned, and then it was alleged, without any cause, as the complainant (the taxi-driver) was about to start his taxi, the officer assaulted him, poked him with a stick and then gave him a blow on the head. The blow on the head caused an abrasion of the skin and bleeding. The sergeant then blew a whistle, which brought 2 or 3 constables to the spot, dragged him out of the car and took him to the thana. That is the complainant's story.

The case for the Petitioner is that he

THOMAS J. H. ARNUP v. KEDARNATH GHOSH.

found the complainant's cab stationary and on asking the complainant to move it, he was told that he stopped there for the purpose of getting a cup of tea. The Petitioner then told him that he must not stay there and asked him to move his car which he refused to do. The Petitioner also asked for his license but the complainant refused to produce it. The Petitioner then attempted to arrest the complainant with the object of taking him to the thana because of the obstruction which he had caused and because he refused to produce his license. There was a scuffle and the Petitioner had to get assistance and in the course of the scuffle the complainant's head was hurt by his falling on the ground.

The Rule was granted on three grounds. The first was "that the learned Magistrate's judgment was not in accordance with law inasmuch as he had not considered the evidence of the witnesses examined on behalf of the defence."

On further examination of the judgment and by reason of the explanation of the Magistrate, I am of opinion that there is no substance in that ground.

Another ground on which the Rule was granted was that "the learned Magistrate was wrong in holding that the statements of Kedarnath, Anath, Motilal and Harendra Chakervarty before the Deputy Commissioner of Police were not on the record and the said witnesses were not confronted with them." This ground, as far as I can see upon further information, now, needs consideration only with regard to the complainant Kedarnath and Anath.

It appears that the complainant was examined by the Deputy Commissioner on the 22nd of February, that is to say, three days after the event, and he was represented by a pleader. The Deputy

Commissioner took down his statement in writing: and, there is no doubt that the complainant, when he was before the Magistrate in this case was cross-examined with regard to certain statements which he was alleged to have made to the Deputy Commissioner and which the Deputy Commissioner had taken down in writing. They were put to the complainant for the purpose of showing that the complainant's evidence could not be relied upon by reason of the fact that the complainant had made statements to the Deputy Commissioner which were inconsistent with parts of the evidence which he had given before the Magistrate.

The Magistrate stated in his answer to the Rule as follows:—"With regard to ground 8 of the petition this Court considered the statements of the witnesses Kedarnath Ghose (and not Khagendranath as stated in the petition, evidently through an oversight), Anath, Motilal and Harendra Chakervarty before the Deputy Commissioner of Police inadmissible in evidence for the following reasons." I need not deal with this point at any length because the learned Vakil, who appeared for the Crown, did not endeavour to support the contention, which was put forward by the Honorary Magistrate in this respect—and, he stated that he could not contend that the statement which Kedarnath, the complainant, had made to the Deputy Commissioner was inadmissible. In my opinion the learned Vakil for the Crown was correct in his opinion and took the right course in not contending that the statement was inadmissible. In my judgment it was admissible.

It therefore appears that in this respect there was ground for this Rule being granted.

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The next question which has to be considered is whether the Rule should be made absolute by reason of the matter to which I have just referred.

In my opinion, the statement which the complainant made to the Deputy Commissioner was of importance, first because it was made within three days of the occurrence and the evidence given by the complainant before the Magistrate was given some months after the event. Therefore, it is probable that the complainant would be more accurate, when he was making his statement three days after the event, than when he was giving evidence some months after.

In the second place the statement which the complainant made to the Deputy Commissioner contained some important admissions: for instance, the complainant said: "I stopped my car. I was going to get my flag down but the would-be passenger told me to wait a couple of minutes. I then ordered for a cup of tea from the tea-shop-keeper who sent me a cup of tea. I was drinking it. Just at this time a sergeant came and told me to move on and I told him that I was waiting because a Baboo had told me to wait. Sahib asked for my license. I did not show him the license but I was begging the sergeant to excuse me at which the sergeant abused me."

That statement refers to two matters, first, that the complainant was having a cup of tea; and secondly, that he was asked for his license and he did not produce it. Both these statements the complainant denied when they were put to him when he was giving evidence before the Magistrate. I do not place much importance upon the point whether the taxi-driver was having a cup of tea or was not having a cup of tea—but the other matter is of importance, because if he was asked for the

license and he refused to produce it, I understand that it would be the duty of the Petitioner to take him into custody, and if the complainant resisted, the Petitioner would be justified in using the necessary amount of force to carry out his duty.

To what extent the mind of the Honorary Magistrate would have been influenced, if he had understood that the above-mentioned evidence was admissible and that he must take it into consideration it is difficult to say. It is true that in his judgment the Magistrate did refer to this statement having been put to the complainant when he was giving evidence, but I do not find that the Magistrate at any time in his judgment came to any definite decision whether the complainant was asked for the license and whether he refused to produce it. He has referred to the fact that the complainant was charged with obstruction and was convicted of causing an obstruction; and, the Magistrate seems to have thought that there the matter ended and that he need not consider that question further.

In my opinion it was essential in this case that the Magistrate should make up his mind in the first instance as to how the scuffle began—did it begin by an unwarranted assault by the Petitioner upon the complainant or did it begin by reason of the Petitioner asking him for the license and by reason of the complainant refusing to produce it?

It seems to me quite possible that if the Magistrate had applied his mind to that view of the case he might have come to a contrary conclusion.

For these reasons, without expressing any opinion upon the merits of the case I am of opinion that this Rule must be made absolute.

In the ordinary course, and especially

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having regard to the fact that the Petitioner was in the position of a sergeant of the Police, I should have thought it necessary to remit this matter to the Magistrate in order that it might be retried, the Magistrate giving due weight to the evidence which he thought was inadmissible but which I have decided is admissible.

But this is, I trust, an exceptional case : and, in my opinion for the reasons, to which I will presently refer, it would be wrong for this Court to direct a further trial.

The Rule therefore must be made absolute, the conviction and sentence set aside : and, the fine, if paid, will be refunded.

I have already stated that the occurrence took place on the 19th of February 1924 and the matter was eventually decided by the Magistrate on the 23rd of March 1925, more than a year after the event. We were informed that the proceedings against the Petitioner were instituted on the 20th of March 1924, which was, as my learned brother reminds me, the day following that on which the proceedings against the complainant were started in respect of the alleged obstruction. We were informed that the hearing of this case did not begin until the 25th of August 1924, as I understand, because the other case (the prosecution of the complainant) was taken up first and was not concluded until about that time.

In my judgment there are not sufficient materials before this Court to enable it to form any estimate as to what was the reason or what were the reasons for the extraordinary delay which occurred in the disposal of this case.

It is only necessary to mention one or two facts to see that some steps must be taken to prevent such delays occurring in

the future. This was a simple case—an ordinary assault case—which in my judgment ought to have been disposed of within a week or so after the event, which happened on the 19th February 1924. Instead of that, I find that witnesses were examined in August, September, October and November 1924, and the decision was not given until March 1925. Whether this is considered from the point of view of the complainant or from the point of view of the Petitioner, such a delay as took place in this case, is inexcusable having regard to the simple nature of the case, and it might easily amount to a denial of justice. I desire to make it clear that I do not intend to make any reflection upon the Honorary Magistrate, because, as I have already said, I have not sufficient materials to enable me to specify what was the cause of the delay, and further it is evident that the Magistrate took great care with the case.

The fact, however, remains that it was more than a year before this simple case was disposed of ; and, my learned brother and I are of opinion that it is our duty to call attention to it and direct that a copy of our judgments be sent to the Government of Bengal.

PEARSON, J.—I entirely agree with the judgment of the learned Chief Justice in this matter : I also think that the learned Magistrate ought to have gone right back to the very beginning of the events leading up to the assault, and from that point of view it was of very great materiality to consider the question which has been raised of the demand for the production of the license by the accused from the complainant.

In so far as the learned Magistrate has stated in his explanation that he considers the previous statement of certain witnesses inadmissible in evidence, I

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only wish to say that it is abundantly clear to my mind that the evidence was admissible under sec. 155, sub-sec. (3) of the Evidence Act subject only to this, that the provisions of sec. 145 of the Evidence Act had been complied with, in the matter of putting the specific parts of it, which were to be relied upon, to the witnesses in their cross-examination. That in fact was done in at least two cases. That evidence was admissible.

I desire to associate myself entirely with what has fallen from the learned Chief Justice with regard to the delay which has taken place in this case. I have not been able to go in detail into the matters which would enable me to say upon whom the blame rests. While I desire also to associate myself with what has been said about the great care which the Magistrate seems to have applied in coming to his judgment in the case, it seems inconceivable that a simple assault case—which ought to have been disposed of within a few days of the event or, at any rate, within a few days of the complaint—should spread itself over a period of more than a year before the decision was arrived at. Such delay is only inviting evidence which cannot be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses give evidence the greater the probability of confusion and of the truth being obscured, particularly in a case like this where the accused happens to be a police officer, and the alleged offence arises out of his conduct during the course of his duties.

S. C. M.

IN RE REVISIONAL JURISDICTION.]

REV. NO. 6 OF 1926.

C. C. GHOSE, J.

HARA MOHAN DAS,

DUVAL, J.

Petitioner,

1926,

19, February.

THE KING-EMPELO.

Improper trial—Conviction by Magistrate of offence triable by him when facts proved showed commission of offence triable exclusively by Court of Sessions. Conviction set aside by High Court and Magistrate directed to commit accused to Court of Sessions—Indian Penal Code (Act XLV of 1860), secs. 196, 471.

Where the Petitioner was convicted by the Magistrate under sec. 196, I. P. C., but it appeared, on the findings arrived at by him that there was a prima facie case against him under sec. 471 which was exclusively triable by the Court of Sessions, the High Court in revision set aside the conviction and sentence and directed the Magistrate to commit the Petitioner to the Court of Sessions.

This was a Rule granted on the 5th January 1926 against an order of the Extra-Assistant Commissioner of Barpeta (Moulvie A. Rahman), dated the 10th June 1925, convicting the accused under sec. 196, I. P. C., and sentencing him to undergo rigorous imprisonment for 15 months and to pay a fine of Rs. 200, the order having been confirmed, on appeal, by the Sessions Judge of the Assam Valley Districts (Mr. R. E. Jack) on the 14th November 1925.

The facts appearing from the judgment of the Sessions Judge are as follows:—

The Petitioner was convicted of an offence under sec. 196, I. P. C., on the ground that he used in evidence as genuine a forged receipt for Rs. 500 knowing it to be forged. It was urged that the prosecution case being that the accused dishonestly used as genuine a valuable security knowing it to be forged, he

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should have been charged with an offence under sec. 471, I. P. C., and committed to Sessions. . . .

The case was previously tried and on appeal to the Sessions Court remanded for re-trial on the ground that the provisions of sec. 360, Cr. P. C., had not been observed. Then there was an application to the High Court for trial by another Magistrate. But neither in the Sessions Court nor in the application to the High Court was any objection made to the trial of the case under sec. 196, I. P. C., and it was not until after the prosecution case had been closed that an objection was made to the jurisdiction of the Magistrate and even then there was no attempt to appeal against his orders. The Sessions Judge found :—“ The accused Appellant does not seem to be prejudiced in any way by his trial for an offence under sec. 196, I. P. C.

“ The learned Magistrate has discussed the evidence and the probabilities of the case at considerable length and he is right in holding that the receipt for Rs. 520 is forged. The accused produced the receipt before the Munsif of Barpeta in an execution case to show that he had paid to the decree-holder Rs. 530 out of the decretal debt. The decree-holder denied that he had received the money or granted the receipt.”

On a consideration of the evidence and taking all the circumstances into account, the Sessions Judge was convinced that the receipt was a forgery and that the accused knew it to be a forgery and was rightly convicted under sec. 196, I. P. C.

Babus Suresh Chandra Talukdar and *Jatish Chandra Guha* for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

In this case the accused has been con-

victed under sec. 196, I. P. C. A perusal of the judgment of the learned Magistrate shows that there should not have been a conviction under sec. 196 having regard to the facts found [see in this connection *Empress v. Khirode Chandra* (1)]. The facts found show that the section of the Indian Penal Code, under which the accused should have been charged, is sec. 471, I. P. C. An offence under sec. 471 is exclusively triable by a Court of Sessions, and on the findings arrived at by the Magistrate it would appear that there is a *prima facie* case against the accused under sec. 471, I. P. C.

We therefore set aside the conviction and sentence under sec. 196, I. P. C., and direct the Magistrate to commit the accused to the Court of Sessions to stand his trial under sec. 471, I. P. C. With these remarks let the record be sent down to the lower Court as early as possible.

The Petitioner who is on bail will remain on the same bail as he is now pending further orders of the Magistrate.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE
RESIDENT IN MYSORE.]

VISCOUNT DUNEDIN.
MR. AMER ALI.
SIR ARTHUR CHANNELL.

1926,

Heard, 26, January.
Judgment, 26, January.

THOMAS CHARLES
WILLIAM SKIFF,
Appellant,
v.
LILIAN MILDRED
KELLY,
Respondent.

Breach of promise to marry—Woman married at time of promise but expecting to be divorced and divorced subsequently—Promise, if actionable—Implied new promise after divorce—Damages, measure of—Seduction, proof of, if relevant—Privy Council—Practice, not to review measure of damages.

A promise to marry a woman who at

(1) I. L. R. 5 Cal. 717 (1890).

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the time of the promise was a married woman, though it was understood between them that a divorce was going to take place and a divorce did afterwards take place, is a void promise.

Where the parties, nevertheless, considered themselves as engaged persons and behaved as such, and after the termination of the divorce proceedings when the woman became a free woman, the man bought her a ring and actually arranged the date on which they were to be married:

Held—That the Courts in India properly inferred that there was in law a new promise to marry.

DITCHAM v. WORRALL (1) and DE THOREN v. ATTORNEY-GENERAL (2) referred to.

The Judicial Committee would not interfere with a measure of damages which had been fixed by a Judge unless they saw that there was something very clearly wrong with the figure which he had fixed upon.

These were consolidated appeals (No. 152 of 1924) from a decree, dated the 20th March 1923, of the Court of the Resident in Mysore at Bangalore, which varied a decree, dated the 11th September 1922, of the Court of the District Judge, Civil and Military Station, Bangalore.

The Plaintiff-Respondent in the present appeal sued the Appellant claiming damages for breach of promise of marriage.

The facts as concurrently found by the Indian Courts were as follows:—

The Plaintiff was in 1905 married to William Kelley, but lived apart from him after two years of married life.

The Defendant in 1911 proposed marriage

to the Plaintiff and offered to help her financially in procuring a divorce.

The offer was accepted and with the Defendant's financial assistance the Plaintiff obtained a decree which was made absolute on 11th August 1914. Subsequent to that date the Defendant boarded with the Plaintiff's mother and the parties behaved as an engaged couple.

In June 1919 the Defendant gave the Plaintiff an engagement ring.

In May 1920 the Plaintiff and her mother went to England and returned to Bombay in August 1921.

The Defendant was married in Bombay to a lady other than the Plaintiff in August 1920.

Both Courts in India held that the Defendant was engaged to the Plaintiff until his marriage in 1920 and they found that the Defendant had broken his contract.

The District Judge awarded damages of Rs. 50,000 but that amount was reduced to Rs. 15,000 by the Resident.

The Defendant appealed and the Plaintiff cross-appealed on the question of damages.

Mr. E. L. Thornton for the Defendant contended that the contract to marry was void throughout as being opposed to public policy and could not become operative by ratification. He further contended that it was dissolved by mutual consent.

Mr. R. A. Yule for the Plaintiff.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT DUNEDIN.—This is an action by a lady for breach of promise of marriage against the Defendant. The case was tried by the District Judge of the Civil and Military Station, Bangalore. He formulated the following issue: "Was there a valid contract of marriage?"

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Their Lordships think perhaps the expression there used ought rather to have been whether there was a definite promise of marriage, because the expression "contract of marriage" is usually used in another sense, but it is quite plain what he actually meant. He found that issue in favour of the Plaintiff. He then went on with another issue: "If there was such a valid contract, did the Defendant or the Plaintiff break it either expressly or impliedly?" He found that issue also in favour of the Plaintiff. When the case went to appeal the learned Resident in Mysore found that the engagement did subsist up to the time of the Defendant's marriage with another lady, and therefore a breaking of the contract was necessarily inferred.

The point was taken by the Plaintiff, the Respondent in the main appeal, that these two findings, being concurrent findings of fact, cannot be interfered with, and, to a certain extent their Lordships think that is true, but at the same time the Defendant put forward what he considered a legal plea, because he said that upon a proper consideration of the promise which had been held proved, that promise was not a promise which could be recognised in law, because it was merely a ratification of a void promise which had been made before.

That plea arises upon these facts. It is undoubtedly the case that the Defendant first promised to marry the Plaintiff when, as a matter of fact, she was a married woman. It was understood between them that a divorce was going to take place, and a divorce afterwards did take place; but it has been quite well settled, and no one can doubt the law upon the subject, that a promise made in such circumstances is a void promise. Nevertheless, the

parties considered themselves as engaged persons; behaved as engaged persons, and, though their Lordships need not go through the various circumstances of the case, it is certain that after the divorce proceedings had gone through, and consequently the Plaintiff became a free woman, the Defendant bought her a ring and actually arranged the date on which they were to be married.

The legal point is whether, from circumstances like that, it is possible to infer what really is in law a new promise to marry. There is no difficulty as to consideration because the promise to marry is sufficient consideration. It seems to their Lordships that the case is in precisely the same position as the case of *Ditcham v. Worrall* (1) and their Lordships cannot do better than read a few words from the judgment of Lindley, J., (as he then was) in that case. He says at p. 414:—

"Unless, therefore, the statute" (he is speaking of the *Infants Relief Act*) "forbids such an inference from their conduct, it appears to me that the jury might have found, and ought to have found, that there was a promise by the Defendant after he came of age to marry the Plaintiff on the day ultimately fixed for the marriage, and not a mere ratification of a promise made previously to marry at a day to be thereafter fixed,"

and then he gives reasons for saying that that opinion is warranted by the decision of the House of Lords in the case of *De Thoren v. Attorney-General* (2). Their Lordships entirely agree with that reasoning. It seems to them that when persons fix a day for their marriage it may be inferred from this that there is a promise of marriage, and one is not bound to take it as a ratification of a contract which in itself is void, and which, therefore, in law cannot be rectified by anything that can be subsequently done.

(1) L. R. 5 C. P. D. 410 (1890).

(2) L. R. 1 App. Cas. 686 (1876).

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Accordingly their Lordships think the learned Judges here on the facts, which cannot be controverted because they are concurrent findings, came to a conclusion which they were perfectly warranted in law in coming to.

Although their Lordships did not stop the Appellant from reading the evidence, they really think that the examination of the evidence as to how the parties behaved afterwards was scarcely relevant in view of these two findings, but, as it has been gone into, their Lordships would wish to say that they think that the learned Resident has taken a perfectly correct view of what happened between these two parties. They had lover's quarrels, each was unwilling to take the first step of reconciliation, and so they drifted on with periods of separation, but after a time came together in India, when this renewed promise was made.

Now the learned District Judge held that the matter was made worse by what he considered was a proof of seduction. That proof of seduction was rejected, and rejected their Lordships think upon perfectly right grounds, by the learned Resident on appeal. The result was that the learned Resident, on appeal, reduced the damages from Rs. 50,000 to Rs. 15,000.

Their Lordships, whatever their own views would have been if they had been trying the case, would never think of interfering with a measure of damages which had been fixed by a learned Judge unless they saw that there was something very clearly wrong with the figure which he had fixed upon, and, therefore, as regards this part of the judgment also they do not consider it right that it should be altered.

Their Lordships will therefore humbly advise His Majesty that the main appeal

should be dismissed, and that the Respondent should have such costs as a pauper can obtain, because she has been allowed to defend in *forma pauperis*, and, as her cross-appeal has not been insisted upon, it should also be dismissed, and that there should be no costs to either party in that cross-appeal.

Solicitors: Messrs. Josselyn & Elwes for the Defendant-Appellant.

G. D. M.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD DUNEDIN.

LORD SHAW.

LORD BLANESBURGH.

SIR JOHN EDGE

1925,

Heard,

17, December.

1926,

Judgment,

21, January.

RAJA RAJESWARA
SETUPATI AVARUAL,
Raja of Ramnad,
Appellant,

v.

KAMID ROWTHEN and
ors., Respondents.

Madras Estates Land Act (I, M. C., of 1908), sec. 12—Suit by landholder for compensation for trees cut by occupancy raiya's—Trees growing on tenants' land, not mentioned in lease—Lease dealing with trees on the land as a separate entity—Trees settled with persons other than tenants of land on which they grew—Position of occupancy raiyat in each case—Measure of damages.

The ordinary position of a raiyat is that he is in possession of the land for agricultural uses, but that he is not entitled to cut down trees.

Adverting to the modification of this position as enacted in sec. 12 of the Madras Estates Land Act, I of 1908, M. C., where occupancy raiyats cut down some palmyra trees:

Held—That sec. 12 of the Act applies and the landholder has no claim for compensation for trees growing on the land

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which is held by a raiyat though no mention of trees be made in the lease.

Sec. 12 does not apply where the trees are let to a person on whose land they do not grow and the landholder is entitled to the full value of the trees cut.

MURUGAPPA v. RAMANATHAN (1) *approved.*

Quære.—When the trees grew on land held by a raiyat but were let as a separate entity in his lease.

This was a consolidated appeal (No. 29 of 1924) from a judgment and orders, dated the 24th February 1920, of the High Court at Madras, reversing a judgment and decrees, dated the 5th October 1917, of the Court of the District Munsif of Manamadura.

The suits were filed by the Appellant Raja as Small Cause Court suits in the District Munsif's Court.

The Plaintiff claimed damages against the Defendants for cutting down and carrying away palmyra trees.

The District Munsif decreed the suits and the Plaintiff preferred petitions to the High Court, under sec. 25 of Act IX of 1887, for the revision of the said decrees on the ground that the damages had been wrongly assessed. The High Court dismissed the Plaintiff's petitions and allowed a revision petition preferred by one of the Defendants.

The facts and the findings thereon by the Indian Courts are fully set out in the judgment of the Judicial Committee.

Messrs. L. DeGruyther, K. C. and Kenworthy Brown for the Appellant.

Mr. Narasimham for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by .

LORD DUNEDIN.—The Plaintiff in the

(1) 1 L. W. 831 (1904).

present set of cases is the Zamindar of Ramnad, an estate situated in the Presidency of Madras. The Defendants are riyats who are tenants of the Plaintiff in virtue of certain pottabs. The Plaintiff complained that the Defendants had cut down trees belonging to him. The trees were palmyra trees, which yield a juice which is tapped from the trees, and, as it makes an intoxicating liquor, has a commercial value. The Plaintiff raised separate actions against each alleged wrongdoer in the Court of the District Munsif of Manamadura. The pleading in the case was in the highest degree unsatisfactory and was, as will appear hereafter, the real cause of the unsatisfactory condition of the case on the appeal before this Board. It may be here parenthetically explained that the ordinary position of a raiyat is that he is in possession of the land for agricultural uses, but that he is not entitled to cut down trees. But in Madras there is special legislation dealing with the subject, namely, the Madras Estates Land Act, being Act I of 1908. Sec. 12 of that Act is in the following terms:—

"Subject to any rights which by custom or by contract in writing executed by the raiyat before the passing of this Act are reserved to the landholder, every occupancy raiyat shall have the right to use, enjoy and cut down all trees now in his holding, and in the case of trees which after the passing of this Act may be planted by the raiyat or which may naturally grow upon the holding he shall have the right to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary."

In the definition clause, sec. 3, sub-sec. 6, "occupancy raiyat" is defined:—

"'Occupancy raiyat' means a raiyat having a permanent right of occupancy in his holding."

Then sub-sec. 15 defines "raiayat":—

"'Raiyat' means a person who holds for the purpose of agriculture raiyati land in an estate on condition of paying to the landholder the rent which is legally due upon it."

Sub-sec. 3 defines "holding":—

"'Holding' means a parcel or parcels of land held

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under a single puttah or engagement in a single village."

Now, what the Plaintiff ought to have said in each case was in plain terms that the Defendants were not persons to whom sec. 12 applied, because they were lessees of the trees in terms which made them usufructuaries of the trees, but did not give them the trees as a mere appanage of land let to them, and then to have averred that they had wrongfully cut down the trees. Instead of this, what he did was this (the averments in one case may be taken as a sample of the whole as they are all in terms practically identical). After averring the cutting down of the trees, he said :—

"The Defendant, who is bound according to the custom of the village and Zamin and according to law to pay compensation to the Plaintiff for the said trees, has not done so."

To this the Defendant (again taking one case as a sample) replied first, by denying that the trees had been cut and, second, by denying the custom alleged. It is thus evident that, so far, the real question as to whether the Act of 1908 applied had not been properly raised. It is true that it had been alleged that the pottah was a tree pottah. But that allegation had not been pressed home by the appropriate plea, that the result was that the Act did not apply. On the contrary a custom of payment had been set up, which exactly fits the exception mentioned in the opening words of sec. 12. The parties then went to trial in the Court of the District Munsif of Manamadura. He delivered a judgment. In this judgment he found as a fact that the trees had been cut. He then found in law that, as a *tirva* or rent was paid for the trees, the trees belonged to the Zamindar and that, therefore, at common law, apart from custom, if the tenants cut the trees they must pay damages. He then went

on to deal with the averment of custom as if it had been an averment of custom, not as to right of payment, which it obviously was, but as to scale of payment, which it obviously was not. He then found that there was no universal custom proved as to scale, and thus it being left to himself to determine the figure of damages, he determined them as 25 years' purchase of the annual rent value of a tree. He did not in his judgment make any mention of the Act of 1908. He granted decrees in all cases for a sum representing the 25 years' purchase of the rental value of the trees cut.

From this judgment, an appeal in the form appropriate to such a case from the Munsif's Court, *i.e.*, civil revision petition, was preferred to the High Court of Madras. This was disposed of by Moore, J. He in his judgment, after stating the claim, says this :—

"These Civil Revision Petitions arise out of a number of small cause suits which were brought by the Petitioner, the Raja of Ramnad, to recover from his tenants the value of palmyra trees on their holdings which had been wrongfully cut and appropriated by the tenants. The value of the trees was claimed at the rate of Rs. 3 per tree in one village and Rs. 6 per tree in the other two villages. In C. R. P. No. 1252 of 1918, the Petitioner is the Defendant in one of the small cause suits. It was alleged in the plaint that the Defendants, who were bound according to the custom of the village and Zamin and according to law to pay compensation to the Plaintiff for the trees cut, had not done so. The Defendants denied having cut the trees and the custom alleged in the plaint and claimed the ownership of the trees. They further contended that the value claimed was excessive. The District Munsif found that the alleged cutting was true and that the value claimed was proper for the trees, *viz.*, Rs. 3 and Rs. 6 and that the holding consisted of trees which were assessed to *tirva*. On the third point, *viz.*, 'Whether the alleged usage was true and what relief was Plaintiff entitled to?' the District Munsif held that the proper amount of compensation would 'ordinarily' be the capitalised value of the annual *tirva*, or twenty-five times the annual *tirva*. The findings on the first two points being in Plaintiff's favour, the only question for deci-

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sion in these petitions is whether the method of calculating compensation adopted by the lower Court is correct."

He then mentions the contention of the Defendants under sec. 12 of the Act, but he says no more about it. In other words, he seems to stick to his view that the only question left was the valuation question. He criticises unfavourably the Munsif's view of the 25 years' purchase of the rental value of the trees as the proper measure of damages, a result which, he says, he cannot extract from the proof as to custom, and he then remits the case to the inferior Court for findings on the following points:—

"1. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the Defendants, without the permission of the landholder? 2. If so, what is the compensation payable by the Defendants?"

The case then went back to the lower Court. This time there was a different Munsif. He pronounced a very clear judgment. He said:—

"I have to give findings on the following two issues:—

I. Whether there is a valid custom entitling the landholder to claim compensation for palmyra trees cut by the Defendants without the permission of the landholder?

II. If so, what is the compensation payable to the Defendants?

2. Issue No. 1:—

I have heard Mr. T. C. Srinivasa Ayyangar, pleader for Plaintiff, the Raja, at great length. I have approached the question in the light of the observations contained in the judgment of High Court. I would find the issue in the negative.

Issue No. II requires no finding in view of my finding on issue No. 1."

He also takes no notice of the Act, but assumes that he had been told that the Zamindar's only right to compensation rests on a custom to receive it.

On the return to the High Court of the findings, the Zamindar presented a note of objections. In these objections he, for the first time, raised definitely the

true case as to the application of the Act:—

"4. The District Munsif erred in throwing the onus of proof on the Plaintiff.

"5. The District Munsif erred in assuming that the Estates Land Act had any application to the present case."

The case was then resumed by the High Court with the returned findings and the objections thereto. They, in all the cases, set aside the decree of the lower Court and dismissed the suits. They granted the Respondents their costs in the High Court; in one case they directed that there should be no costs in the lower Court, but in all the other cases they were silent as to the costs in the lower Court. The opinion of the learned Judge who delivered the leading judgment begins with the statement that "the counter-Petitioners are the tenants of land on which trees were and are standing." He then goes on to say:—

"The remaining questions for consideration are:—

(1) Whether the District Munsif was right in allowing as damages not the value of the trees cut, but only 25 times the *tirru* payable; and

(2) Whether Plaintiff (Petitioner) is legally entitled to claim damages at all, in other words, whether the tenants have got absolute right to deal with the trees in any manner without being liable for any damages for so dealing. So far as the first question is concerned, I might at once say that if the tenants are legally liable for damages, they ought to have been made to pay the market value of the trees and not 25 times the *tirru*. But, on the second point, I am of opinion that the Defendants are not liable for any damages at all."

After dealing with an argument which seems to have been presented that the right to cut down trees does not include the right to appropriate them, which he negatives, he then comes to the true question of the case. This portion of his judgment must be quoted in full and is as follows:—

"Lastly it was argued that the Defendants are not raiyats holding lands for agricultural purposes, but that they are merely persons who have been allowed

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to enjoy the produce of the trees on payment of some remuneration to the landholder which remuneration does not fall within the definition of rent in the Estates Land Act, and that therefore sec. 12 has no application at all. The muchilikas, Exs. E series, executed by the tenants do not, in my opinion, support this contention. They are all ordinary muchilikas of the kind usually executed by raiyats holding land under the Zamindar. The only special feature of these muchilikas is that the fixed rent payable by the raiyat who holds the land, calculated on the area of the land, which is described as *Regai punja*, is increased by an amount varying with the number and size of the trees in the holding. Under the definition in cl. 1 of sec. 3 of the Act, agriculture includes horticulture, and the fact that the rent for the land varies with the number of trees standing thereon does not make the raiyat a mere licensee enjoying the produce of the trees under the landlord. He is the occupancy raiyat of the land itself with the trees thereon, though paying varying rents according to the number of trees existing on the land. (We were told in the course of the argument that the assessment was varied once in six years, according to the number of trees at the time of the periodical settlement.) Reliance was, however, placed on the decision in *Murugappa v. Ramanathan Chettiar* (1) for the contention that these were not muchilikas for the land held by an occupancy raiyat, but that these are agreements for payment of *rari* or tax payable in respect of the trees held on tree pattas. We have not before us the muchilika executed in that case and if, on a consideration of the terms of that muchilika, it was held that it was an agreement by a licensee to pay *tirra* for enjoying the produce of trees without any *kudicaram* right in him in the land on which the trees stood, I accept (if I may say so with respect) the correctness of that decision. But, as I said, I am satisfied in this case that the land itself on which the trees stand is held on patta, though the rent payable for that land varied with the number of trees standing on it, owing to a certain amount (varying according to the number of trees) being added to the invariable rent based on the extent of the land. Therefore, the Estates Land Act does apply to the relationship of landlord and tenants in this case."

Spencer, J., concurs and says as follows:—

"The suggestion that sec. 12 of the Madras Estates Land Act does not apply in this case was put forward on the assumption that the pattas in the suits were purely tree pattas and not pattas for land. But a reference to the muchilikas on the record shows that this is not the case. I agree with my learned brother

both on the general question as to the effect of sec. 12 of the Madras Estates Land Act, and as to the order to be passed in particular cases."

It is, therefore, quite clear that the case has been decided upon the ground that the raiyats were holders of land on which trees stood, that they had cut trees standing on their own holdings, and that they had the right so to cut them in respect of sec. 12 of the Madras Act. It is clear also that, had the tenants' right to the trees not depended on the fact that the trees stood on their holdings, but had depended on a separate lease of the trees as trees, whether trees stood on their holdings or on the holdings of other persons, the learned Judges would have come to the opposite conclusion and would have held that the damages for illegal cutting were to be measured by the value of the trees so cut and, lastly, it is clear that the reason that they held that the trees in question were held as part of the land holdings and not in respect of a separate title was not in respect of any local knowledge as evidenced by proof led, but because they determined the fact as a matter of construction of the leases in question of which the *muchilikas* or tenants' counterpart were produced. Their Lordships are in entire concurrence with the learned Judges as to the result in law if the trees are held on what may be called separate title. In such a case sec. 12 of the Madras Act does not apply, and they think that the case cited of *Murugappa v. Ramanathan* (1) was rightly decided. They think also that the result that follows was rightly affirmed by the learned Judges, i.e., that the full value of the trees which had been illegally cut must be paid for.

But their Lordships are quite unable to concur with the reasons of judgment on

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the further point. From the reference made to the Ex. E series of the *muchilikas* it would seem as if the learned Judges had exclusively directed their attention to a case where there is both land and trees which are included in the lease. In one case at least, by a comparison and reference, perhaps it is possible to infer that some at least of the trees are on the land let, but that is not the case with all. Moreover there are a large number of *muchilikas* which deal with trees and trees alone. How can it be possible to deduce from this, as a matter of construction, that these trees are on a land holding of the person to whom the tree right is granted? How can it be told that he holds any land at all? It is matter of common knowledge—and the case already mentioned is an instance—that, in view of the known use of the palmyra tree, leases of what are only the usufruct of the trees as such are granted. Many of the *muchilikas* produced point to such a lease. But in the judgment they have all been compelled to suffer the fate of the *muchilika* which is above mentioned. If the judgment stands it would be very far-reaching and, in granting leave to appeal to the King in Council, the learned Judges seem fully to appreciate that fact. In their Lordships' view, the facts on which the case depends have not been properly found one way or other.

There are just three situations in which palmyra trees may be held:—

1. They may simply be growing on land which is held by a raiyat, though no mention of trees be made in any lease.

2. They may be growing on land held by a raiyat, but they may be let as a separate entity in his lease.

3. They may be let to a person on whose land they do not grow.

Assuming trees to be cut without the

leave of the landholder the position in law as regards 1 and 3 seems simple.

As regards 1, sec. 12 of the Act of 1908 applies and the landholder has no claim.

As regards 3, sec. 12 of the Act of 1908 does not apply and the landholder has a claim for the full value of the trees so cut.

As regards 2, their Lordships will not express an opinion because, as yet, there is no determination of the question so far as they know, by the Courts in India, and they would wish such a determination before coming themselves to a conclusion.

But as regards the cases in this appeal, there are no materials for ascertaining positively in regard to the 30 separate cases in which of the three categories each case falls. They cannot be taken in a block. Each case stands on its own facts. Their Lordships have, therefore, come to the conclusion that these cases must go back to the Courts in India to determine on evidence of fact in each particular case into which category it falls and, in accordance with that determination, to pronounce or refuse decrees in each particular case. As regards costs, for the reasons stated in this judgment, their Lordships consider that the confusion into which the cases have fallen is largely due to the inadequate pleading of the Plaintiff. At the same time the Defendants ought not to have denied the cutting—a fact which has been determined against them. Their Lordships, therefore, think that the case should be remitted as aforesaid, that the Respondents should have the costs of the appeal before this Board, and in each of the Courts below, except the costs of the original inquiry before the first Munsif; that, in that inquiry in the case of all Defendants who denied cutting of trees, there should be no costs to either party; and that the

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costs of the future progress of the case should be determined by the Courts in India. They will humbly advise His Majesty to issue an order in accordance with these views.

Solicitors: Messrs. Chapman, Walker & Shephard for the Appellant.

Solicitor: Mr. H. S. L. Polak for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)

LETTERS PATENT APPEAL

No. 52 OF 1925.

CUMING, J.	MUNSHI SALIMUDDIN
MUKERJI, J.	AHAMMAD, Plaintiff,
1926,	Appellant,
Heard,	v.
21, January.	RAHIM SHEIK and
Judgment,	ors., Defendants,
8, February.	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 153—Amount of rent annually payable—Decree passed upon finding that the landlord has no co-sharer, if amounts to a decree as to the share of rent payable by the tenant.

The trial Court awarded a decree to the Appellant for the full amount of rent claimed, finding that he had no co-sharer. The first Appellate Court dismissed the Respondents' appeal on the ground that sec. 153 of the Bengal Tenancy Act was a bar to its maintainability. A single Judge of the High Court on second appeal set aside the decree of the first Appellate Court holding that the appeal to it was competent, because the decree of the trial Court decided a question of the amount of rent annually payable by the tenant:

Held, on appeal under the Letters Patent—That the primary Court having found that the landlord Appellant had no co-sharer, it had no occasion to decide, and in fact it did not decide

the question as to the share—the amount—of the rent which he was entitled to.

The finding that the landlord has no co-sharer and is therefore entitled to the whole rent claimed is not a decision of the question as to the amount of rent annually payable by the tenant.

SUDHANNA SANTRA v. BASANTA KUMAR SARKAR (1), NARAIN MAHATON v. MANOFTI (2), WAFUZZUDDIN PRAMANIK v. MAHAMMED BALAKI (3), PARASHMONI DASI v. NABO KISHORE LAHIRI (4), BASHIRAM NATH v. SRINATH (5) and FAKHER MANDAL GAIN v. ARSHED MOLLA (6) referred to.

This was an appeal under cl. (15) of the Letters Patent against the decree of CHAKRAVARTI, J., dated the 31st of March 1925, passed in appeal from Appellate Decree No. 1123 of 1923.

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and Babu Manindra Nath Roy for the Appellant.

Babus Jitendra Kumar Sen Gupta and Ramendra Mohan Majumdar (for Biraj Mohan Majumdar) for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MUKERJI, J.—This appeal arises out of a suit for rent under the Bengal Tenancy Act. The Plaintiff landlord obtained a decree for the entire amount of his claim in the Court of first instance. The tenants Defendants preferred an appeal which was held as barred by the provisions of sec. 153 of the Act. They preferred a Second Appeal to this Court with

(1) I. L. R. 49 Cal 58; s. c. 20 C. W. N. 60 (1921).

(2) I. L. R. 17 Cal. 489 (F. B. (1900).

(3) 28 C. W. N. 1xxii (1924).

(4) I. L. R. 30 Cal. 778; s. c. 8 C. W. N. 193 (1903).

(5) 23 C. W. N. 1xxvi (1919).

(6) 10 C. W. N. cclxxx (1905).

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the result that the decree of the Subordinate Judge has been set aside and the case has been remitted to his Court for the appeal being dealt with on the merits. Against this judgment the present appeal has been preferred by the Plaintiff under cl. (15) of the Letters Patent.

The judgment under appeal has held that a first appeal lay, notwithstanding the provisions of sec. 153, for the decree of the trial Court decided a question of the amount of rent annually payable by the tenants. The Plaintiff's case was that he had purchased the interest of one Bepin from his sole widow Janaka Sundari. The Defendants in their written statement challenged the factum and validity of the purchase by the Plaintiff and averred that even if the purchase was established, the Plaintiff was not entitled to claim 16 annas of the rent as Bepin had left two widows, namely, Janaka Sundari and Sukhada Sundari, and that the suit could not proceed in the absence of the latter who was a necessary party. I may observe in passing that in the written statement I do not find any statement that the Plaintiff was entitled to 8 annas and not 16 annas of the rent, as I find stated in the judgment under appeal. That however is not a matter of much importance. The Munsif found that Janaka Sundari was the sole widow left by Bepin and decreed the suit for the amount claimed. The issues raised, or rather the points for determination set out, in the judgment of the Munsif, were : 1st, Does the relationship of landlord and tenant exist between the parties? 2nd, Is the suit bad for defect of party? 3rd, Is the Defendants' plea of payment true? And 4th, What relief, if any, is the Plaintiff entitled to? My learned brother Chakravarti, J., has ob-

served, and in my opinion rightly, that whatever may be the wording of those questions for determination, the matter for consideration, in order to determine whether an appeal lay or not, is a matter of substance and not of form. He was of opinion that if the question raised by the Defendants was determined in their favour it might be that the Plaintiff instead of getting a decree for the 8 annas of the rent might not get any decree for rent because the other co-sharer was not a party to the suit and the suit might fail. He, however, took the view that the determination of the first and the second issues set forth above involved the determination of the question as to whether the Plaintiff was the sole landlord or a landlord to the extent of an 8 annas share and therefore the decree for the entire rent must be read as a decree determining that the amount of rent payable was 16 annas and overruling the defence of the Defendants that it was only 8 annas and not more.

In a matter like this which relates to the curtailment of a right of appeal if there is the slightest doubt in one's mind, the benefit of that doubt should go to the party who seeks to appeal; and were it not for the opinion that I have formed, namely, that to adopt the aforesaid line of reasoning would be practically to make the provisions of sec. 153 nugatory by putting it in the power of the tenant to defeat the said provisions by taking a defence of this character, however unsubstantial it may be, I would not have touched the judgment of my learned brother in this case.

In a suit for rent the tenant may dispute the amount of the rent of the tenure or holding or the landlord's title to the entire rent or to the share of the rent which he claims and may allege that the amount of the rent or the share is less.

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In such cases, if the defence is pressed, the landlord is called upon to prove the amount of rent or is put to the proof of his title to the share or to the amount which he claims, as there is a real controversy between the parties on these points and the Court has necessarily to decide a question of the amount of rent or the rent payable to the landlord, whichever way the decision may go. There may be cases however where the afore-said defences of the tenants are dependant entirely on his averment that there is a co-sharer or there are co-sharers. In those cases it becomes necessary to go into these defences only in the event of the Court finding that there is a co-sharer or that there are co-sharers. If the finding be that there is no co-sharer of the Plaintiff the other questions do not arise and there is no occasion or necessity for the Court to decide the question of the amount of rent. The decision of the Court in such cases, whether dismissing the suit on the ground of non-joinder of Plaintiffs or decreeing the suit in Plaintiff's favour, does not expressly decide and cannot by implication be held to have decided the question.

Certain decisions of this Court have been placed before us as explaining the law on the point and it is necessary to consider them in order to see whether they, in any way, militate against the propositions enunciated above. In the case of *Sudhanna Santra v. Basanta Kumar Sarkar* (1) the facts were these: The Plaintiff claimed rent at the rate of Rs. 8-3-8 pies on the ground that he had inherited a 6 annas 8 gandas share in *maliki* right from his mother and a 9 annas 12 gandas share in *ijara* right from his father. The defence was that the

Plaintiff was entitled to the 6 annas 8 gandas share in *maliki* right and, not the 9 annas 12 gandas share in *ijara* right. The Court found that the Plaintiff was entitled to both the rights and gave a decree at the rate claimed. There was thus a substantial point in controversy, namely, whether the amount payable to the Plaintiff was to be calculated at the rate claimed or two-fifths of that rate. This Court on a review of most of the authorities bearing on the point held that a question as to the amount of rent payable was determined as these words in sec. 153 signified the amount of rent payable by the tenant to the landlord who had instituted a suit for rent, a question which had been settled by a Full Bench decision of this Court in the case of *Narain Mahaton v. Manofi* (2). This case clearly comes within the first class of cases to which I have referred, and there is an appeal. The next case is that of *Wafuzuddin Pramanik v. Mahammed Balaki* (3). I have perused the original judgment of this Court in that case. The Plaintiff claimed rent at Rs. 9-11 annas in his 4 annas share. The defence was, firstly, that Plaintiff had other co-sharers in the 4 annas share in whose absence the suit was not maintainable, and secondly, that the suit was also not maintainable as there had been no separate collection of the Plaintiff's share of the rent. The trial Court gave effect to both these pleas and dismissed the Plaintiff's suit. It was contended on the authority of the cases of *Narain Mahaton v. Manofi* (2) and *Sudhanna Santra v. Basanta Kumar Sarkar* (1) that from this decision an appeal lay as a question as to the amount of rent

(1) I. L. R. 49 Cal. 538 at p. 543; s. c. 26 C. W. N. 96 (1921).

(2) I. L. R. 17 Cal. 489 (F. B.) (1890).

(3) 26 C. W. N. 1221 (1924).

(1) I. L. R. 49 Cal. 538; s. c. 26 C. W. N. 96 (1921).

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had been determined. This contention was overruled by this Court and it was held that no appeal lay from the said decision. This case falls within the second class of cases to which I have referred. In the case of *Parashmoni Dasi v. Nabo Kishore Lahiri* (4) the Plaintiffs claimed 8 annas share of the total rents alleging that though they were proprietors of an 1 anna odd gandas share, by an amicable arrangement with their co-sharers they were entitled to realize the said 8 annas share and the Defendants disputed the amount of the *jama* and further pleaded that the Plaintiffs were not entitled to recover more than 1 anna odd gandas share, and the Court passed a decree for the last-mentioned share. It was held that "the question raised and decided was not merely the amount of rent payable to the co-sharer but whether he had a right to recover an 8 annas share of the rent" and an appeal lay. This is a case which clearly comes within the first class of cases to which I have referred. The case of *Bashiram Nath v. Srinath De* (5) was also referred to before us in this connection. In that case the objection to the competency of an appeal to this Court was taken when the appeal was from an Appellate decree of the Subordinate Judge in which he had held that the Plaintiff was not entitled to the 16 annas of the rent he claimed but to only 8 annas of it as he had a co-sharer who was entitled to the other 8 annas share. This objection was overruled and in my opinion rightly as the case was one in which the question of the Plaintiff's right was raised and determined. This case, it may be said, was one in which the existence of the co-sharer having been found it became

necessary to decide the question of the share and in point of fact that question was decided. It was observed in the case of *Sudhanna Santra v. Basanta Kumar Sarkar* (1) that the said decision was affirmed on appeal under the Letters Patent. The case of *Fakeer Mandal Gain v. Arshed Molla* (6) also has been cited before us. In that case it was held that an appeal lay to this Court from a decree of the lower Appellate Court in which overruling the Defendant's contention that the Plaintiff had acquired only an 8 annas share, a decree for the rent of 16 annas had been given to the Plaintiff. It was held by this Court that no appeal lay. It will be seen, however, that doubt has been cast upon the authority of this decision [*Sudhanna Santra v. Basanta Kumar Sarkar* (1)]. Indeed the case would come within the first class of cases mentioned above and judged by the test laid down here an appeal should have been held as competent.

In the present case in view of the fact that it was found that the Plaintiff had no co-sharer, I am unable to hold that the Court had any necessity to go into any question as to the share of the rent to which the Plaintiff was entitled and I do not see that any such question was, in fact, decided. If we were to hold otherwise, it would be open to any Defendant to state that the Plaintiff has some co-sharer and so he is not entitled to the whole rent, and though this statement may be utterly false he would be able to get a right of appeal and defeat the provisions of sec. 153, Bengal Tenancy Act, merely by such an assertion, though there may be no controversy at all about the amount of rent which the Court may be

(4) I. L. R. 20 Cal. 773; s. c. 8 C. W. N. 198 (1903).

(5) 23 C. W. N. Lxxvi (1919).

(1) I. L. R. 49 Cal. 538 at pp. 542-543; s. c. 26 C. W. N. 96 (1921).

(6) 10 C. W. N. cclxxx (1905).

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called upon to decide. I am therefore of opinion that no appeal lay in this case from the Munsif's decision.

The decision of Chakravarti, J., is accordingly set aside and that of the Subordinate Judge restored with costs in the two appeals in this Court.

CUMING, J.—I agree.

H. D. C.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 759 OF 1925.

C. C. GHOSE, J.

DUVAL, J.

1926,

BATAI MONI DASSI,

Appellant,

Heard, 4 and

5, March.

r.

THE KING-EMPEROR.

Judgment,

9, March

Excise Act (V, B. C., of 1909), sec. 46 - Illegal possession and sale of cocaine—Statements of accused and a servant of the accused obtained while in custody of excise authorities, if admissible in evidence—Opinion of excise officer as to reputation of accused as a dealer in cocaine, if admissible—Conviction on residue of evidence—Exemplary sentence passed by Magistrate relying on extraneous matters not supported by evidence—Impropriety of such sentence—Prosecution, how to be conducted without prejudices to accused.

The Petitioner was convicted under sec. 46 of the Bengal Excise Act for illegal possession and sale of cocaine and sentenced to one year's rigorous imprisonment on each charge. The trying Magistrate in determining the sentence remarked that the accused was carrying on cocaine dealing in a very large way, that her reputation for years had been that of one of the most notorious of cocaine dealers and that she possessed some of the finest equipages in Calcutta and three motor-cars and an exemplary sentence was necessary. It appeared that in the course of the trial various complaints were made by the accused as

regards the manner in which the search was conducted and in which she herself was treated, that certain statements obtained from the accused and one of her servants while in custody in the excise barracks were received in evidence and that the opinion of the excise officer as to the reputation of the accused as a dealer in cocaine on a large scale elicited from him by the Magistrate was also admitted in evidence:

Held—That the statements in question which could not be considered as voluntary statements should not have been received in evidence.

That the Magistrate should not have allowed the excise officer's opinion as to the reputation of the accused to be admitted in evidence.

That excluding the inadmissible evidence the residue was enough to justify a conviction, but there being no evidence as to the matters relied on by the Magistrate in passing an exemplary sentence, in fixing which he was influenced by extraneous matters, the sentence inflicted was extraordinarily severe and quite uncalled for.

That there might be exaggerations in the complaint made by the accused about the manner in which her premises were searched and the way she was treated, but indications were not wanting on the record to show that the search was conducted and the accused detained in an inconsiderate manner.

Prosecutions ought to be conducted fairly and squarely and nothing should be done so as to give ground for complaint on the part of the accused.

This was an appeal preferred on the 16th of November 1925 against an order of Mr. Keays, Additional Chief Presidency Magistrate, Calcutta, dated the 10th November 1925.

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The facts of the case will appear from the judgment.

Sir B. C. Mitter, Mr. S. K. Sen, Babus Probodh Chandra Chatterji and Saraj Kumar Dutt for the Appellant.

Messrs. B. L. Mitter (Advocate-General) and J. C. Guha (Advocate) for the Crown.

The JUDGMENT OF THE COURT was as follows :—

The Appellant before us Srimati Batasi Moni Dassi has been convicted by the learned Additional Chief Presidency Magistrate of Calcutta under sec. 46 of the Bengal Excise Act (Act V, B. C., of 1909) for having sold cocaine and for being in possession of cocaine without a pass or license and has been sentenced to undergo rigorous imprisonment for a period of one year under each of the said two charges, the sentences to run consecutively.

The trial commenced on the 5th February 1925 and did not terminate till the 10th November 1925. On the day the trial commenced, the case against the present Appellant was split up into two parts, viz., one charge in respect of the sale of three ounces of cocaine, and the other in respect of possession of cocaine. The case relating to the sale of cocaine was ordered to be proceeded with and on the 3rd March 1925 the Magistrate passed an order to the effect that the case in respect of possession of cocaine would be taken up after the disposal of the case in respect of the sale of cocaine. This was done apparently because as the Magistrate himself said later on he had no idea that the second charge against the accused related to a case of possession of cocaine on the same day as that on which it was alleged she sold the three ounces of cocaine. This Court having been moved by the accused against the order for adjournment

of the hearing of the second charge, the Chief Justice and Mr. Justice Panton directed on the 27th May 1925 that the two charges, viz., for sale and for possession of cocaine against the accused should be proceeded with in one and the same trial. This was accordingly done and as stated above the trial came to an end on the 10th November 1925, the delay in disposal being partly due to the accused's illness.

In passing sentence upon the accused the Magistrate observed as follows :—
“The evidence shows that the accused was carrying on cocaine dealing in a very large way. It has been elicited in cross-examination that her reputation for years has been that of one of the most notorious of cocaine dealers. In the course of his speech for the defence Babu Kristo Lal Dutt stated that she possessed some of the finest equipages in Calcutta and three motor-cars and exemplary punishment is necessary. I sentence the accused to one year's rigorous imprisonment under each charge, the sentences to run consecutively.”

In view of the order which we propose to make, the extract from the judgment of the Magistrate set out above requires separate consideration. But before we advert to it, it will be desirable to state shortly the facts giving rise to the present prosecution. It appears that sometime in January 1925 information was received by the Superintendent of Excise Mr. S. N. Roy that cocaine was being sold by the accused in contravention of the provisions of sec. 46 of the Bengal Excise Act. Mr. Roy thereupon arranged with one Ram Lakshman Singh to purchase cocaine from the accused. On the 26th January 1925 he gave Ram Lakshman Rs. 180 in currency notes, the numbers of which had been previously taken down by

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him on a piece of paper (Ex. 2 in the case). Ram Lakshman, who was accompanied by two other persons named T. Ali and Inspector B. K. Bose, was thereupon sent with orders to purchase cocaine from the accused. Ram Lakshman went into the accused's premises, while the others waited a short distance away. This was about 3 P.M. in the afternoon. It is alleged that Ram Lakshman purchased 3 ounces of cocaine from the accused for a sum of Rs. 180 and that payment was made to the accused in notes, the numbers of which, as stated above, had been taken down on Ex. 2.

Mr. Roy, on receipt of information of the purchase of cocaine, raided the premises of the accused, that is, premises No. 28, Ahmerst Street. The raiding party went in ten taxi cabs and scaling ladders were used for the purpose of getting into the accused's premises. Ram Lakshman said in the presence of the accused that he had purchased three ounces of cocaine from the accused but the latter denied that she had sold any cocaine to Ram Lakshman. The premises were thereupon searched and a large number of packets of cocaine were discovered in the kitchen. Scrapings from the floor were also taken and, as will be seen later, they also contained cocaine. A search-list was prepared, being Ex. 3/1, and it appears that the articles which were suspected to contain cocaine were sealed in the presence of the accused, she also sealing the same. Some of the packets of cocaine were intact and some were half burnt and it was alleged that the accused and two other women, being her maid-servants, were putting some packets in the fire in the kitchen at the time when they were surprised by the raiding party. Meanwhile the Superintendent, Mr. Roy, having received information that the

money which had been given by him to Ram Lakshman had found its way into a shop at premises No. 27, Ahmerst Street, there premises being also owned by the accused, proceeded to the shop in question and recovered certain of the currency notes of the value of Rs. 98 mentioned in Ex. 2 from one Pran Ballav Shaw, who was in charge of the shop in question. In consequence of a statement made by Pran Ballav (who was an accused in the case but has been discharged) early the next morning Rs. 70 more of these notes were recovered from a rice shop at Tollygunge. Besides the articles found in the kitchen there was also found in the bed-room of the accused in an iron chest a pair of scales. The suspected packets of cocaine, as also the scales, certain empty tins, some water and other articles were sent to the Chemical Examiner for Customs and Excise and it was discovered that there was cocaine in the packets referred to above, in the scrapings from the floor which had been taken and also on the scales. Thereafter the present prosecution was started, with the result indicated above.

The accused alleged that on some date previous to the search, there had been a quarrel between her and the Superintendent of Excise Mr. Roy over a debt due to the shop at 27, Amherst Street, by a deceased connection of Mr. Roy and that as a result thereof her premises were raided out of pure revenge by the excise people. She alleged that the search of her premises was conducted in a spirit of vindictiveness and went on to state as follows:—

“That nearly 70 men, excise and police officers, rushed pell-mell into the house, some rushing up the staircase, some scaling over ladders and the excise men overran the whole house, wantonly breaking door panels, glasses, almirahs

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and boxes, tearing up bolsters and pillows and doing various other acts of wanton mischief. That immediately the raiding party reached the first floor I was seized by 2 excise orderlies under orders of Inspector S. C. Mozumdar in my bedroom and threatened to be dishonoured if I made the slightest attempt at movement. That I protested against the wanton destruction of my properties and wanted permission to send for a Magistrate, but no heed was paid to my request and they proceeded with the search of the whole house indiscriminately while I was in that position. That after ransacking the house for more than 3 hours some articles were brought into the bedroom where the search witnesses were waiting all the time and a list of them was made out and I was asked to put my seals on some of the articles. I was also asked to put my thumb impression on the search-list, which I declined to do as I did not understand English but which I had to do for fear of molestation. That I was kept in custody in my house till 1 o'clock in the morning and then taken without food and even a drink of water and without being allowed to answer calls of nature. That "thereafter I was removed to the excise barracks where I was kept in the same condition and was compelled to put my thumb impression on a piece of paper. That it was the next morning at 6 o'clock when I was taken to the Sukea Street thana that I got my first drink of water after 14 hours and physical worry and harassment. That it was absolutely untrue that I sold 3 ounces or any cocaine to Ram Lakshman as falsely alleged by him or that I ever possessed any cocaine in the house." It appears that during the examination and cross-examination of the witnesses the manner in which the search was conducted was gone into. The ac-

cused complained to the Magistrate that a full note had not been taken down in recording the evidence of the fact that the Superintendent of Excise, Mr. S. N. Roy, admitted that 16 or 17 bolsters or pillows were torn open during the search and that the witness Bhubaneshwar Shaw had said that Mr. Roy told the accused "that he would give her a shoe beating and turn her out of the house." (See in this connection the petition of the accused filed on the 6th November 1925 and the Magistrate's remarks thereon).

Turning now to the evidence on record at the outset we must express our regret that various matters which ought never to have been allowed to get on to the record have been so allowed by the Magistrate. In our opinion the statements which had been obtained from Pran Ballav Shaw and the accused are not such as should have been received in evidence at all. They were taken by the excise officers after they had taken the accused and Pran Ballav to the excise barracks and while they were in custody, and they, i.e., the statements, in our opinion, cannot be considered voluntary statements and it is surprising that these should have been made exhibits in the case. It is equally surprising that the Magistrate should have asked the Superintendent of Excise, Mr. Roy, what reputation the accused had and that he should have allowed Mr. Roy's opinion of the accused's reputation as being a dealer in cocaine on a very large scale to be admitted in evidence and to influence him in his decision. Further, in our opinion, the Magistrate should have insisted on the production in Court of the search witnesses who were present at the search of the accused's premises. We are not unmindful of the fact that K. N. Bose, who was present at the search, has been examined, but some at

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least of the other search witnesses referred to by Mr. Roy in the course of his evidence should have been examined before the Magistrate. K. N. Bose is obviously a person who stands well with the excise authorities. It is admitted that he is a neighbour of the Superintendent of Excise and that he has often been out on cocaine raids with the Superintendent and that he expects a reward on conviction of the accused. These and other matters had led us to scrutinise the evidence in this case with some degree of suspicion and what we have done is to eliminate from our consideration such parts of the evidence, both oral and documentary, to which exception can justly be taken. But having done so, we are bound to state that the residuum of the evidence on record and the accused's statements in Court are sufficient to justify the conviction of the accused. There is in our opinion abundant evidence that cocaine was found on the premises of the accused at the time of the search; whether there were as many as 500 packets of cocaine or not is a circumstance into which we need not enter. The fact that cocaine was found in the premises of the accused cannot be denied. There is no substance in the contention that the accused had nothing to do with the cocaine which was found at the search and that it was the maid-servants who had brought the cocaine in question into the premises. The suspected packets, as stated above, were sealed at the time of the search, one of the seals being the accused's. They were examined by the Chemical Examiner for Customs and Excise and it is noteworthy that traces of cocaine were found on the pair of scales belonging to the accused which were in an iron safe in the accused's bedroom of which the accused produced the

key. There is also in our opinion sufficient evidence on record to justify the conclusion that the accused had sold cocaine to Ram Lakshman Singh. Ram Lakshman Singh's evidence has been subjected to minute and vigorous criticism. It is said that there is evidence that Ram Lakshman will get a reward of as much as Rs. 500 on conviction of the accused and that indications are not wanting on the record to show that Ram Lakshman is a man who is more or less in what is called the pocket of the excise authorities. A great deal of criticism has also been levelled at the evidence by which it has been sought to connect the find of the currency notes, of which the numbers had been taken down previously in the shop where Pran Ballav Shaw is employed, with the accused. We are free to admit that the evidence on this last point is not particularly satisfactory, after we have eliminated from our consideration Exs. 4 and 9 being the statements made to the excise officers; but making all allowances in favour of the accused, we do not see that there is any escape from the conclusion that she did sell 3 ounces of cocaine to Ram Lakshman Singh and that the notes paid therefor did pass to her tenant's shop and some of them therefrom to Tollygunge. At the time when the accused's premises were raided, the quantity of cocaine which it was alleged she had sold to Ram Lakshman was produced before her. No doubt she denied that she had sold the cocaine to Ram Lakshman; we do not see what else she could do under the circumstances; but the evidence of Inspector B. K. Bose, Inspector S. C. Mozumdar, T. Ali, corroborating Superintendent Roy, on this point must be accepted. The result, therefore, as indicated above, is that in our opinion there is sufficient evidence on

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the record to justify the conviction of the accused on the two charges mentioned above.

There now remains for us to consider the question of the sentence to be inflicted on the accused. It is apparent from the judgment of the Magistrate in this case that extraneous matters have been allowed to influence him in determining the sentence which he passed on the accused. There is in our opinion no evidence to show that the accused was carrying on cocaine dealing in a very large way. We have already commented on the fact how evidence of repute was extracted by the Magistrate during the cross-examination of Mr. S. N. Roy. There is also no evidence on record that the accused possessed some of the finest equipages in Calcutta and three motor-cars. What the possession of equipages and motor-cars by the accused had got to do with the question of the sentence to be passed on the accused passes our comprehension. The learned Advocate-General very properly expressed his deep regret on behalf of the Crown that these and other irrelevant matters should have been referred to by the Magistrate in his judgment and at the way in which the case had been conducted in the police Court. There may be exaggerations in the complaint made by the accused about the manner in which her premises were searched and the way she was treated; but indications are not wanting on the record to show that the search was conducted and the accused detained in an inconsiderate manner. The prosecution in cases of this nature, or for the matter of that in every case, ought to be conducted fairly and squarely and nothing should be done so as to give ground for complaints on the part of the accused such as have been made in this case. We trust it will

not be necessary for us to repeat the observations we have just made in future.

The sentence inflicted on the accused, namely, one year's rigorous imprisonment on each of the two charges, the sentences to run consecutively, is, in our opinion, if not outrageous, extraordinarily severe and quite uncalled for. After full and careful consideration of the entire record, we have come to the conclusion that the ends of justice would be sufficiently met if we sentenced the accused to undergo rigorous imprisonment for a period of one month and to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for one month more, on each of the two charges, the sentences to run consecutively. We accordingly modify the sentences in manner indicated above and with this modification we dismiss the appeal. The Appellant who is on bail must surrender to her bail bond and serve out the remainder of the modified sentences.

S. C. M.

(CRIMINAL REVISIONAL JURISDICTION.)

Ref. No. 22 of 1925.

WALMSLEY, J.

MUKERJI, J.

1925,

Heard, 15 and

16, July.

Judgment,

21, July.

EMPEROR

v.

YAKUB and ors.,
Accused.

Jury, trial by—Disagreement between Judge and jury—Unanimous verdict of guilty—Reference to High Court for acquittal—Accused given benefit of doubt and acquitted.

The Appellants were tried by a jury on charges under secs. 147, 325 read with sec. 149, I. P. C., and unanimously found guilty. The Sessions Judge made a reference under sec. 307, Cr. P. C., recom-

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mending the setting aside of the unanimous verdict:

Held (on a consideration of the entire circumstances)—*That the whole case was suspicious and the real facts in connection with the occurrence and circumstances under which it took place had not been disclosed by the prosecution, nor was the case for the defence entirely true and to convict the accused under such circumstances was likely to cause miscarriage of justice and the accused should be given the benefit of the doubt and the verdict of the jury set aside.*

This was a Reference under sec. 307, Cr. P. C., made by the Assistant Sessions Judge of Dacca (Mr. Satindra Nath Guha), dated the 29th April 1925, as he disagreed with the verdict of the jury.

The facts of the case will appear from the judgment.

Babu Satindra Nath Mukerji for the Crown.

Babus Suresh Chandra Talukdar and *Kiran Mohan Sircar* for the Accused.

Babu Mukund Behari Mullik for the Complainant.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This is a Reference made by the Assistant Sessions Judge of Dacca under sec. 307, Cr. P. C., recommending that the unanimous verdict of the jury convicting the accused under secs. 147 and 325/149, I. P. C., be set aside.

The accused persons are six in number, Yakub, Sahadat, Bihal, Niaz Ahmed, Ali Ahmed and Mahamed. Yakub is brother-in-law of Bihal (the two being the husbands of two sisters). Sahadat and Mahamed are sons of Yakub. Niaz Ahmed and Ali Ahmed are sons of Bihal.

The prosecution case shortly stated

was this : In village Shyampur there is a Namasudra *basti* populated mostly by Namasudras. In this village there is the homestead in connection with which the present occurrence took place. It lies on the north of a small *khal*, and also on the west of it with a sugarcane field lying between. Just to the north of it is the *bari* of one Raj Mohan Mistry who is the person who lost his life in this occurrence. This homestead together with the sugarcane field belonged to two brothers Harilal and Akshoy in equal shares. In or about April 1924 Harilal sold his undivided 8 annas share of the homestead to the accused Yakub and removed to his father-in-law's house. Akshoy died sometime ago, and his son Dharani in April or May 1924 mortgaged his undivided 8 annas share with possession to the wife of one Jumair. Rajendra, the sister's son of Harilal and Akshoy, purchased the right, title and interest of the mortgagee and then sold it to one Hafizuddi, son-in-law of the accused Yakub. The case for the prosecution is that Harilal on selling his share removed his huts leaving only some materials of one hut on the land. It is also their case that Rajendra sold one of his two huts to a man named Abin and removed the other. Rajendra's brother Akhil had also two huts in the homestead—a south *bhiti* hut and a cook-shed and these two used to be occupied by Rajendra, his second wife Radharani, his son Satish by his first wife, Akhil's son Lakhi and some others. These two huts also, the prosecution say, were sold by Rajendra to Hafizuddi but the family continued to live there as before with the permission of Yakub and Hafizuddi. The prosecution case is that the accused persons came to the *bari* on the morning of the 23rd September 1924 variously armed in order to turn out the

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inmates by force, and when there was resistance the occurrence took place resulting in some of them being injured and in the death of Raj Mohan Mistry who had come to interpose.

The defence case on the other hand was that the accused were peacefully in occupation of the *bari* since the purchases but the Namasudras did not like their presence in the midst of their *basti*, that formerly Yakub alone lived there occasionally but from 15 days before the occurrence Yakub came to live there with his wife, two sons, sister-in-law (Bihal's wife) and her son, but the Namasudras resented their occupation of the *bari*, and on the day of occurrence they came in a body, forcibly broke down the tin hut of Yakub which he had erected there soon after the purchases, removed the tins and assaulted the inmates.

The jury unanimously found the accused guilty of the offences under secs. 147 and 325/149, I. P. C., the common object of the unlawful assembly as set out in the charges being to take forcible possession of the *bari*. They found, as they stated in answer to a question put to them by the Judge, that Rajendra was in possession of the disputed house on the day of the occurrence and that the accused persons came to drive him and his family away forcibly from the house. Great weight undoubtedly attaches to the unanimous opinion of the jury on questions which are purely questions of fact. It has therefore to be seen whether there is any substantial basis for the contrary opinion expressed by the learned Judge in his letter of Reference.

The question of possession of the two huts, namely, the southern *bhiti* hut and the kitchen, is the principal question to be determined in the case. The case was started on a petition of complaint filed by

a neighbour Chandra Mohan who alleged that he came upon the scene on hearing the *golmal* and was struck with a *juti* which pierced his knee and remained sticking to it. In this petition as also in the examination of the complainant on oath the fact of Yakub's purchase of only the undivided 8 annas share of Harilal is mentioned but not the purchase of the mortgagee's right with possession in respect of the other 8 annas share of Dharani. The latter sale was admitted by Rajendra in his evidence in Court. Once these two transactions are proved, the probability becomes overwhelming that Yakub should take possession of the homestead instead of allowing Rajendra to occupy it as if the transactions had not taken place. Then the presence of the materials of a demolished hut with the tins or thatches of the roof missing as deposed to by the Sub-Inspector, P. W. 14, is a circumstance which has to be explained by the prosecution. They say that Rajendra left the materials on the land when he removed to his father-in-law's house after the sale. This is somewhat strange but not altogether improbable. The real difficulty is created by the admission made by P. W. 3, Radharani, the second wife of Rajendra, about an incident which has been referred to in the case as the fowl incident. She states that sometime in Baisakh last Bihal's fowl came to Rajendra's hut and was killed by the latter's dog. She explains the incident by saying that the fowl came from Bihal's house and not from the accused Yakub's hut. With regard to this incident a complaint was lodged by Nitai, a brother of Rajendra, on the 25th April 1924. Rajendra and the other prosecution witnesses deny knowledge of this complaint and offer no explanation as to the incident. This complaint, however,

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was admitted without objection from the side of the prosecution. In it there is a clear statement of the accused Yakub having erected a hut in the homestead and living there with fowls and rearing them. This statement no doubt is not substantive evidence as to the truth of the facts stated, but the fact that such a statement was made requires explanation and it has not been explained. In the absence of such explanation the defence version of the possession of the homestead as given in Yakub's petition of complaint and in his examination on that complaint which was also filed on the same day and almost simultaneously with Chandra Mohan's complaint, seems to be acceptable.

Then as to the occurrence, there are features which are exceedingly suspicious. In the first place if Yakub was bent upon turning out Rajendra and his family by force from a *bari* which was surrounded on all sides by houses of Namasudras and which was situated in the very heart of a Namasudra *basti*, it is hardly likely that he would come there accompanied by his brother-in-law and their four sons and no others. Nextly, there is absolutely no evidence that Rajendra and his family were ever asked to vacate the premises prior to the occurrence, or that there was any quarrel or misunderstanding over the matter. Rajendra's evidence is that Yakub was generous enough to give him and his family permission to live on the premises till the rains were over. He states that several months before the occurrence there was a friendly conversation between him and Yakub and he had promised to vacate. He states that after this conversation, Yakub never asked him again, though in the Court of Sessions for the first time he introduced a story of a demand for 4000 rupees before the occurrence, a story which is not supported by any of

the other witnesses and is obviously untrue.

As regards the occurrence itself, apart from minor contradictions there are serious contradictions on broad points. Chandra Mohan (P. W. 1) states that when he came up he found Yakub pulling Radharani, that Yakub said—"Your husband has sold the hut to me, you go away from this house; Radharani said nothing," that he interceded, and on that Yakub threw a *juti* at him, and that thereafter Sahadat struck him with a *barga*. He states that Raj Mohan came when he had been struck and Raj Mohan was beaten after he had fallen down and that after sometime Rajendra came. In his examination on the complaint which he had filed he stated that Yakub threw a *juti* on Rajendra and that *juti* pierced his knee. This itself is a material variation. In cross-examination he admitted that other persons, *viz.*, Raimohan, Ram Chandra and Raj Mohan came to the house before he was beaten. Rajendra, P. W. 2, supports the version given by Chandra Mohan in his examination-in-chief and states that when he came he found Chandra Mohan lying with a *juti* stuck into his knee and also Raj Mohan lying unconscious. Two of the accused were still in the house, four had left and were in the *khal* in knee-deep water. He states that Niaz Ahmed and Sahadat beat him, the former with the handle of a broken *baita* and the latter with a *barga*. Radharani, P. W. 3, states that after Chandra Mohan was beaten Raj Mohan came up and interceded and on that Yakub struck him on the head with the blunt side of a *dao*, and then Ali Ahmed struck him with a *lathi* and Sahadat with a *barga*. She then states that her husband Rajendra came and he was beaten by three of the accused, namely,

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Niaz Ahmed, Ali Ahmed and Mahamed. P. W. 4 Tarini gives a version which is wholly different. She states that Sahadat was pulling Radharani, that after Chandra Mohan fell on the ground, Raj Mohan went to the house with a broken bamboo *rua* in his hand to beat the accused saying "what a terrible oppression." She states that Raj Mohan beat the accused and the *rua* was broken and Yakub struck him on the head and also three times after he had fallen down. She states in cross-examination that Rajendra when he came beat the six accused, and that he beat them with *lathis* which he snatched away from the hands of the accused. P. W. 5 Rajbidya, the sister of the deceased Raj Mohan, states in cross-examination that Chandra Mohan came after Raj Mohan had been beaten and that Rajendra beat the accused with a small something which was in the yard. P. W. 6 Ram Chandra, who is said by Chandra Mohan to have been in the house when he was being beaten, states that when he came he found Chandra Mohan lying and Raj Mohan being beaten. P. W. 7 Rasharaj states that he and Rajendra came simultaneously and yet he is able to speak to the assault on Raj Mohan which according to Rajendra took place before his arrival." P. W. 8 Raimohan speaks to the fact that Rajendra was assaulted by three of the accused which is in conflict with what Rajendra states. These are contradictions which, in my opinion, show that the witnesses are not speaking to facts which they had actually seen but were repeating a story, the consistency of which they were unable to maintain in their evidence. To add to this is the fact that there is no explanation of the injuries on the females of the accused's family which are spoken to by the doctor, and the prosecution witnesses

ignore their presence at the occurrence altogether.

In my judgment the whole case is, to say the least, a suspicious one. The real facts in connection with the occurrence and the circumstances under which it took place have not been disclosed by the prosecution. It must also be said that the case which the defence put forward is also not true in its entirety. To convict the accused under such circumstances is likely to cause a miscarriage of justice, and I agree with the learned Judge in holding that the accused persons are at least entitled to the benefit of the doubt.

I would therefore accept the Reference, set aside the verdict of the jury and order that the accused be acquitted.

VALMSLEY, J.—I agree.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 148 OF 1926.

RAM CHANDRA

ACHARYA, 2nd party,
Petitioner,

v.

ADITYA CHANDRA PAI,
1st party, Opposite
Party.

SUNRAWALDY, J.

DUVAL, J.

1926,

23, April.

Criminal Procedure Code (Act V of 1898), sec. 147, proviso—Institution of enquiry, meaning of—Three months, if to be calculated from date of order directing police enquiry or when proceedings actually drawn up.

Where on receipt of a petition regarding an alleged obstruction of a pathway the Magistrate immediately ordered a police enquiry but proceedings under sec. 147, Cr. P. C., were actually drawn up more than three months after and a final order made thereon:

Held—That the order under sec. 147 was without jurisdiction.

The word "enquiry" in the proviso

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has reference to the words "enquire into the matter" in the first paragraph. The enquiry that is contemplated there is enquiry by the Magistrate and not enquiry by the police. Institution of the enquiry into the existence of the likelihood of breach of the peace must precede the enquiry into the respective rights of the parties and the Magisterial enquiry is constituted when proceedings are drawn up by the Court under sec. 147.

This was a Rule granted on the 8th February 1926 against an order of the Deputy Magistrate of Madaripur (A Mitter, Esq.), dated the 29th October 1925, prohibiting 2nd party from interfering with a certain right of way under sec. 147, Cr. P. C., an application for revision of which order was rejected by the Sessions Judge of Faridpur (Mr. N. Edgley) on 16th December 1925.

The facts of the case will appear from the judgment.

Babus Suresh Chandra Taluqdar and Kalyan Kumar Das Gupta for the Petitioner.

Babu Jahnabi Ch. Das Gupta for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This Rule was issued against an order passed by the Deputy Magistrate of Faridpur under sec. 147, Cr. P. C., on two grounds: (1) That the learned Magistrate acted without jurisdiction in drawing up proceedings under sec. 147, Cr. P. C., after having ordered issue of notice upon the second party under sec. 107, Cr. P. Code; (2) that the learned Magistrate acted without jurisdiction in drawing up a proceeding under sec. 147, Cr. P. C., because more than three months had elapsed from the date of the alleged obstruction on the 14th February 1925 and

the date of the institution of the proceeding on the 3rd August 1925. We have heard the parties on the second ground mentioned above, as, if that is decided in favour of the Petitioner, it will not be necessary to enquire into the first ground. A petition was filed by the first party on the 14th February complaining of obstruction of a pathway by the second party. On the 16th February 1925 on that petition the Magistrate passed the following order. "To Elaka police for enquiry and report by the 5th March 1925." The report by the police was submitted on the 26th May 1925. On the 14th July the Magistrate passed the following order on the body of the petition: "Issue notice on Ram Chandra Acharjee to show cause why he should not be dealt with under sec 107, Cr. P. C. Fix. 3rd August." On the 3rd August the following order was recorded. "Issue the notice ordered on 14th July. Fix. 28th August." On the 20th August the order passed was— "Heard parties and seen documents. Draw proceedings under sec. 147, Cr. P. C., fixing 7th September." The case was subsequently transferred to another Magistrate who recorded the evidence and passed an order on the 29th October 1925 prohibiting the second party to interfere with the exercise of the right claimed by the first party under sec. 147, Cr. P. C. Against this order an application was made to the Sessions Judge of Faridpur who declined to interfere. It appears that the only ground which was urged before the learned Sessions Judge was that the proceedings started on the 20th August were without jurisdiction inasmuch as more than three months had elapsed from the date of the obstruction. The learned Judge was of opinion that the enquiry was really instituted on the 14th February (the date on which the Magi-

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Magistrate ordered the police to enquire into the matter. "although formal proceedings were not drawn up with regard to this matter till the 20th August 1925." The same view has been urged before us by the learned vakil who appears for the first party. It is argued that the enquiry was as a matter of fact instituted when the Magistrate passed an order upon the police to report. We are unable to accept this contention. The first paragraph of sec. 147, Cr. P. C., says that "when ever any District Magistrate or Magistrate of the first class is satisfied that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land . . . he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court . . . and to put in written statement of their respective claims and shall thereafter enquire into the matter in the manner provided in sec. 145." The proviso to the second paragraph says that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the enquiry. The question that falls for determination relates to the meaning of the words "institution of the enquiry." It is contended that the order passed by the Magistrate on the 16th February asking the police to enquire and report must be taken as institution of the enquiry under the proviso. It seems to us that the order that was passed on the 16th February was upon the police to satisfy itself and report not with regard to the alleged rights of the parties but apparently with regard to the existence of a dispute likely to cause a breach of the peace, because in drawing up proceedings the Magistrate has to state his

reasons for holding that a likelihood of a breach of the peace exists, and for that purpose it is usual on petitions of this nature to order "police to enquire whether there exists a likelihood of the breach of the peace" and it is on the report of the police that such likelihood exists that the Magistrate obtains jurisdiction to start proceedings under sec. 147, Cr. P. C. Then again the word "enquiry" in the proviso has reference to the words "enquire into the matter" in the first paragraph. The enquiry that is contemplated there is enquiry by the Magistrate and not enquiry by the police. Institution of the inquiry into the existence of the likelihood of breach of the peace must precede the enquiry into the respective rights of the parties and the Magisterial enquiry is instituted when proceedings are drawn up by the Court under sec 147. It must therefore be held in the circumstances of this case that the enquiry was instituted on the 20th August 1925. The objection complained of having taken place on the 14th February long before three months from the date when proceedings were drawn up, it must be held that the Magistrate had no jurisdiction to proceed under sec. 147, Cr. P. C. In this view the Rule must be made absolute and the order of the Magistrate of the 29th October 1925 set aside.

B. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.]

V SCOUNT DOMIN.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMBER ALI.

1926,

Heard, 16 and

18, February.

Judgment,

16, March.

BALBHADDAR SINGH
and another, Appellants,
v.BADRI SAH and another,
Respondents.

*Malicious prosecution, suit for damages for—
giving information to police which leads to prosecution,
if prosecution—What Plaintiff has to prove,
innocence or termination of criminal proceedings
in his favour.*

*Where, as in India, prosecution is not
private, giving information to the police
which leads to prosecution amounts to
prosecution for the purposes of a suit for
damages for malicious prosecution.*

*In an action for malicious prosecution,
the Plaintiff has (amongst other things) to
prove not that he was innocent of the
charge upon which he was tried, but only
that the proceedings complained of terminated
in favour of the Plaintiff, if from
their nature they were capable of so terminating.*

**BASBE v. MATTHEWS (1), WESTON v.
BREMAN (3) and HUNTLEY v. SIMSON (4)**
referred to.

This was an appeal (No. 66 of 1924)
from a decree of the Court of the Judicial
Commissioner of Oudh, dated the 6th of
August 1923, reversing a decree, dated the
15th of May 1922, of the Court of the Sub-
ordinate Judge at Kheri.

The Plaintiffs, who are Appellants
before the Judicial Committee, brought
the suit for damages for malicious prosecution
alleging that the Defendants had

caused proceedings to be instituted against
them for murder. The parties were resident
in the village of Mohiuddinpur from which
Sheo Bux Singh disappeared on the 17th
September 1919.

Two days later Raghunath Singh, the
second Defendant, made a report to the
police that he, Teja and the Plaintiffs had
murdered Sheo Bux. The body of the
murdered man was found in Raghunath's
house.

Teja and Raghunath made confessions
in which they implicated the Plaintiffs.

They were accompanied to the police
station by the Defendant Badri Sah.

Warrants were issued for the arrest of
the Plaintiffs; they, however, appeared
voluntarily in Court and were released on
bail.

A rule was issued by the Sessions Judge
calling upon the Plaintiffs to show cause
why they should not be committed to
trial but was discharged on their appearance.

Raghunath and Teja retracted their
confessions at their trial before the Sessions
Judge, and stated that they had made them
at the instigation of Badri Sah. Both
were acquitted.

The Appellants then applied for leave
to prosecute Raghunath and Badri Sah
under sec. 211 of the Indian Penal Code.
Leave was granted, but was quashed on
appeal, and the Appellants thereupon
instituted the present civil suit, and obtained
a decree in the Subordinate Court.

On appeal to the Court of the Judicial
Commissioner of Oudh the judgment of
the Subordinate Judge was reversed and
the present appeal was then brought in the
ordinary course.

The facts of the case and the findings of
the Indian Courts are set out at length in
the judgment of the Judicial Committee.

Messrs. DeGruyther, K. C. and Dube
for the Appellants.

(1) L. R. 2 C. P. 654, 655 (1887).

ON 27 L. J. Ex. 87 (1887).

ON 27 L. J. Ex. 124 (1887).

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Messrs. Dunne, K. C. and Ramsay for the Respondent Badri Sah.

THEIR LORDSHIPS' JUDGMENT was delivered by

VISCOUNT DUNEDIN.—The Appellants and Respondents are lambardars and the principal inhabitants in the village of Mohiuddinpur. The suit arises out of circumstances of a remarkable character, which took place in connection with a crime as to which the complete truth will in all likelihood never be discovered.

One Sheo Bux, a humble inhabitant of the village, was last seen alive on the evening of the 17th September 1919. As he was under police supervision his absence after that date was noticed by the village policeman, but it was supposed that he had gone to some other village.

On the 20th September, a little after noon, a party of four persons arrived at the police office, which is situated at a place called Pasgawan, about two miles from the village. These were Badri Sah, a lambardar in the village, and one of the Respondents, Hazari, a cultivator, his son, Raghunath, aged 18, and Bharat, a cultivator. The Sub-Inspector of police was, at the moment, absent, and a policeman was in charge. Raghunath then proceeded to make a confession, which was recorded in the police diary of the day. The confession was to this effect :—

The Appellants had, some time ago, offered him Rs. 500 if he would do away with Sheo Bux. He had returned an ambiguous answer to the proposal. On the 17th September his father had gone away from the village. The Appellant Bachchu had then said that this was the opportunity desired. Accordingly when nightfall came, the two Appellants came to his house and despatched Teja, a barber, 16 years old, to fetch Sheo Bux. They all

sat down; then Balbhaddar fell upon Sheo Bux, put his hand on his mouth, while Bachchu grappled with him. With the assistance of Teja and himself, Raghunath, they carried him into the house. He and Teja held his feet. Balbhaddar sat on his chest and held his mouth and Bachchu, with a knife, cut his throat and he died. A hole was then dug in the floor of the house and the body buried. He applied for his Rs. 500, but was told by the Appellants he would get that when they took the body away. On the 19th September he asked them to take away the body, but they said that they had had no opportunity of doing so. This day, that is, the 20th, his father had returned and he told him the whole story. His father went to Badri Sah, who told him to bring Raghunath to him where he was sitting along with Bharat Singh. To them he repeated the story, whereupon they all took him to the police office. After this he was consigned to the lock-up, and the policeman in charge sent a message to the Sub-Inspector. The Sub-Inspector hurried back to the village and sent for Raghunath from the lock-up. He repeated to him the same confession, and on being taken to his house pointed out where the body was buried and where the shoes and garments of the deceased were also buried.

The body was exhumed; the shoes and garments found. It was the body of Sheo Bux and his throat was cut. The Sub-Inspector thereupon arrested Teja and locked him and Raghunath up. The next morning he sent both Raghunath and Teja to Lakinpur, and there, on the 24th September, they were brought before the Magistrate. The Magistrate, as in duty bound, took a statement from each of them, no policemen being present, and he having duly informed them that he was a Magistrate. Raghunath repeated his

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confession with a little more dramatic detail, but in all essential respects as before. Teja gave a shorter account. He described the murder in identical terms. To each of these confessions the Magistrate appended this note :—

"I believe that this confession was voluntarily made. It was made in my presence and hearing. It was read over to the person making it, and was admitted by him to be correct. It contains a full and true account of the statement made by him."

On the 27th October the Magistrate, having examined some other witnesses, among whom was Musammat Parbati, the mother of the murdered man, who swore that, on the 17th, she saw the two Appellants along with Raghunath and Teja at Raghunath's house, issued warrants for the arrest of the two Appellants. The Appellants were absent and the warrant was not executed.

On the 30th December the Magistrate took up the case, and on the evidence committed Raghunath and Teja for trial, but discharged the Appellants who without the execution of the warrant had voluntarily appeared, as he considered there was no real evidence against them except the confessions of Raghunath and Teja. Subsequently, some doubt having arisen in the mind of the District Judge as to whether this dismissal was right, summonses were issued to the Appellants to appear before the District Judge. These were taken up by the District Judge, Mr. H. G. Smith, who was not the Judge who had raised the doubts. He again discharged the Appellants, considering that there was not sufficient evidence to warrant them being put on their trial.

The trial took place, but when Raghunath and Teja were asked as to their confessions, they both admitted that they had made them, but stated that they were untrue. Raghunath said :

"I said to Badri that the corpse seemed to be in the

house. Badri Sah then took me to his Chaupal and there he gave me *sherbet* to drink. He took me to the police station and asked me to get the names of Bachchu Singh and Balbhaddar Singh recorded, adding that otherwise I would be hanged and that he would defend me. When I reached the police station I felt as if intoxicated. I do not know what I got recorded in the report."

Teja said :—

"The day on which the Sub-Inspector visited my village, i.e., on Saturday, Badri Sah came to my house at midday and said, 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy (Magistrate) what Badri Sah and the Sub-Inspector asked me to say. I do not know who committed the murder."

In the end both were discharged, there being, in the view of the Sessions Judge, not sufficient evidence against either of them.

After this the present Appellants applied to the Magistrate to order the prosecution of Raghunath and Badri Sah. The Magistrate gave leave to prosecute under sec. 211 of the Indian Penal Code, which is :—

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ;

"And if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

The Sessions Judge on appeal came to a different conclusion as regards Badri Sah, and quashed the leave given. He said in the course of his judgment :

"I do not think it would be possible to prove that Badri Sah instigated the making of the charge."

The appeal was taken to the Commis-

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sioner, but he confirmed the determination of the Sessions Judge.

The Appellants then raised the present civil suit for malicious prosecution. The crucial averment was that the Respondent Badri Sah had tutored Raghunath and Teja to say what they did in their original confessions. Evidence was led before the Subordinate Judge. The facts which have already been detailed and as to which there could be no controversy were proved. Some other witnesses were examined, as to whose testimony there was controversy, with which their Lordships will presently deal.

Teja, being examined, repeated his recantation of his original testimony, saying that Badri Sah had tutored him. But Raghunath reverted to his original account, saying that the story of the murder having been committed by the Appellants with the assistance of Teja was true. The learned Subordinate Judge delivered an exceedingly careful judgment, and came to the conclusion that the Plaintiffs, now Appellants, had made out their case.

On appeal to the Court of the Judicial Commissioner of Oudh, the Judicial Commissioners reversed that judgment. Unfortunately, however, they took a completely wrong view of the law of the case. In their judgment they put the matter thus :—

"In an action for malicious prosecution the Plaintiff has to prove :—

"(1) That he was prosecuted by the Defendant. . .

"(2) That he was innocent of the charge upon which he was tried.

"(3) That the prosecution was instituted against him without any reasonable and probable cause.

"(4) That it was due to a malicious intention of the Defendant, and not with a mere intention of carrying the law into effect."

Proposition (2), as stated, is quite erroneous. It should be—"That the proceedings complained of terminated in favour of

the Plaintiff if from their nature they were capable of so terminating." This phraseology may be found in the judgment of Montague Smith, J., in *Baseb v. Matthews* (1). But the practice was in accordance with these words long before that case. Under the old forms of pleading a declaration, if the law were really as the Judges in this case defined it, would in all cases where there had not been an actual acquittal have been bad if there were not added the statement that the Plaintiff was innocent of the crime charged. The reports may be searched in vain for any declaration so found bad, though there were many cases where prosecutions had terminated without acquittal. There was controversy as to what terminated proceedings, as, e.g., whether a *nolle prosequere* of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to an end when a Magistrate declines to commit [*Delgal v. Highley* (2)]. *Weston v. Beman* (3) and *Huntley v. Simson* (4). Accordingly in Bullen and Leake's Precedents, 8th Edn., at p. 434, the regular form is given for an action for malicious prosecution when the Plaintiff has been arrested and brought before a Magistrate. After narrating the arrest and the charge, it continues : "The said Justice having heard the said charge dismissed the same and discharged the Plaintiff out of custody, whereupon the said proceedings terminated." In the present case it was sufficient for the Appellants to prove, as they have done, that the criminal proceedings threatened on account of the disclosure contained in the confessions of Raghunath and Teja ended so far as they were con-

(1) L. R. 2 O. P. 684 at p. 686 (1867).

(2) 3 Bing. N. C. 360 (1837).

(3) 27 L. J. Ex. 57 (1857).

(4) 27 L. J. Ex. 134 (1857).

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cerned when the Sessions Judge finally refused to commit them for trial. That opened the way for the proof of the next proposition that the Respondents had instigated the proceedings maliciously and without probable cause.

The result of the view of the law taken by the Judges was that the evidence was gone into with a view of saying whether the Appellants had proved their innocence, and finally the learned Judges held that "the Plaintiffs have failed to prove their innocence of the crime."

It is true that having stated that "the two main issues in the case are (1) whether the Plaintiffs have proved themselves to be innocent of the charge of murder, and (2) whether Badri Sah instigated Raghunath to implicate the Plaintiffs falsely," they go on to consider this (2) which, taken by itself, is relevant, but unfortunately their view on the second issue is permeated by their view on the first. Indeed, they say so themselves: "The two issues of the Plaintiffs' innocence and Badri Sah's tutoring run into each other." Although, therefore, there are various comments on the evidence in the judgment which are of value, the mistaken view so permeates it as to make it impossible for their Lordships to confirm the judgment as it stands. They are consequently compelled to consider the judgment of the learned Subordinate Judge just as if the appeal had come direct from him to them. Their Lordships will now advert to the evidence given in addition to that which proved the facts which have been already set forth, and it will be convenient to separate that as to which there is no controversy from that as to which controversy exists. It was clearly proved that between the Appellants Balbhaddar and Bachchu, who are uncle and nephew, on the one hand, and Badri Sah, on the other, there

was a long standing and bitter enmity. They were the two principal families in the village and people of influence. The other persons who appear in the course of the case were all in very humble positions. This enmity had shown itself in litigations and prosecutions. Fines had been imposed and punishments inflicted; and there was a state of deadly feud between the two families.

On the night of the 17th a neighbour had heard a noise going on in Raghunath's house, and he had seen two men run out of the house and a light extinguished, but identification was out of the question.

So far as to matters which cannot be controverted. Next as to the evidence as to which there was controversy. Musamat Parbati, the mother of Sheo Bux, said that she remembered Teja coming for Sheo Bux to go to Raghunath's house a little after nightfall. She then said that she got dinner ready and went to Raghunath's house to ask Sheo Bux to come back to dinner. She found there Sheo Bux, Balbhaddar Singh, Badri and Teja all sitting together. In answer to her request Sheo Bux said he did not need dinner as he had eaten already, and that he would not come home; he would take his turn as watchman. On the other hand, it is pointed out that this witness originally made no statement to the police. She was examined twice before the Magistrate, and on each occasion she said that the reason why Sheo Bux did not wish to dine was because he had already eaten yams. The post mortem disclosed that there was only pulse and rice in his stomach and not yams. Before the Sessions Judge she was again examined, and she then went back on the statement as to yams, and said that he had only eaten rice. It was her statement that led the Magistrate to issue a

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warrant for the apprehension of the Appellants.

Badri Sah, the Respondent, confirmed the statement that he was approached by Hazari, the father of Raghunath, and then by Raghunath, and that after hearing the story he went with them to the police station. He denied having seen Raghunath previously to the joint meeting between him and Hazari. Hazari, it may be noted, had died before the evidence was led in this case. But a schoolmaster deposed that he had seen Badri Sah and Raghunath talking together "in the morning." A man called Bikari said that a day before the confession he went to Badri Sah's house and that, as he approached from outside, he overheard Badri Sah say to Raghunath that if he would not leave out the names of Balbhaddar and Bachchu he would save him. On the other hand, there seems no particular reason for Bikari being at the house. He had a grudge against Badri Sah, and the whole story is contrary to the united story of Badri Sah and Raghunath of the first communication having been made when Hazari brought Raghunath to Badri Sah.

As already stated, the learned Subordinate Judge decreed in favour of the Plaintiffs. Their Lordships wish to emphasise their appreciation of the carefulness and ability of the judgment. They have given every weight to the reasoning, although, as will be explained hereafter, they are not able to reach the same conclusion. The reasons which led the Subordinate Judge to reach his conclusions may be summarised thus :—

(1) Not only were the Appellants not prosecuted after being brought up before the Magistrate, but the idea of their having murdered Sheo Bux rests on no foundation. There was no enmity. Two motives were suggested. One a desire to

get his house; but this is not really proved, and, besides, the widow would still have had it. Second, a supposed intrigue between Sheo Bux's wife and Bachchu and also Raghunath. This is only suggested by Badri and Raghunath, and the idea of co-paramours plotting together to get rid of a husband is against human experience. Musammat Parbati's evidence was quite unreliable.

(2) The undoubted hatred of Badri Sah to Balbhaddar and Bachchu.

(3) Badri Sah was the person who suggested that Raghunath should go to the police station and confess.

(4) All through the various proceedings Badri Sah was always to the fore. He got his own pleader to undertake the defence of Raghunath. All he wanted was that the Appellants should be convicted.

(5) There was no reason, if Raghunath had confessed to his father Hazari, that Hazari should have gone to Badri Sah.

(6) The Deputy Magistrate in the application for sanction under the Indian Penal Code took the view that Badri Sah had tutored Raghunath and Teja. (It is omitted to be stated that two Judges took the opposite view.)

(7) There was no reason for Teja making his first confession voluntarily. He was not in danger if he kept quiet. *Ergo* it seemed to be inspired by Badri Sah.

(8) Raghunath is utterly untrustworthy. He confessed, recanted and then re-confessed. Teja only once recanted and then adhered to it.

There is much in this reasoning, but what, in their Lordships' opinion, the learned Subordinate Judge has a little left out of view is that this is not a case which must be determined on a balance of probabilities. The question is not, "Did the Appellants commit the murder?" or,

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"Did Badri Sah invent the murder against them?" the two queries exhausting the possibilities of the situation. The question is, "Have the Appellants proved that Badri Sah invented and instigated the whole proceedings for prosecution?" Of course, there is nothing in the point which seems to have been taken in the Courts below but which was not urged before their Lordships, that here *de facto* the Appellants were not prosecuted by the Respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie. But it must be kept in view that, so far as the police were concerned, there was ample cause for the initiation of prosecution proceedings. There were the clear narratives of two people, Raghunath and Teja, concurrent in all necessary particulars. The Appellants must, therefore, go the whole way. There is no half-way point of rest. They must show that Badri Sah invented the whole story as far as it implicated the Appellants, and tutored Raghunath and Teja to say it. That is a very heavy onus of proof, and unless they sustain it the Appellants must fail.

Let the view which must be taken, if the Appellants are to prevail, be analysed. As to the fact of a murder there is no doubt. That the corpse of the murdered man was lying beneath the floor of Raghunath's cottage is also without doubt. One of the suggestions in Raghunath's evidence was that the corpse had been put there by somebody else and that he discovered its existence owing to the progress of putrefaction. This is an unlikely story, but it

does not matter. Nobody supposes, nor was it suggested, that Badri Sah murdered Sheo Bux. His first knowledge of the existence of the corpse must have come from Raghunath, and whether Raghunath told him that he himself was implicated in the murder, or whether he merely told him he had found a corpse, is for the moment immaterial. For in either case Badri Sah must have, according to the theory, said to himself: "Now is my opportunity; let me get my enemies implicated in the crime," and this he is supposed to have done. He goes with Raghunath and Hazari—it is a pity that Hazari was dead before the evidence in the case, and there is no trace at all in the papers of his evidence before the Magistrate—and Raghunath makes his first confession. What is that confession? It implicated himself and the Appellants, but it also implicated Teja. Now it is very important to notice that Teja by all accounts had not met Raghunath and Badri Sah till after Raghunath's confession. For this is what he, Teja, says in his recantation, which is, of course, the foundation of the Appellants' case:—

"I did not call away Sheo Bux to Raghunath's house. The day on which the Sub-Inspector visited the village, that is, the Saturday, Badri Sah came to my house at midday, and said: 'Raghunath Singh names you. If you say what I ask you, I will get you released.' Thereupon I stated before the Deputy Magistrate what Badri Sah asked me to say."

What an extraordinary risk this was to tutor a confession which implicated not only his enemies but a man whom he had not yet interviewed, and why bring in Teja at all?

It is, of course, quite useless to pin any faith to what Raghunath and Teja have said. Raghunath had executed a double somersault in confession, Teja a single one, and yet, unless Teja's confession is strictly true, the Appellants' case is gone.

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The argument was used why should Teja recant except to speak the truth? The answer is easy enough. The Appellants had got off by not being committed for trial. Teja and Raghunath then wanted to save their own skins. No doubt Teja stuck to his recantation. Raghunath, who had by this time been let off, had no skin to save and recanted again. The very argument which has to be used to explain Teja's first confession may be used to explain his second. Fear was what prompted him, it is said, to make his first confession and implicate himself, though quite innocent. "Raghunath has mentioned you. You will be lost unless you say what I tell you." So fear would drive him to his second. "I have implicated myself foolishly. Let me now say I had nothing to do with it."

Lastly, as to Badri Sah's meddling with the case. That Hazari, if he was told the story by his son, would go to Badri Sah is likely enough. He would wish advice from some one in position, and Badri Sah was the only person except the incriminated men themselves. Further that when Badri Sah found that his enemies were implicated, he would be glad and would help to bring about their downfall is more than probable. But that is a different thing from being the sole author of it.

On the whole matter, therefore, their Lordships feel that while there is grave cause for suspicion and while the whole truth in the case is impossible to find, there is not sufficient certainty in this doubtful matter to find that the Appellants have discharged the heavy onus laid upon them. The result arrived at by the Judicial Commissioners on appeal was right, though the methods by which they reached that result were wrong.

Their Lordships will therefore humbly

advise His Majesty to dismiss the appeal with costs.

Solicitor: Mr. H. S. L. Polak for the Appellants.

Solicitors: Messrs. Barrow, Rogers & Nevill for the Respondent No. 1.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2462 OF 1923.

SUHRAWARDY, J. RAHINI NANDAN CHAUDHURI and ors.,
Graham, J. Appellants,

1926,

Heard, 8 and

9, February.

Judgment,

24, February.

JADUNANDAN CHAUDHURI and ors.,
Respondents.

Limitation Act (IX of 1908), Sec. I, Art. 47—Suit for recovery of possession by party against whom order has been made under sec 145, Criminal Procedure Code (Act V of 1898)—Section, how far applicable where portion of Magistrate's order legal and portion illegal—Art. 120, scope and applicability of—Civil Procedure Code (Act V of 1908), Or. 2, r. 2—Scope and applicability of—Exhaustion of reliefs in respect of one cause of action as distinguished from inclusion in the same action of different causes of action—Res judicata—Estoppel.

In a proceeding under sec. 145, Cr. P. C., in respect of a jalkar the Magistrate found that the first party had the right to fish by large nets only during a certain period of the year and the second party the right to fish by small nets during that period and both by large and small nets for the rest of the year and directed that the parties should be entitled to catch fish in the manner aforesaid. In 1910 the first party to the proceeding under sec. 145 as Plaintiffs brought a suit for a declaration and injunction that the Defendants, the second party to the proceeding under sec. 145, had no right to catch fish with small nets or with any

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other means during the period the Plaintiffs were entitled to catch fish in the jalkar and further asked for a declaration that the Plaintiffs had the right to catch fish throughout the year. The suit was decreed in a modified form in respect of a portion of the jalkar in which it was held the Defendants had no right to catch fish with small nets or with any other means during the time the Plaintiffs were entitled to catch fish and a permanent injunction was granted accordingly. The Defendants again interfered with the Plaintiffs' rights and in 1917 a suit was brought by the Plaintiffs in respect of the same portion of the jalkar asking for a declaration and permanent injunction that the Defendants had only the right to catch fish with small nets during a particular period:

Held—That the suit was not barred by limitation under Art. 47 of the Limitation Act.

Per SUHRAWARDY, J.—That under sec. 145, Cr. P. C., the Magistrate was only entitled to decide the question of possession at the date of the proceeding. His order that the Defendants were in possession of the fishery throughout the year whilst the Plaintiffs were entitled to possession jointly with the Defendants for a portion of the year was without jurisdiction as also the portion of the order laying down the way in which each party should exercise his possession. Art. 47 of the Limitation Act prescribes a period of three years for a suit by a party against whom possession has been found under sec. 145, Cr. P. C. That article has no relation to any portion of the order of the Criminal Court which has no reference to the question of possession. The suit of 1910 was brought within three years from the order of the Magistrate so far as it decided the question of possession and was therefore rightly constituted and

within time. Moreover as the order of the Magistrate did not dispossess the Plaintiffs or maintain Defendants' possession to the exclusion of the Plaintiffs, Art. 47 did not apply.

As regards Art. 120 the Magistrate's order as to the mode of possession or the use of large nets by the Defendants could not give a cause of action for a suit which, if not brought within the statutory period, made that portion of the order binding between the parties. The intention of the law of limitation is that if no suit is brought within the statutory period the remedy is lost and in case of an order of a competent Court it remains binding between the parties. The cause of action was not the Magistrate's order under sec. 145 but the infringement of Plaintiffs' right, and when the Defendants again started doing what they had no right to do, it gave rise to a fresh cause of action.

That it was also a case of continuing wrong.

That the suit was not barred under Or. 2, r. 2, C. P. C., which is directed to securing the exhaustion of the reliefs in respect of a cause of action and not to the inclusion in one and the same action different causes of action even though they arise out of the same transaction.

The order under sec. 145, even if valid, gave rise to two different causes of action: one in respect of the Plaintiffs' period of the possession of the fishery and the other in respect of the Defendants' period.

That the decision in the suit of 1910 was res judicata as to the size of the nets and, even apart from the question of res judicata, the Defendants, having invited the Appellate Court to decide the question although it was not necessary for the purposes of that suit, were estopped from re-agitating the matter.

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Per GRAHAM, J.—That the order under sec. 145 was superseded by the decree in the first suit; and every fresh infringement of the Plaintiffs' right gave rise to a fresh cause of action.

That as regards the applicability of Or. 2, r. 2, there was no necessity in the earlier suit to ask for a negative relief in regard to the Defendants' claim, since the declaration prayed for as regards Plaintiffs' right excluded the Defendants' claim, and there was thus no relinquishment of relief within the rule.

That the decision in the suit of 1910 was res judicata as to the size of the nets.

This was an appeal against the decree of B. K. Basu, Esq., District Judge of Zillah Rajshahi, dated the 6th of August 1923, modifying the decree of Babu Srish Chandra Bandopadhyay, Subordinate Judge of Zillah Rajshahi, dated the 4th of September 1922.

The facts of the case will appear from the judgment.

Mr. B. Chukrabartty (Counsel), Dr. Dwarka Nath Mitter and Babu Krishna Kamal Moitra for the Appellants.

Mr. Ram Chandra Majumdar, Dr. Bijan Kumar Mukherjee, Babus Sachchidananda Roy and Joges Chandra Bose for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

SUHWARDY, J.—This appeal is by the Plaintiffs arising out of a suit for establishment of fishery rights and for perpetual injunction. The following diagram will show the subject-matter of controversy in this suit :—

Pakuria

8

Pirgunj.

Raikan Dighi.

2

Malda Bandaghat.

Parts 1 and 2 are in the bed of a navigable river Mahananda and No. 3 is a rivulet emerging from it. This suit relates to parts 1 and 3.

The present suit is a stage, let us hope the last, in a long drawn litigation dating from 1860. In that year the Government resumed under Act II of 1819 a portion of the *jalkar* over the river and its branches. In 1861 Prasanna Kumar Boral, Plaintiffs' predecessor, brought a suit against the Government in which he claimed his *jalkar* right on those waters. Defendants' predecessor Alam Saha intervened and asserted his *raiyan* or *raiyan* rights but no order was passed on his application though the *jama* was reduced on that consideration.

The suit was compromised between Prasanna and the Government and his *khas baich* right in the *jalkar* was recognised. The terms " *khas baich* " and " *raiyan* " were not defined in that suit and this has been the fruitful source of dispute between the parties. But it seems to have been conceded from the beginning that " *khas baich* " means fishing with large nets. In 1862, Alam Saha brought a suit against Government and Prasanna for a declaration that Prasanna had only the *khas baich* right which was the right to fish with large nets such as *bera* in the *jalkar*, while he had the rest of the rights. The suit was decreed and Alam's *raiyan* right and Prasanna's *khas baich* right in the rivers were declared. In this suit also " *khas baich* " and " *raiyan* " were not specifically defined but it was stated the former was the right to fish by large nets. Nothing was said, however, as to the periods during which the parties were to exercise their respective rights. After this suit the parties well understood the extent of their respective rights and there was no dispute for about 40 years till

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1899 when the Defendants began to assert higher rights by creating *kabuliyats* and other documentary evidence, as has been found by the Judge, until in 1907 the dispute between the parties culminated in proceedings under sec. 145, Cr. P. Code, in which the Plaintiffs were the first party and the Defendants were the second party. On 19th July 1907, the trying Magistrate passed the following order :— " It has been satisfactorily proved that the first party held the right to fish in the area from *bejoya dasami* to 15th Chait by large nets only. The second party fish by small nets during the above period and both by large and small nets for the rest of the year. *Anta*, *tagi*, *bansi* and other similar contrivances are included in small nets." In the writ for delivery of possession the order was thus stated :—" Therefore I determine and hold that the said parties are in possession and, until they are evicted by lawful means, should be entitled to remain in possession and I order pre-emptorily that meanwhile the parties noted below may not be disturbed in their possession. The first party should be entitled to catch fish with large nets from *bejoya dasami* up to 15th Chaitra while the second party should be entitled to catch fish with small nets and during the rest of the year the second party should be entitled to catch fish with large as well as small nets."

Being dissatisfied with the above order, on 11th July 1910 Plaintiffs instituted a title suit being suit No. 324 of 1910 in the Court of the Subordinate Judge at Rajshahi in which the reliefs claimed were (a) that it be declared that Defendants have no right to catch fish with small nets and with any other means in the *jalkar* from the *bejoya dasami* day to 15th Chaitra; (b) that it be declared that the Plaintiffs have the right to catch fish

through the year in the said *jalkar*, (c) that a perpetual injunction be issued restraining the Defendants from catching fish in the *jalkars* from the day after the *bejoya dasami* to 15th Chaitra and for damages and mesne profits.

It should be noted here that parts 1 and 2 of the *jalkars* were the subject-matter of proceedings under sec. 145, Criminal Procedure Code, but in the civil suit the Plaintiffs included all the three *jalkars*. The Subordinate Judge by his order, dated the 18th February 1914, dismissed the Plaintiffs' suit in respect of *jalkar* No. 2 and decreed it in a modified form in respect of *jalkars* Nos. 1 and 3. He held that the Plaintiffs had "*khas baich*" rights in *jalkars* Nos. 1 and 3 from *bejoya dasami* day to 15th Chaitra every year and the Defendants had no right to fish in those two *jalkars* by small nets or other means during that period of the year, and a permanent injunction was granted accordingly. This decision was upheld by the District Judge in the first Appellate Court on 17th March 1915 and by this Court on 16th May 1917 in appeal from Appellate Decree No. 1317 of 1915. By this decision the "*khas baich*" and *raiyan* rights were defined; the former was held to mean the right to catch fish with big nets which can be plied by 5 or 7 or a larger number of *pais* (workmen) and the latter as the right to catch fish by small nets which can be plied by one or two *pais*.

The Defendant obeyed the above decree and stopped the use of large nets till 1917 when they again started to interfere with the Plaintiffs' right as settled by the decree. The present suit was therefore brought in 1919 in respect of *jalkars* Nos. 1 and 3 for the following reliefs :—(a) That it be declared that the Defendants and

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their tenants have only the raiyatan rights in the disputed *jalkars* from 16th Chaitra to the day previous to the *bejoya dasami* day, viz., the right to catch fish with small nets that can be plied by one or two men and not with bigger nets. (b) That a permanent injunction be issued restraining the Defendants from catching fish in the disputed *jalkars* by any big nets, and for other incidental reliefs. The suit was decreed in full by the Subordinate Judge in the trial Court. The Defendants appealed to the District Judge who by his decree, dated the 6th August 1923, dismissed the Plaintiffs' suit as regards part 1 of the fishery from Malda Bandaghat to Pirgunje and confirmed the decree of the trial Court as regards part 3, that is to say, from Pirgunje to Pakuria with the modification that the small nets to be used by the Defendants were defined to be those which require less than five men to wield.

The Plaintiffs have appealed and following points are urged on their behalf :—

(I) Plaintiffs' "*khas baich*" rights and Defendants' raiyatan rights were settled by the decree in the suit of 1862 and size of the nets to be employed by the parties respectively was settled in the suit of 1910. These matters cannot therefore be reopened.

(II) The District Judge has taken an erroneous view of the effect of the order under sec. 145, Criminal Procedure Code, and has erred in holding that the Plaintiffs' suit is barred by limitation.

(III) The learned Judge has erred in law in holding that under Or. 2, r. 2, Civil Procedure Code, the Plaintiffs' claim for a declaration that the Defendants have no right to use large nets during the latter's period as regards part 1 of the fishery is barred.

(IV) The learned Judge is not justified

in fixing the size of Defendants' nets as those which require less than five men to ply and not less than three as decreed by the Subordinate Judge.

In order to appreciate the grounds taken before us the learned Judge's reasonings and findings have to be stated. On the questions of fact he has stated his decision categorically as follows :—

(a) Up to 1306 Defendants never used large nets.

(b) From 1306 the Defendants began to claim use of large nets, the Plaintiffs coming to know of it, dispute followed, culminating in the 145 case of 1907.

(c) The sec. 145 proceeding being decided in favour of the Defendants the Defendants started now openly to use large nets during their period.

(d) The Subordinate Judge's decision in 1914 induced the Defendants to stop the use of large nets. But in 1917 they started again and in 1919 the present suit was brought.

There are two other findings of fact arrived at by the learned Judge which settled all the issues of facts raised in the suit. With regard to the meaning of the terms "*khas baich*" and "*raiyan*" Plaintiffs argued that it was finally settled by the decision in the suit of 1910. The learned Judge observed that apart from it his own conclusions on the evidence in the present case are to the same effect, viz., the former means the right to fish with large nets and the latter the right to fish with small nets. With regard to the question of the nets to be used by the Defendants during their period, i.e., from 16th Chaitra to *bejoya nabami* day, the Defendants argued that the decision of this question was not necessary in the suit of 1910 and therefore the decision in that suit on this question should not be considered final or operate as *res judicata*.

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The learned Judge has rightly held on this point that it is not open to the Defendants now to say that the finding in question was merely collaterally or incidentally in issue and not directly and substantially in issue in the previous suit. It is clear that on the above findings of fact the learned Judge would have decreed the suit in respect of part 1, had not his decision on the questions of law been adverse to the Plaintiffs as is evident from the fact that he has decreed the suit in full as regards part 3 of the *jalkar*. It is necessary therefore to examine the correctness of the view taken by the learned Judge on the questions of limitation and the application of Or. 2, r. 2, Civil Procedure Code.

As to limitation :—It is argued that by his order in the 145 case the Magistrate decided that the Plaintiffs had the right to use large nets only from *bejoya dasami* day to 15th Chaitra in their "*khas baich*" rights and the Defendants' raiyatan rights gave them the right to use small nets only during the Plaintiffs' period and both large and small nets during the rest of the year. The suit of 1910 was directed against the first portion only of the Magistrate's order, *viz.*, the Defendants' right to catch fish with small nets during the Plaintiffs' period, but there was no relief sought in that suit against that portion of the order which related to the Defendants' right to use large nets during their period. Accordingly the learned Judge holds that the Plaintiffs' suit for a declaration that Defendants are not entitled to use large nets during their period is barred either under Art. 47 or Art. 120 of the Limitation Act, the suit having been brought more than twelve years after the decision of the 145 case. It is therefore necessary to test the legal effect of that decision. Under sec. 145, Criminal Procedure Code,

the Magistrate is authorized to decide, without reference to title, which of the parties before him was in possession of the subject of the dispute at the date of the proceedings. The Magistrate therefore was entitled only to find whether the Plaintiffs or the Defendants were in possession of the fishery on the date when he drew up the proceedings under sec. 145. He had jurisdiction to find possession but not the mode of possession or how the possession was to be exercised. Besides, it appears from the order of the Deputy Magistrate that he held that the Defendants were in possession of the fishery throughout the year, while the Plaintiffs were entitled to possession jointly with the Defendants for a portion of the year. In my judgment this order was beyond the scope of sec. 145 and therefore without jurisdiction. The portion of the order which lays down the way in which each party should exercise his possession was likewise passed without jurisdiction. The fact that in the suit of 1910 the Plaintiffs stated the Magistrate's order as giving rise to the cause of action for the suit should not be held to compel them to challenge the whole of the order though it was *ultra vires*. The only portion of the order which dealt with the question of possession was that part of it which held that the Defendants were to have partial possession of the fishery by catching fish with small nets during Plaintiffs' period and that portion of the order the Plaintiffs challenged in the suit of 1910. It may be mentioned that in the plaint in that suit the Plaintiffs alleged that "the Defendants had only the raiyatan right in the *jalkar*, that is to say, the right to catch fish with small nets plied by one or two men and with *anta*, *bansi* from the 16th of Chaitra to the day previous to the *bejoya dasami* day every year." Art. 47 of the

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Limitation Act prescribes a period of three years for a suit by a party against whom possession has been found under sec. 145, Criminal Procedure Code. That article has no relation to any portion of the order of the Criminal Court which has no reference to the question of possession. The suit of 1910 was brought within three years from the order of the Magistrate so far as it decided the question of possession and was therefore rightly constituted and within time. Moreover as the order of the Magistrate did not dispossess the Plaintiffs or maintain Defendants' possession to the exclusion of the Plaintiffs, Art. 47 does not apply. As regards Art. 120, the Magistrate's order as to the mode of possession or the use of large nets by the Defendants could not give a cause of action for a suit which, if not brought within the statutory period, made that portion of the order binding between the parties. The intention of the law of limitation is that if no suit is brought within the statutory period the remedy is lost and in case of an order of a competent Court it remains binding between the parties. In the view I take of the matter, that part of the Magistrate's order which relates to the use of large nets by Defendants was not an order of a competent Court and had no binding force. Then again, according to the finding of the learned Judge the Defendants ceased to ply large nets for more than three years from 1914 to 1917. The cause of action was not the Magistrate's order under sec. 145, but the infringement of Plaintiffs' right and so during that period Plaintiffs had no ground for a suit for such infringement; and when the Defendants again started doing what they had no right to do, it gave rise to a fresh cause of action, for the Plaintiffs had no reasons to suppose that after the decision of the question by the High Court of

the land and the Defendants obeying it for a long time there would be recrudescence of the wrong. In the plaint in the present suit the cause of action is mentioned as arising in 1917 and therefore the suit is within time. It is also a case of continuing wrong within the meaning of sec. 23 of the Limitation Act. I hold that the suit is not barred by limitation.

As to Or. 2, r. 2, Civil Procedure Code : —

The above observations apply with equal force to this question. As an abstract proposition of law, the view taken by the learned Judge is open to objection. That rule lays down that every suit shall include the whole of the claim in respect of the cause of action and if a portion of the claim is omitted from the suit the Plaintiff shall not sue for it again. As has been held in *Pagana Reena Saminathan Chetty v. Palaniappa Chetty* (1) this provision of the law is directed to securing the exhaustion of the reliefs in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise out of the same transaction. The order under sec. 145, even if valid, gave rise to two distinct causes of action : one in respect of the Plaintiffs' period of the possession of the fishery and the other in respect of the Defendants' period. In respect of the first, the cause of action was that the Defendants were held entitled to fish during Plaintiffs' term and in respect of the latter, that they could use large nets during their own term. These are two distinct causes of action though in respect of the same fishery. See *Kuloda Prosad Chatterjee v. Khudiram Misra* (2). Then, as I have

(1) L. R. 41 I. A. 142; s. c. 18 C. W. N. 617 (1913).

(2) 27 C. W. N. 073; s. c. 37 C. L. J. 545 (1922).

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said, the cause of action for the present suit arose afresh in 1917 as a fresh breach of Defendants' obligation. The suit is accordingly not barred under Or. 2, r. 2, Civil Procedure Code.

The next question that falls for consideration is the size of the nets to be used by the parties during their respective terms. In the suit of 1910, the trial Court held that "by big nets are meant such nets as can be plied by five or seven or larger number of men including *ber* and *bacher* which are the biggest and by small nets are meant those which are plied by one or two *pails*." The Subordinate Judge in the present case held that all questions relating to the respective rights of the parties and the size of the nets were decided in the suit of 1910 and were accordingly *res judicata* in this suit and could not be re-opened. The learned District Judge says that he is not very happy in his mind as to whether small nets and big nets have been satisfactorily defined. He observes that the evidence in the case as to this is very unsatisfactory and that the Defendants did not make any serious attempts to challenge the definition of small nets given by the Plaintiffs in their plaint. He regards the result anomalous and observes:—"I should say that all nets that are not big as defined in the previous case are small, that is to say, nets that require more than four men to wield are big nets and those that require four men or less are small nets." In the judgment in suit No. 324 of 1910 the trial Judge made the following remarks in this connection:—"It is neither necessary in this view of the case to define what are big nets and what are small nets. It is also not easy to determine the question. It can, however, be generally held that by big nets are meant all nets which can be plied with five or seven or larger number

of men including *ber* and *bacher* which are the biggest and by small nets are meant those which are plied by one or two *pails*." On appeal from this decision in appeal No. 58 of 1914, the District Judge of Rajshahi after discussing the evidence stated:—"I am of opinion that the learned lower Court was perfectly correct in its definition of the '*khas baich*' rights and in restricting fishing by the Defendants as it has done." In appeal from the decree of the District Judge (Second Appeal No. 1317 of 1915) it appears that objection was taken by the present Defendants that the Court below in granting permanent injunction against them had not defined what sort of nets or other traps the parties were to use in the exercise of their respective rights. The learned Judges thought that they had been sufficiently defined. As observed by the Subordinate Judge in suit No. 324 of 1910, it was not necessary to define the size of the nets for the purposes of that suit but the Defendants invited the Appellate Court to decide the question. In these circumstances, it is difficult to resist the conclusion that the Defendants are estopped from re-agitating the matter in the present suit. Apart from the question of *res judicata*, I think the decision in the previous suit and that of the Subordinate Judge in this suit on this point are correct. In the application in the Plaintiffs' suits of 1861 and the suit brought by him in 1862, Alam Saha, Defendants' predecessor, claimed the right to fish with *anta*, *bansi* and other *bhashan* fish traps. The decision of the Magistrate in the 145 case was also to same effect. *Anta* and *bansi* are small nets which can be plied by one or two men and *bhashan* fish traps are contrivances which float on the water during the rainy season (see the judgment of the Subordinate Judge in suit No. 324 of 1910). The learned District

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Judge's view is not based upon evidence in the case but is probably, according to him, a common sense solution of the problem. There may be sufficient logic in the Judge's view that what is not large is small but the conduct of the Defendants and their predecessors for a large number of years and the impracticability of distinguishing large nets from small, if they are so near each other in size, support the view taken by the trial Court. I therefore hold that the decision of the trial Court on the size of the nets should be upheld.

In the view above expressed this appeal should succeed, the decree of the lower Appellate Court is set aside and that of the first Court restored with costs throughout.

The Respondents have filed cross-objections and three points have been urged on their behalf. Firstly, it is argued that the Plaintiffs' suit should be dismissed in the absence of any cause of action. It is said that as the Plaintiffs' suit refers to the period of the year during which the Defendants are in sole possession of the fishery the Plaintiffs cannot object to the mode of possession by the Defendants. This contention has no substance. The respective rights of the parties in the fishery are exclusive of each other for their mutual benefit. The Plaintiffs are to catch only large fish and Defendants small fish only. If Defendants catch big fish during their period it is not unlikely that there will be diminution of the quantity of such fish during Plaintiffs' period. The fact that two different rights, "*khas baich*" and "*raiyan*," exist in the same fishery proves that they must be mutually exclusive and misuse of one will necessarily interfere with the exercise of the other. It has moreover been found by the Subordinate Judge that the Plaintiffs have actually suffered loss by the conduct of the Defen-

dants. Plaintiffs have therefore the right to restrict the Defendants to their *raiyan* rights and have a good cause of action for the suit.

Secondly, it is contended that permanent injunction should not have been granted in this case under sec. 54 of the Specific Relief Act. I see no force in this argument. The learned Subordinate Judge observes in this connection: "In my opinion the fact that Plaintiffs suffered loss has been established by evidence. Moreover there can be no doubt that the action of the Defendants would cause loss to the Plaintiffs." On this finding the decree for injunction is proper and legal.

Lastly, it is argued that the learned Judge is in error in holding that the decision in the suit of 1910 that the Defendants can use small nets only during their period is *res judicata*. There is no force in this contention either. In that suit the trial Court said:—"It is also necessary to determine for the purposes of this suit what are the Defendants' rights in the said two parts" (parts 1 and 3) "of the *jalkars* by virtue of their *raiyan* right." The decision on this question of the trial Court was upheld by the Court of first appeal and by this Court in second appeal. In order to decide the question in issue in that case the Court had to determine the extent and nature of the rights of the parties in the fishery and this determination was the ground-work of its decision of the issue in the case. See in this connection *Dwijendra Narain Roy v. Joges Chandra Dey* (3) and the cases cited therein. Besides, the finding on the evidence in this case of the learned Judge as regards the meaning of Defendants' *raiyan* right renders the further discussion of this question of no practical importance.

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In the result the cross-objection is dismissed but without costs.

GRAHAM, J.—This appeal, in which the Plaintiffs are the Appellants, arises out of a suit for declaration of their rights in a certain *jalkar* in the river Mahananda and a branch thereof. They asked for a declaratory decree declaring that the Defendants, now Respondents, as well as their tenants and lessees had, from the 16th Chaitra up to the day previous to the *bejoya dasami* day every year, only what was described as raiyatan right in the said *jalkar*, that is to say, to catch fish by means of small nets plied by one or two men, and not by means of larger nets. They also asked for a perpetual injunction restraining the Defendants from catching fish during the said period by means of big nets, or by means of any contrivances in excess of their said raiyatan right.

The Defendants pleaded *inter alia* that the suit was barred by limitation, that the Plaintiffs, not having included their claim in respect of the size of the nets in their previous suit (No. 324 of 1910), the present suit was barred under Or. 2, r. 2 of the Code of Civil Procedure, that they (the Defendants) had been exercising this right for a long time, that there was no restriction in regard to the use of nets by them, that Plaintiffs were not entitled to obtain a permanent injunction, and that the suit was liable to be dismissed.

Issues were framed in accordance with these pleadings and the trial Court after deciding them in favour of the Plaintiffs gave a declaratory decree in the terms asked for as well as a perpetual injunction. On appeal the learned District Judge of Rajshahi modified that decision holding that the suit must be dismissed as regards part one of the fishery from Malda Bhandaghat to Pirgunje, while as regards part three, *viz.*, from Pirgunje to Pakuria, he

confirmed the judgment and decree of the Subordinate Judge with the modification that the small nets to be used by the Defendants were defined to be those which require less than five men to wield them, and not less than three, as decreed by the Court of first instance.

It may be explained that the *jalkar* consists of three parts, and that we are concerned in this appeal with parts one and three only, as part two is not the subject-matter of the suit.

The Plaintiffs have now appealed and the main points urged on their behalf are :—

1. Firstly, that in regard to part three of the fishery the Court of Appeal below erred in holding that big nets and small nets were not satisfactorily defined in the previous litigation, and in modifying the decree of the trial Court and defining big nets as those that require four men to wield them and small nets as those wielded by four men or less. It is urged that in the suit of 1910 it was necessary to determine the exact nature of *khas baich* and raiyatan rights, both with reference to the nature of the net to be used, as well as the period during which the rights were to be exercised, and that the learned District Judge has erred in going behind the decision of the Subordinate Judge, which was subsequently confirmed by the Court of Appeal and by this Court, and in re-opening the question as to the nature of the nets which the Defendants were entitled to use in exercise of their raiyatan rights. Stress has been laid on the finding of the Subordinate Judge in the suit of 1910 "that it can be generally held that by small nets are meant those which are plied by one or two *pais*," and it is argued that the Court of Appeal below was precluded by the doctrine of *res judicata* from find-

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ing that small nets meant those which can be plied by four men or less.

In my opinion these contentions are well-founded and must prevail. It seems to be abundantly clear that in the previous suit of 1910 the attention of the Court was directed not only to the question of the period during which the rights were to be exercised, but also to the mode in which those rights were to be exercised, or in other words, to the size of the nets to be used. That this is so is apparent from the following passage in the judgment of the Subordinate Judge in that suit :—" It can, however, be generally held that by the big nets are meant all nets which can be plied with 5 or 7 or a larger number of men . . . and by small nets are meant those which are plied by one or two *pais*. It is therefore further held that during the *khas baich* period the Plaintiffs will not be entitled to use such small nets as are plied with one or two *pais*, but only long nets, which are plied by 5 or 7 or a larger number (of) *pais*."

Thus there was a clear decision that small nets meant nets plied by one or two *pais* only, and in face of that decision, which apparently was invited by the parties and acquiesced in by them, it is difficult to see how this matter could be re-opened, and how the learned District Judge could go behind it and hold that by small nets were meant those nets which are plied by less than four persons. The learned District Judge seems to have been influenced by the fact that there is a gap or lacuna between the big and small nets as defined by the Subordinate Judge, and he appears to have been of opinion that, if nets wielded by 5 or 7 persons or more were big nets, then nets wielded by any lesser number of persons must be deemed to be small nets. And at first sight there may be something to be said for this

point of view, since the definition leaves it open to doubt whether nets wielded by three or four *pais* come within the category of large or small nets. The definition may perhaps be logically incomplete, but that cannot to my mind alter the position. There was a clear finding in the former suit that big nets were those wielded by 5 to 7 or more persons and small nets those wielded by one or two men. That finding was subsequently confirmed by this Court on appeal and it was held that it was necessary to decide as to the meaning of *khas baich* and *raiyan* rights, and further that those rights had been sufficiently defined.

On behalf of the Respondents a good deal of stress has been laid on the fact that in the plaint in the suit of 1910 no case was expressly made in regard to the size of the net to be used by the Defendants, and that no issue was framed on the point. It is argued therefore that this was not part of the basis of that suit, and that the finding thereon cannot operate as *res judicata* in this suit. There is, however, authority for the view that, even if a particular matter be not included in a formal issue, if it is directly and substantially in issue between the parties, and if there be a decision thereon, it will operate as *res judicata*. It cannot be doubted that this question as to the size of the nets to be used was in issue in the former suit, and that a decision upon the point was necessary. Indeed the whole object of the suit of 1910 was to obtain a definition of the respective rights of the parties, and this appears to have been rendered necessary by the conduct of the Defendants in re-opening the question as to the meaning of *khas baich* and *raiyan* rights decided in the suit of 1862 and after for a long period acquiescing in that decision disputing the matter afresh and causing proceedings to

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be instituted in 1907 under sec. 145 of the Code of Criminal Procedure. It may be true, as I have said above, that the definition of the respective rights of the parties, so far as it related to the size of the nets to be used was somewhat logically defective, and it may be argued that, if the definition given by the Court of Appeal below be adopted, there will be less likelihood of trouble arising between the parties again. On the other hand, it is conceivable that the gap between the rights of the parties was purposely left in order to make it clear that the Defendants were only entitled to use the smallest size nets such as could be plied by one or two persons. If, on the other hand, the sizes of the nets to be used by the parties merged into one another that might in itself give rise to further disputes.

Be that as it may, I am clearly of opinion that the question of the size of the nets was *res judicata* in view of the decision arrived at in the suit of 1910, which was afterwards confirmed as stated above by the Court of Appeal, as well as by this Court, and that being so, it was not open to the learned District Judge to re-open the matter, and decide that the Defendants were entitled to use a net of different size.

It was next argued on behalf of the Appellants that the Court of Appeal below had erred in law in holding that the suit in regard to part one of the fishery was barred by limitation. The learned District Judge held that even if Art. 47 of the Limitation Act did not apply, Art. 120 was applicable, that under that article the suit must be brought within six years, and that, as it was brought more than 12 years after the decision of the case under sec. 145 of the Code of Criminal Procedure, the suit was time-barred. On behalf of the Appellants it is replied that the case under

sec. 145, Criminal Procedure Code, ceased to have any effect when the subsequent suit determined the rights of the parties, and that thereafter when the rights of the Plaintiffs were again infringed, a fresh cause of action accrued to them, and that consequently the suit was not barred by limitation. The learned Advocate for the Respondents has sought to meet this contention by an ingenious, but I think fallacious, argument based upon what he has described as the dual nature of the order under sec. 145. That order, he contends, consisted of two branches: one of which, *viz.*, the second portion, relating to the plying of big nets was not challenged in the plaint in the suit of 1910. Therefore he argues the suit was restricted to the first part of the Magistrate's order, and so far as the second part of the order was concerned, that order continued to be operative and effective with the result that limitation must date therefrom. In my opinion this contention is without substance. The order under sec. 145 cannot, I think, be split up in this fashion. That order was superseded when the suit was decided, and after the decision of the suit if there was, as has been found, a fresh infringement of the Plaintiffs' rights, they would have a fresh cause of action. In my opinion therefore the suit was not barred as regards part one of the fishery.

It remains to deal with the argument that the suit, so far as part one of the fishery is concerned, is barred under Or. 2, r. 2 of the Code of Civil Procedure. The rule in question lays down that every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action, and that, where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relin-

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quished. It is argued on behalf of the Respondents that when the Plaintiffs brought the suit of 1910 they ought to have included their claim relating to the size of the nets, and that as they did not do so, they must be held to have relinquished it and cannot be now permitted to sue for it. The learned District Judge has given effect to this contention, but in my opinion he is in error. The Plaintiffs, as the trial Court pointed out, repeated in suit No. 324 the whole of their allegations made before Magistrate, *viz.*, their right to fish all the year round with big nets and Defendants' rights to catch fish with small nets during their portion of the year, and there was no reason therefore for asking for a negative declaration regarding the big nets of the Defendants, as they had themselves set up a claim of right to fishing with big nets all the year round. In other words, the nature of the claim set up by them rendered it unnecessary that they should ask for any such negative relief. In my judgment therefore the argument as to relinquishment is without substance.

In the result the appeal succeeds, the judgment and decree of the District Judge must be set aside, and the judgment and decree of the trial Court restored.

The Appellants are entitled to their costs in this Court and in the Courts below. A cross-objection has been filed by the Respondents and it has been urged that on a proper construction of the previous judgments the Court of Appeal below should have held that with regard to part three of the fishery the Defendants were entitled to use big nets during their own period of fishery, and that the Plaintiffs' claim to restrain the Defendants from using big nets during their period was barred under Or. 2, r. 2 of the Code of Civil Procedure. It has already been held

that such a prayer must be held to have been included in that suit and there was a decision on the point. The cross-objection therefore fails and must be dismissed.

S. C. M.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM ORDER

No. 191 of 1925.

SUHRWARDY, J.
PAGE, J.

1926,

5, March.

BRUTNATH DEB and
ors., Opposite Party,
Appellants,

v.

SASHIMUKHI BRAHMANI,
Petitioner, Respondent.

Civil Procedure Code (Act V of 1908), sec. 47, Or. 41, rr. 4 and 53 -- Appellate Court, if competent to make an order in favour of a person who is no party to the appeal before it.

Upon appeal by one judgment-debtor alone as regards the portion of the decreed amount payable by her only, the lower Appellate Court dismissed the Appellant decree-holder's entire application for execution as time-barred, although her co-judgment-debtor was no Respondent to the appeal before it:

Held—That the lower Appellate Court was competent, in acting under Or. 41, r. 33 of the Code, to dismiss the decree-holder's entire application for execution, as against both the judgment-debtors as time-barred upon appeal by one judgment-debtor alone, although her co-judgment-debtor was not made a party Respondent to the appeal and there was thus no cross-objection on her behalf and notwithstanding that the appeal was not directed against the entire decree but only as to a part of it, *viz.*, as regards the proportionate share of the decreed amount payable by the Appellant.

The Appellate Court may decide any question under this rule in favour of a

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party to the suit though he is not a Respondent to the appeal.

HARI DAS DEB v. KAILASH CHANDRA BOSE (2) dissented from.

AMBIKA CHARAN CHAKRAVARTI v. SASITARA DEBI (3) and GANGADHAR MURADI v. BANABASHI PADHARI (4) followed and relied on.

ABJAL MAJHI v. INTU BEPARI (5) and AKIMANNESSA BIBI v. BEPIN BEHARY MITTER (6) referred to.

This was an appeal against the order of N. K. Bose, Esq., Subordinate Judge, 2nd Court of Zillah Midnapur, dated the 5th of January 1925, reversing the order of S. Mukherjee, Esq., Munsif, Ghatal, dated the 4th of September 1924.

The facts of the case will appear from the judgment.

Babu Gopendra Nath Das for the Appellants.

Mr. S. C. Maity, Babus Apurba Charan Mukerji and Durga Charan Roy Choudhury for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SUHRWARDY, J.—This appeal arises in connection with execution proceedings and the main question considered in the Court below was whether the execution was time-barred.

The decree was passed on the 21st of December 1918. It was a personal decree against judgment-debtors Nos. 1 and 2 passed under Or. 34, r. 6, C. P. C. Respondent No. 3 is a transferee from the other two judgment-debtors.

The decree-holder's case is that on the 26th of January 1919 Rs. 6 was paid by

Respondents Nos. 1 and 2, the judgment-debtors, on the 26th of October 1919; another sum of Rs. 3 was paid by the Respondents Nos. 1 and 2 on the 2nd November 1920; a sum of Rs. 2 was paid by the second Respondent alone on the 20th of December 1921; a sum of Rs. 2 was paid by the first Respondent alone and on the 17th of January 1922 Rs. 33 was paid by the second Respondent only. The first application for execution was made on the 10th of November 1922 and notice under Or. 21, r. 22 on the judgment-debtors was ordered to be issued on the 24th of November 1922 and the notice was served. No further steps in execution having been taken the execution case was struck off and a second application for execution was presented on the 28th of January 1924. It was objected on behalf of the judgment-debtor No. 2 that the execution was barred under Art. 182 of the Limitation Act.

The Court of first instance believed the third and the fourth payments, namely, the payments on the 2nd of November 1920 by the second Respondent Mandakini and on the 20th of December 1921 by the first Respondent Sashimukhi and held that the execution was not barred by limitation.

On appeal by the first Respondent the Subordinate Judge found upon the evidence that the books produced by the decree-holders were not genuine, and for the reasons given by him he disbelieved the oral evidence of the decree-holders. He found that the payment of Rs. 2 by Sashimukhi on the 20th of December 1921 was not proved and hence execution so far as against her was barred. He further found that the payment on the 2nd of November 1920 by Mandakini was also not proved. In the result he dismissed the application for execution.

(2) 44 Ind. Cas. 480 (1916).

(3) 22 C. L. J. 61 (1915).

(4) 22 C. L. J. 390 (1914).

(5) 22 C. L. J. 394 (1915).

(6) 22 C. L. J. 397 (1915).

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Two points have been raised on behalf of the decree-holders in this appeal.

Firstly, it is contended that the Court below should not have considered the payment made by Mandakini on the 2nd of November 1920 as she was neither an Appellant nor a Respondent before it. It is argued that if the Court acted under Or. 41, r. 33 the Court was not justified in passing an order in favour of a party who was not made a Respondent in the appeal, and, in support of this view, reliance has been placed on the cases of *Jogesh Chandra Banerjee v. Sarada Kumar Chakravarti* (1) and *Hari Das Dey v. Kailash Chandra Bose* (2). The first case is not decided on the construction of Or. 41, r. 33 and is based upon its own particular facts. The second case, decided by the same Judges who were parties to the first case, no doubt supports the Appellants' contention. Fletcher, J., laid down the proposition broadly thus :-- "That section" (Or. 41 r. 33) "does not apply to a person who was not a party to the appeal. These non-contesting Defendants were not parties to the litigation in the lower Appellate Court. Obviously, on first principles, the learned Judge in that Court could not vary the decree of the Court of first instance as regards the rights and liabilities as adjudicated on by that Court." In my humble judgment, the restriction to the operation of r. 33 put by the learned Judge is not borne out by the wording of the section or the principle underlying the enactment. Or. 41, r. 33 is in these words :—"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require." I pause

here to comment that if the section had ended here there would have been no limitation to the right of the Court to pass any order which on its finding should have been passed. The section goes on : "And this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents or parties although such Respondents or parties may not have filed any appeal or objection." The net result of the enactment is that the Appellate Court may pass any order it thinks fit in appeal though the appeal does not extend to the whole of the decree appealed against and though the power is exercised in favour of any Respondent or any party who has not objected before it to the decree. By the use of the expression "Respondents or parties" in the section I understand that the Appellate Court may pass an order in favour of the Respondents who have not appealed and it may similarly decide any question in favour of a party, by which I understand a party to the suit and who is not a Respondent in the appeal. Otherwise, there was no sense in using the words "Respondents or parties." The learned Judges in the cases above referred to may have been induced to form the opinion they did in view of the illustration attached to the section, but it is hardly necessary to say that the illustration does not limit the section and is not intended to illustrate its full scope. The view that appeals to me is supported by the decision in the case of *Ambika Charan Chakravarti v. Sasitara Debi* (3). The section should be given a broad and generous interpretation in view of the fact that it is intended to secure consistency in the administration of justice and avoid anomalies which may

(1) 22 C. W. N. 223 (1918).

(2) 44 Ind. Cas. 490 (1916).

(3) 22 C. L. J. 61 (1916).

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result if the Court is held to be helpless in giving effect to its own decision to the full extent. Where the rights of parties depend on the same obligation, *e.g.*, contract, and where the Court finds that the contract is genuine or not genuine, it may give effect to its finding by holding all the parties liable under the contract or by exonerating all the parties who are sought to be made liable, without consideration as to whether such parties are before it or not. But the power which the Court is vested with under this section must be exercised in the interest of and for the furtherance of justice as has been observed in the case of *Gangadhar Muradi v. Banabashi Padihari* (4): "As the result of the Appellate Court's interference in favour of the Appellants further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience." In the view that I have taken I am sceptic about the propriety of giving the section such a narrow construction as not to make it applicable to cases where there may be disregard of the provisions of other statutes such as the Court Fees Act, as has been observed in *Abjal Majhi v. Intu Bepari* (5) and *Akimannessa Bibi v. Bepin Behary Mitter* (6), as the section is expressly made applicable to appeals as to part of the decree. As to substantive law like the law of limitation, other and different considerations will arise. In accordance with the above observations I should have felt inclined to hold that the determination of the question as to the payment by Mandakini on the 2nd of November 1920 was not necessary in order to give relief in the appeal by Sashimukhi, for it is apparent that even if that pay-

ment was believed it would not have, under sec. 21 of the Limitation Act, extended the period of limitation against Sashimukhi. I would have given effect to the contention of the decree-holders that the Court of Appeal below should not have dismissed the entire application for execution but should have allowed the execution to proceed as against Mandakini, the Respondent No. 2, but I find from a perusal of the judgment of the learned Judge that he was invited by the decree-holders to decide the factum of the alleged payment on the 2nd of November 1920 by Mandakini. The idea in the Court below of the legal adviser of the decree-holders was apparently that a payment by one judgment-debtor would stop limitation running as against the other judgment-debtors. It might have been a mistaken view of the law but it was at the invitation of the decree-holders that the Judge went to decide that question and it was found that the payment on that date was also not proved. Having come to that finding I cannot say that he acted illegally in dismissing the decree-holders' application for execution *in toto*.

Secondly, it is urged that the Court of Appeal below should have considered the payment alleged to have been made on the 17th of January 1922. That payment was made more than three years after the decree which had been passed on the 21st of December 1918, but the second payment which is alleged to have been made by Respondents Nos. 1 and 2 on the 26th of October 1919 would make the subsequent payment in time to save the decree. It is, therefore, submitted that the Court below having found that the fourth payment was not proved should have enquired into the last payment before holding that the application for execution was

(4) 22 C. L. J. 390 (1914).

(5) 22 Q. L. J. 391 (1915).

(6) 1 F.C. L. J. 897 (1915).

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barred. It appears that there is no express finding by the learned Subordinate Judge with regard to this payment, but it appears that the first Court did not consider this alleged payment and in the lower Appellate Court the learned Subordinate Judge has disbelieved all the evidence that was brought forward to support this payment in connection with the consideration of the fourth payment, and it further appears that this last payment was never pressed before the learned Judge nor was he invited to express any definite opinion upon it. The judgment of the Subordinate Judge where he deals with the question begins with these words: "Now, the main question in this case is whether any payment was made by judgment-debtor No. 2 on the 5th Pous 1328 B. S., i.e., 20th December 1921." Then he goes on to consider the evidence and observes that the evidence consists mainly of one witness, namely, Jasada Nandan Hazari, who states that he made entries in the books in 1328 B. S. of the fourth and fifth payments. He discusses the decree-holders' evidence and comes to the conclusion that the books of account filed on behalf of the decree-holders are fabricated and that the witness Jasada could not have written the books. In these circumstances, I think it will serve no useful purpose to ask the learned Subordinate Judge to consider the last payment. Evidently his opinion is that the books filed by the decree-holders in support of the alleged payments could not be relied upon and that the oral evidence such as was adduced before him was of persons who were either servants or directly related to them.

The result is that in my opinion this appeal fails and is dismissed with costs, hearing-fee, two gold mohurs.

PAGE, J.—I agree.

As regards the contesting Respondent judgment-debtor No. 2 the learned Judge in the lower Appellate Court has held that the alleged payment of Rs. 2 on the 20th of December 1921 on her behalf as part payment of the debt was not proved. The learned vakil for the Appellants contends that there is no finding that a subsequent payment of Rs. 33 alleged to have been made as part payment of the debt on the 17th of January 1922 has not been proved. In my opinion, there is no substance in this contention. It is not pretended that this sum of Rs. 33 was paid in cash or currency. What is contended is that on the 17th Magh 1328 B. S., the Defendant No. 1 delivered or caused to be delivered to the Plaintiffs some paddy and a witness was forthcoming on behalf of the Plaintiffs who stated that that paddy was taken as part payment of the debt in question. Although it is well-established that payment within sec. 20 of the Limitation Act of 1908 need not be in cash or currency, yet if it is to be in kind the party alleging that the payment was made must prove that there was an agreement between the parties that the payment should be made in that particular manner. The learned Judge in the lower Appellate Court has disbelieved the evidence of the witness who purported to prove the alleged payment of Rs. 33 by appropriation of paddy, and, in my opinion, in substance there is a finding that no payment on the 17th of January 1922 for the purpose of limitation was made. That disposes of the appeal so far as the second Defendant is concerned.

It appears, however, that the Plaintiff in the lower Appellate Court contended that if there was a payment made on the 2nd of November 1920 by the first Defendant (who did not appeal from the decree

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passed against her to the lower Appellate Court), the effect of such a payment would be that the Plaintiff's cause of action would be saved as against both the first and the second Defendants. The learned Judge came to the conclusion that none of the alleged payments were proved to have been made and dismissed the Plaintiff's suit as against both the joint debtors. The learned vakil on behalf of the Appellants has contended that the learned Judge in the lower Appellate Court had no jurisdiction to dismiss the suit as against the first Defendant because the first Defendant was not a party to the appeal. In my opinion, that is not the true construction to be placed upon Or. 41, r. 33, C. P. C. In my opinion, it was open to the Court to dismiss the suit notwithstanding that the appeal was not directed against the entire decree and notwithstanding that the first Defendant had not filed an objection or an appeal against the decree which had been passed against her, the real position being that upon a true construction of r. 33 "no hard and fast rule can be laid down; but I think it may be fairly said that ordinarily the power contained in r. 33 should be limited to those cases where, as the result of the Appellate Court's interference with the decree in favour of the Appellants, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience," *per* Jenkins, C. J., in *Gangadhar Muradi v. Banabashi Padihari* (4). An illustration of the way in which the rule may be utilized is to be found in *Ambika Charan Chakravarti v. Sasitara Debi* (3). Care, of course, must be taken in each case to see that r. 33 is not utilized as a mode of evading the pro-

visions of other statutory rules or orders. In this case the Court having found at the Appellants' invitation that no part payment of any sort or kind was made, in my opinion, it was a proper exercise of the powers entrusted to him under r. 33 that the learned Judge should have held in the circumstances of that particular case that the entire claim of the Plaintiffs should be dismissed. I agree in the order which has been passed.

H. D. C.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

VISCOUNT DUNEDIN.

LORD SHAW.

LORD SUMNER.

SIR JOHN EDGE.

LORD SALVESSEN.

1925,

Heard, 17, 19 and

20, November.

1926,

Judgment, 1, March.]

MANECKJI PESTONJI
BHARUCHA and anr.,
Appellants,

v.

WADILAL SARABHAI
& Co., Respondents.

*Indian Contract Act (IX of 1872), secs. 83, 95
121 Shares, transfer of, by delivery of certificates
and blank transfers signed by registered holder, if
effective—Choses in action—Goods—Sale of unascertained
goods, when complete—Right to rescind sale,
when arises—Vendor, when has lien in shares—
Bombay Stock Exchange Rule No. C, true meaning
and effect of.*

The Plaintiff, a certified share-broker, sold on the Bombay Stock Exchange to D.1 a certain number of shares of a Company, and in order to make delivery acquired the requisite number of shares in the market from various brokers taking from the latter blank transfers signed by the registered holders along with the corresponding certificates. The certificates and blank transfers were handed to D.1, who purported to pay by a cheque which, however, was dishonoured. The blank transfers and certificates were then hand-

(3) 22 C. L. J. 61 (1915).

(4) 22 C. L. J. 390 (1914).

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ed over in succession to two other persons, D.2 and D.3, on certain propositions as to raising money. In a suit by Plaintiff against D.1, D.2 and D.3 for return of the certificates and blank transfers or otherwise for damages :

Held—That though full property in shares in a Company is only in the registered holder, the title to get on the register consists in the possession of certificates together with transfers signed by the registered holder and these constitute choses in action, which, by the terms of the Contract Act, are goods. These goods which were not ascertained at the date of the contract became ascertained when the certificates and blank transfers were handed over to D.1 and were accepted by him and thereupon, under sec. 83 of the Contract Act, the sale became complete and the property passed. Thenceforward Plaintiff could only sue D.1 on the cheque or for the price of the shares unpaid in respect of the cheque which was dishonoured. Having parted with possession, Plaintiff had under sec. 95 of the Act no lien in the goods and could not sue the subsequent transferees for delivery of the shares.

Rule C of the Bombay Stock Exchange cannot be read into the contract of sale as an express stipulation to rescind within the meaning of sec. 121 of the Act. It had, in any case, nothing to do with the perfection of contracts or the passing of property.

This was an appeal (No. 126 of 1924) from a decree, dated the 15th March 1923, of the High Court at Bombay, which reversed a decree, dated the 17th August 1922, of the said Court in its Ordinary Original Civil Jurisdiction.

The Plaintiffs were brokers in Bombay

and sued to recover from the first Defendant Gora a sum of Rs. 1,51,800, and from the Defendants Wadilal & Co. and Ghia, delivery of the certificates and transfers relating to 305 shares of Alcock, Ashdown & Co., Ltd., and for damages. The principal facts were not disputed. The Plaintiff Bharucha was a certified broker. The second Plaintiff Arajania is not a certified broker but has been described as a sub-broker for the first Plaintiff.

In March 1920 Bharucha purchased 129 shares in Alcock, Ashdown & Co., Ltd., and on payment on 14th April received the relative certificates and blank transfers.

In March 1920 Arajania sold 150 shares in the same Company to Gora for completion on 14th April 1920, and on that date having received the documents for the said 129 shares from Bharucha, Arajania handed them over to Gora and received from him a cheque, drawn in favour of Bharucha, for Rs. 1,51,800, the price of the shares. The cheque was dishonoured on presentation the following day.

Gora had been speculating for some time previously in the shares of Alcock, Ashdown & Co., Ltd. Between 13th February and 9th March he had purchased 460 shares from the Defendant firm Wadilal Sarabhai & Co., through their agent Manilal. In addition to these shares Gora had purchased shares from other sources making a total of 569 shares in all, and the final adjustment was to take place on the 17th April.

On the 15th April 1920 Gora handed to Manilal in liquidation of his debt to the Defendant firm a cheque for Rs. 3,16,800 and the certificates for 305 shares (including therein 104 of the 129 shares received from the Plaintiffs).

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The said 305 shares were at the instance of Manilal pledged with his nominee, the 3rd Defendant Ghia, and the money advanced was utilised in part discharge of moneys owing by Gora to Wadilal in respect of their share transactions.

The amount due by Gora to the Plaintiffs was never paid, and Gora was declared a defaulter on 19th April 1920 and absconded shortly after.

The trial Judge (Kajiji, J.) decided that Arajania was a sub-broker to Bharucha and that the latter had a right of action and that Bharucha and Arajania were entitled to the 129 shares, which he ordered Gora to deliver up to the Plaintiffs or pay Rs. 1,51,800.

104 shares out of the 129 were declared to be in the possession of Wadilal & Co. and Ghia who were ordered to deliver them up and pay to the Plaintiffs damages calculated at the difference between the contract and market rates and to account for all dividends.

In arriving at this decision the learned Judge found that the contract for the sale of the shares was made with Gora by Arajania acting on behalf of Bharucha as his sub-broker. He accepted the contention of Wadilal & Co.'s Counsel that the shares in question were goods within the meaning of Chap. VII of the Indian Contract Act, but though he held that for this reason delivery of the shares to Gora might make him the ostensible owner of them, with power to give a title thereto to a purchaser for value without notice, yet he held that as Wadilal & Co. and Ghia knew that Gora had not paid for the shares, they were in no better position as regards Bharucha and Arajania than he was, and that the latter as unpaid vendors had an equity in them which entitled them to call on Wadilal & Co. and

Ghia for the return of the shares, and to recover from them the damages caused by their wrongful refusal to return them.

Wadilal & Co. and Ghia filed separate appeals which were heard together by Sir N. Macleod, C. J., and Crump, J., who reversed the decision of the trial Judge. They held that only Arajania had any right of action, and that therefore the resolution and practice of the Stock Exchange had no application and that Arajania as not being the registered holder, and having parted with the share certificates and blank transfers, could only sue Gora for the price of the shares, and had no title in law or in equity to the shares themselves. They held that the subject-matter of the sale was "goods" within the meaning of, and that the case was governed by, sec. 121 of the Indian Contract Act.

Mr. Justice Crump concluded his judgment in the following words :—

"On delivery of the documents there was no interest left in Plaintiff No. 2 on which an equity can be founded. As between him and Defendant No. 1 there was no fraud or misrepresentation which can vitiate the transaction. Plaintiff No. 2 had thus no lien for his unpaid purchase money and without such lien he cannot seek to follow the documents. He could not do so were they still in the possession of Defendant No. 1 and therefore the further history of these documents is not material.

"The same result follows from the statute laws of this country. Whatever be the exact nature of the property sold it must be 'moveable property' for the purposes of Chap. VII of the Indian Contract Act. The definition in sec. 2, subsecs. (5) and (6) of the General Clauses Act (Act I of 1868) is applicable. The property is not 'immoveable' property

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within that definition. Therefore it is 'moveable' property. It follows from sec. 76 of the Contract Act that this property is 'goods.' The case therefore falls within sec. 121 of the same Act. Plaintiff No. 2 delivered all that he had. He cannot therefore rescind the contract on the buyer's failing to pay the price unless it was stipulated by the contract that he should be so entitled. I agree that no special condition to this effect is proved."

The Plaintiffs appealed to His Majesty in Council.

Messrs. Clauson, K. C., E. B. Raikes and Henry Johnston for the Appellants.—No property in the shares ever passed to Gora or to the Respondents Wadilal & Co.

There would be no "delivery" until the transfer is registered.

The sale was not of "goods" but of choses in action which cannot come within the meaning of goods. General Clauses Act X of 1897, sec. 3.

Contract Act IX of 1872, sec. 76.

In that case sec. 121 of the Contract Act would not be applicable.

Even supposing the property in the shares did pass it passed conditionally only on Gora's cheque being duly honoured.

Arajanian was selling on behalf of a disclosed principal who was a member of the Bombay Stock Exchange and the presumption is that the rules of the Stock Exchange are incorporated into the contract. Rule C provides for the return of the shares and is a "stipulation" within the meaning of sec. 121 of the Contract Act. Time was of the essence of the contract and there is an implied stipulation from the nature of the transaction and the usages attached to it that the Appellants should be entitled to rescind on dishonour of Gora's cheque.

Re Schwabacher (1).

Sec. 55, Contract Act, IX of 1872, applies to all cases of reciprocal promises whether or not the property in the goods sold has passed.

Buldeo Dass v. Howe (2).

The High Court in its Original Jurisdiction has all the powers of a Court of equity (Supreme Court Charter, 1823, cl. 18) and the Appellant is entitled to equitable relief. The contract is one of which specific performance would be granted and the Appellant is entitled to prevent Gora from parting with the shares.

Paine v. Hutchinson (3).

Specific Relief Act I of 1877, secs. 12, 35.

The subject-matter of the contract is an equitable chose in action to which the Contract Act may apply but in the construction of that contract the Court will apply equitable principles.

The principle applicable is that where a vendor has parted with the subject-matter of the contract without receiving any consideration, the purchaser is in possession as trustee for the vendor, that is to say, the vendor has a lien on the subject-matter for the unpaid purchase money and also a right to have the contract rescinded and the shares returned.

In re Albert Life Assurance Co. (4) and *In re Stucley* (5).

They also referred to sec. 130, Transfer of Property Act, 1882.

Sir John Simon, K. C., Sir Geo. Lowndes, K. C. and Mr. B. Dubé for the Respondents Wadilal & Co.—There was no stipulation within the meaning of sec. 121 of the Contract Act. The parties to

(1) 93 L. T. 127, 129.

(2) 1 L. R. 6 Cal. 64 (1880).

(3) L. R. 3 Ch. App. 348.

(4) L. R. 11 Eq. 164, 178 (1870).

(5) [1906] 1 Ch. 67, 79 (1905).

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the contract were not members of the Bombay Stock Exchange and there is no pleading on evidence that the Stock Exchange rules should be applied to it.

The contract between Arajania and Gora was genuine and devoid of fraud; at the time that it was made there was *bona fides* and Gora had funds to meet the cheque.

Martindale v. Smith (6).

In the absence of fraud Arajania has no right to recover the documents.

In re Eastgate (7).

The transfers were the real subject-matter of the contract. Once the vendor has put the purchaser in possession of that which enables the purchaser to obtain the object of his bargain, delivery takes place.

Possession in the Common Law. Pollock and Wright, pp. 61, 68.

In the present case the seller himself had only a chose in action and there was undoubted delivery of that chose in action, and the contract was completely performed so far as the seller was concerned.

Logan v. Le Mesurier (8) and *London Founders Association v. Clarke* (9).

It is accordingly immaterial whether Gora's cheque was dishonoured or never given, the seller's only remedy being an action for goods sold and delivered.

There was no stipulation in the contract that notwithstanding delivery the seller should have the right to rescind, and no right of rescission accrues under sec. 55 of the Contract Act. That section merely provides for refusal to perform further on the failure of the other party to perform his part.

It follows that inasmuch as the Plaintiffs have no right to claim back the shares from Gora, their rights cannot be affected by any subsequent dealings between Gora and the Respondents.

The claim to a lien has not been made before, and is inconsistent with the plea put forward in the plaint that the shares belong to the Plaintiffs.

There is in any event no lien under the Contract Act (sec. 95) nor under sec. 55 (4) (b) of the Transfer of Property Act, for that applies only to immoveable property.

Sec. 12 (c) of the Specific Relief Act (I of 1877) is not applicable to a speculative deal in shares such as the present transaction. There is no proposition in India that shares must be the subject-matter of specific performance. If shares are purchased for the purpose of acquiring the status of a share-holder, mere damages will not give adequate compensation but in the present circumstances money compensation would be adequate and specific relief is not applicable. Sec. 21, Specific Relief Act.

The Stock Exchange Resolution is not incorporated in the contract and even if it were it would not *ipso motu* give ground for specific relief.

Reference was also made to *Brownlee v. Campbell* (10).

Dawson on Bankruptcy, p. 287.

Mr. Clauson, K. C., in reply. —It is not disputed that under statute law there is no equitable lien on moveables or immoveables but the subject-matter here is a chose in action to which an equitable lien may be applicable.

Irawaddy Flotilla Co. v. Bhugwandas (11) and *Mackreth v. Symmons* (12).

(6) 1 Q. B. 389 (1841).

(7) [1905] 1 K. B. 445, 446.

(8) 6 Moo. P. C. 116.

(9) 20 Q. B. D. 576 (1888).

(10) [1880] 5 A. C. at p. 937.

(11) L. R. 18 1, A. 121 (1891).

(12) 15 Ves. 329 (1808).

MANECKJI PESTONJI BHARUCHA v. WADILAL SARABHAI & Co.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT DUNEDIN.—In March 1920, the second Plaintiff in this case, Arajania, who is not a certified share-broker, and who describes himself as the sub-broker of the first Plaintiff Bharucha, who is a certified share-broker, sold on the Bombay Stock Exchange to first Defendant, Gora, 129 shares of a Company called Alcock, Ashdown & Co., Ltd., for delivery on the 14th April 1920. Neither of the two Plaintiffs was the registered holder of any such shares. In order to make good the delivery the first Plaintiff acquired the requisite number of shares in the market from various brokers, and took from these brokers blank transfers signed by the registered holders along with the corresponding certificates. These certificates and blank transfers were handed by the second Plaintiff to the first Defendant at 6 P.M. on the 14th April. At 8 P.M., a cheque for the sum due under the contract in favour of the first Plaintiff was handed to the second Plaintiff. This cheque was dishonoured on the next day.

The first Defendant, having had the blank transfers and certificates thus delivered to him, made certain propositions as to the raising of money to Manilal, a partner in the firm of Wadilal & Co., the second Defendants, and handed the certificates and transfers to him. The second Defendant in turn handed them to the third Defendant, Ghia, again on certain propositions as to raising money.

The cheque was never honoured, and the first Defendant absconded. The present action is brought by the first and second Plaintiffs against all the three Defendants, asking for return of the certificates and blank transfers or otherwise for damages.

Proof was led before the trial Judge, who held in fact (1) that Plaintiff No. 2 acted as sub-broker to Plaintiff No. 1, and that, accordingly, Plaintiff No. 1 had a direct title to sue the other Defendants; (2) that Manilal, the Defendant No. 2, knew when he took the certificates and shares that the cheque of Gora, Defendant No. 1, was not likely to be honoured. He gave a decree in favour of Plaintiff No. 1 against all Defendants. The ratio of his judgment is to be found in the following passage :—

"Gora was only an ostensible owner and the Plaintiffs, who were the unpaid vendors, had equity in them, and they could have stopped Gora from getting these shares transferred in his name in the books of the Company, but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted *bona fide* and without notice, then I certainly think that such a person would have a better title to these shares than the Plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner. . . . Manilal had notice that these shares were not paid for, and Ghia, being a mere nominee of Manilal, Ghia was in no better position than Manilal himself. They took these shares with the infirmity from Gora, and therefore they cannot claim these shares in priority to the Plaintiffs."

He had previously pointed out that in a question with the Company the owners of the shares were the old owners who had signed the blank transfers.

On appeal by the second and third Defendants the learned Judges of the Appellate Division of the High Court reversed the judgment of the trial Judge and dismissed the action as against them. They held on the facts that Plaintiff No. 2 had acted as agent for Plaintiff No. 1, and that consequently, as Plaintiff No. 2 was not a certified broker, the buyer was not affected by the rules of the Stock Exchange. This is only of importance as regards a certain Rule C, with which their Lordships will afterwards deal. On the merits of the case they held that, under

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the Indian Contract Act, the property of the shares as sold passed on the delivery of the certificates and blank transfers to Gora; that, after that, Plaintiff No. 1 had no claim against Gora except upon the cheque; that consequently he had no claim against Defendants Nos. 2 and 3, and could not have a judgment against Defendant No. 3 for delivery of the certificates and transfers. They held further that sec. 121 of the Contract Act, which is in these terms:—

"121. When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled,"

prevented the Plaintiff from rescinding the sale, there having been no stipulation provided in the contract for sale that he should be so entitled. Appeal was then taken by the Plaintiffs to the King in Council.

Their Lordships agree that the stipulation referred to in the section must be an express stipulation and that, as nothing was proved to the contrary, it must be presumed that the contract here was an ordinary contract for the sale of shares effected by bought and sold notes.

On the hearing of the appeal to their Lordships, the view expressed by the trial Judge that Gora was only an ostensible owner of the shares and the Plaintiff, who was the unpaid vendor, had the equity in them, was elaborated into an argument that, according to the law of England, there would be an equitable lien in favour of the unpaid purchaser and that that law applied. Such a view would be so far-reaching in ordinary Stock Exchange transactions that their Lordships think it necessary to emphasise their view of its unsoundness. In the first place, so far as lien is concerned, the law as to lien is statutory and is contained in the 95th

and following sections of the Indian Contract Act. Sec. 95 applies to this case; unless there is possession there is no lien. But, further, there seems to their Lordships a good deal of confusion arising from the prominence given to the fact that the full property in shares in a Company is only in the registered holder. That is quite true. It is true that what Bharucha had was not the perfected right of property, which he would have had if he had been the registered holder of the shares which he was selling. The Company is entitled to deal with the shareholder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate, together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with certificates and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that, not only registered shares, but also this class of choses in action are goods. Hence equitable considerations not applicable to goods do not apply to shares in India.

Now sec. 78 is as follows:—

"78. Sale is effected by offer and acceptance of ascertained goods for a price, * * *

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or of a price for ascertained goods, * * * together with payment of the price or delivery of the goods."

Here the goods were not ascertained goods at the time of the contract, for the contract was only for so many shares of Alcock's, not of any particular shares, but then sec. 83 provides:—

"83. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete."

So soon, therefore, as Arajania, acting for Bharucha, handed Gora the certificates and transfers and Gora accepted them and gave the cheque, the goods became ascertained goods, the sale was complete and the property passed. From that time onward Bharucha and Arajania could only sue Gora on the cheque, or for the price of the shares unpaid in respect that the cheque had not been honoured. They had no longer any *jus in re* of the certificates and transfers. They had no statutory lien, for they had parted with possession, and, consequently, as they had no contract with Defendants Nos. 2 and 3, they could not sue them for delivery of the shares, whether the Defendants had got good title as against Gora or had not.

Their Lordships have already mentioned that the trial Judge held that the sale was between brokers, and was, therefore, under the rules of the Stock Exchange, from which finding the Court of Appeal dissented. In their Lordships' view it is not necessary to decide this question of fact. They will assume, for the purpose of the argument, that the sale was as between brokers. That brings in Rule C of the Bombay Stock Exchange, which is as follows:—

"C. If the cheque given for the monies of the shares will not be honoured at the Bank on the day

following the day when the cheque is given, the shares shall have to be returned immediately to the person selling (them), and the person purchasing (them) shall have to take away those shares having paid the rupees in cash before two o'clock on that very day. And if the person purchasing shall fail to do so, those shares will be sold off by auction before three o'clock."

It was argued that the effect of this rule was to make the delivery not actual but conditional, with the result that the property did not really pass till the cheque was honoured. Their Lordships consider this argument quite unsound. The Contract Act settles that property is to pass on delivery. Delivery is a fact, and the statutory result must follow. Further, the rule cannot be read as an express stipulation in the sense of sec. 121, because it does not say what sec. 121 provides must be said. But in truth, in their Lordships' view, the rule in question had nothing to do with the perfection of contracts or the passing of property. It is for quite another purpose. The buyer may be unable, from temporary embarrassment, to meet his cheque on an exact day. Time is of the essence of this ordinary contract of sale of shares, therefore he is enjoined by the rule to hand back the shares; he is given the latitude of paying up till 2-0 o'clock, but if he does not do so then they are sold by the authorities, so as to fix, without further ado, the damages which are become due for breach of contract.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal with costs.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Appellants.

Solicitors: *Messrs. Hore Pattisson & Bathurst* for the Respondents.

G. D. M.

(CIVIL APPELLATE JURISDICTION.)**APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 121 OF 1925.**

SANDERSON, C. J.	}	HAJEE TYEB ALI
ROBIN, J.		MULLICK, Appellant,
1925,		v.
Heard,		PURNA CHANDRA PAL
19, November.		and ors., Respondents.
Judgment,		
20, November.		

Presidency Towns Insolvency Act (III of 1899), secs. 36, 55 and Sch. II, r. 18—Validity of a mortgage by an insolvent within two years of his insolvency—Application under Rule by mortgagee—Creditor, if may oppose—Stay of proceeding under Rule, when Official Assignee has started proceeding under sec. 36—Objection under sec. 55, if may be considered in enquiry under r. 18.

Quære.—Whether the Official Assignee alone is entitled to oppose a mortgagee's application under r. 18 of Sch. II of the Presidency Towns Insolvency Act, so that a creditor of the insolvent would have no locus standi to contest the application.

Held—That the proper order in this case, where the Official Assignee had already withdrawn his consent to the holding of an inquiry under the Rule and had started proceedings under sec. 36, was to stay the inquiry under r. 18 so as to give the Official Assignee an opportunity, if so advised, to take proceedings under sec. 55.

This was an appeal against an order, dated the 14th July 1925, made in the exercise of Insolvency Jurisdiction, by Mr. Justice Pearson, on an application by the Appellant creditor to re-open an enquiry into the mortgage executed by Hajee Amiruddin, an adjudicated insolvent.

The Appellant, Hajee Tyeb Ali Mullick, obtained a decree against the insolvent on 11th February 1924 in suit No. 3091 of 1923 for Rs. 4,802 and on 14th January 1925 attached the stock-in-trade of Hajee

Amiruddin & Sons, of which the insolvent was the proprietor. Amiruddin was adjudicated as an insolvent on his own application by this Hon'ble Court on 24th January 1925. Within two years of his adjudication he had executed an usufructuary mortgage of his said business and mortgaged certain other immoveable property in favour of the Respondent Purna Chandra Pal and had given possession of the business to Purna. Under r. 18 of Sch. II of the Presidency Towns Insolvency Act, the Respondent obtained an order whereby the Registrar was ordered to enquire if the Respondent was a secured creditor and if so found, the Official Assignee be at liberty to sell the mortgaged properties. The order was obtained without any notice to the Appellant and the said enquiry was held by the Registrar in Insolvency, as the result whereof the Respondent was held to be a secured creditor. On receipt of these informations the Appellant applied before the said Registrar to re-open the enquiry of the said mortgage. The Registrar referred the matter to the Court.

The matter came before Pearson, J., on 18th June 1925 when his Lordship was pleased to observe as follows :—

PEARSON, J.—The applicant, one of the creditors of the insolvent, asks that certain proceedings held before the Registrar should be re-opened. Purna Chandra Pal claimed against the estate as a mortgagee; on his application with the consent of the Official Assignee the usual enquiry was held by the Registrar under r. 18 of the Second Schedule to the Act. The applicant now asks that that enquiry may be re-opened, alleging that the mortgage was collusive, without consideration, and in fraud of the creditors. He says the enquiry was held without notice to the creditors entitled to oppose and that the

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Official Assignee is not in a position to judge what his attitude should be unless he first consults the creditors.

In my opinion this application cannot succeed. The enquiry was in accordance with r. 18. There is no procedure laid down in the Act which confers on a creditor the right to make such an application, or setting up charges which would come within sec. 55 of the Act. The Official Assignee may proceed thereupon, if he will, after satisfying himself of the sufficiency of the allegations. But I cannot allow the enquiry that has taken place to be re-opened at the instance of a creditor.

The application is misconceived and must be dismissed with costs.

[The matter was re-heard on 14th July 1925 by Pearson, J., when his Lordship observed :—]

PEARSON, J.—This is a matter which came up before me on the 18th June last and I wrote an order on that occasion which resulted from a misconception of the circumstances in which the matter was brought before me: the order was therefore subsequently vacated by common consent and now comes up again.

It appears that what has happened in those proceedings is as follows:—Steps have already been taken for proof of a mortgage under r. 18 before the Registrar and an order has been made in those proceedings *ex parte*. Subsequent to the order being made the present applicant who is one of the creditors applied to the Registrar for the matter there to be re-opened. That application was granted by the Registrar and he sent the matter before this Court for further enquiry and proof of the mortgage.

It appears that the Official Assignee is now taking steps under sec. 36 of the Act and a representation is now made on behalf of the creditor who is the applicant that

this matter should stand over until those proceedings have terminated in order that the Official Assignee may then be in a position to judge whether or not proceedings under sec. 55 should be adopted; if not, then the present proceedings will be concluded upon that footing.

It appears to me unnecessary in the circumstances to delay the consideration of the present matter. I think that in point of fact, as I indicated in my previous judgment, a creditor has no *locus standi* to make an application for the re-opening of the proceedings and although there has been no appeal from that order that is the basis upon which the matter now comes before me, and I do not think a creditor ought to be heard in a matter of this kind. The Official Assignee, it is conceded, will not be embarrassed by the *ex parte* order that has already been made upon the enquiry into the mortgage in so far as his proceedings under sec. 36 and sec. 55 are concerned.

The order I now make is, let the records be sent back to the Registrar and the order for costs that has already been made will stand.

Against the last order the Appellant decree-holder appealed.

Mr. H. D. Bose (with him Mr. H. K. Sarbadhikari) for the Appellant Hajee Tyeb Ali Mullick contended. —Insolvent Hajee Amiruddin Mullick did not file schedule of his assets nor had any meeting of the creditors been called when the Respondent Purna Chandra Pal claiming to be the mortgagee of the insolvent filed an application under r. 18 of Sch. II of the Presidency Towns Insolvency Act and obtained the consent of the Official Assignee thereto. Official Assignee's consent to the said application was in a manner withdrawn as appears from his initiating the proceeding under sec. 36 of the

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Act. Appellant's application on the 4th April before the Registrar was disposed of on the 6th April when the Registrar directed that the enquiry should be re-opened and should be held before the Judge taking insolvency cases. Registrar had no power when the validity of the mortgage was questioned. Refers to *In re Lal Behari Shah* (1).

The only application which was pending for disposal before the Judge was that of Purna Chandra Pal under r. 18, Sch. II of the Presidency Towns Insolvency Act. The alleged mortgage set up by Mr. P. C. Pal is within two years of adjudication and is void against the Official Assignee under sec. 55 of the Presidency Towns Insolvency Act.

The orders of Mr. Justice Pearson, dated 18th June 1925 and 14th July 1925, were passed under a misconception of the application which was made before the Registrar in Insolvency by the Appellant and should be set aside. The learned Judge is clearly wrong in his view as to Appellant's *locus standi* as a creditor in intervening in the proceeding under r. 18, Sch. II. A creditor has *locus standi* and should be heard in a matter of this kind. Refers to the cases of *Jarwa Bai v. Pilambar Nilambar Shah* (2) and *In the matter of Aushu Prokash Ghosh* (3).

The learned Judge should not have passed the order as the Official Assignee was then proceeding under sec. 36 of the Act with a view to ascertain whether he would proceed under sec. 55 of the Act or under any other provisions for setting aside the mortgage.

Proceedings under r. 18 should have been stayed as was asked by the Appellant pending the proceedings which were

taken by the Official Assignee under sec. 36 of the Act.

There should have been no order for costs against the Appellant.

Mr. B. C. Ghose for the Respondents contended.—The learned Judge is perfectly justified in passing the order appealed against. The Appellant as a creditor has no *locus standi* to intervene in the enquiry under r. 18, Second Schedule of the Presidency Towns Insolvency Act, which was held by the Registrar in Insolvency upon the application of Purna Chandra Pal, the mortgagee, with the consent of the Official Assignee. The Appellant wanted the enquiry to be re-opened alleging that the mortgage put forth by Purna Chandra Pal was collusive, without consideration and in fraud of creditors and that the enquiry was held without notice to him.

There is no procedure laid down in the Act which confers on a creditor the right to make such an application. Reads r. 18, Second Schedule. The Official Assignee representing the general body of creditors may proceed, if he chooses, after satisfying himself of the sufficiency of the allegations. But the enquiry cannot be re-opened at the instance of a creditor like the Appellant.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Hajee Tyeb Ali Mullick against the judgment of my learned brother Mr. Justice Pearson delivered on the 14th day of July 1925 when the learned Judge was exercising Insolvency Jurisdiction.

The facts relating to the matter, which this Court has to consider, do not appear in the two judgments of the learned Judge and as it is a matter of some importance

(1) 1 T. R. 47 Cal 721 (1920).

(2) 24 C. L. J. 149 (1916).

(3) 24 C. W. N. 68 at p. 69 (1919).

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I think it is necessary to state the facts shortly.

It appears that Hajee Amiruddin Mullick was adjudicated insolvent on his own petition on the 24th of January 1925. Before that, namely, on the 12th of March 1923, he had executed a mortgage of certain immoveable property in favour of Purna Chandra Pal and in the same document he included a charge upon certain shops or stalls, as they had been called, and their contents. P. C. Pal is the principal Respondent in this appeal, the other Respondent being the Official Assignee.

The Appellant instituted a suit against the insolvent Hajee Amiruddin Mullick sometime in 1923 and obtained a decree on the 11th of February 1924 and attached the shops and their contents on the 15th January 1925. It was stated by the learned Advocate, who appeared for the Appellant, that the insolvent had filed no schedule of his assets nor had any meeting of the creditors been called.

In that state of affairs the Respondent Purna Chandra Pal made an application to this Court under r. 18 of Sch. II of the Presidency Towns Insolvency Act and on the 21st February 1925 the Registrar made an order; that order recites that it was made with the consent of the Official Assignee. The material parts of the order are as follows:—

“It is ordered that the Registrar of this Court do enquire whether the said Purna Chandra Pal is a secured creditor of the said insolvent and holds a mortgage from him and if so, for what consideration and under what circumstances such mortgage was effected by the said insolvent. And it is further ordered that in the event of his finding that the said Purna Chandra Pal is a mortgagee of the properties of the said insolvent the said

Registrar do take the accounts and make the enquiries necessary for ascertaining the principal and interest due to the said Purna Chandra Pal under such mortgage in his favour. And it is further ordered that on the said Registrar being satisfied that the said Purna Chandra Pal is a mortgagee of the said insolvent as aforesaid and upon his making a report thereon, the said Official Assignee be at liberty to sell, under the provisions of the Presidency Towns Insolvency Act, III of 1909, the properties.”

The Registrar apparently dealt with this matter on the assumption that the application was unopposed, and on the 19th of March 1925 he made a report which is to this effect: “I hold that the mortgage had been proved; subject to a translation of the mortgage being put in, a report would be made to that effect.” I have some difficulty in understanding the exact meaning of that order, because, as I understand, at that time the Registrar was purporting to deal with this matter on the assumption that he had jurisdiction to entertain and dispose of it, and, therefore, I do not understand the reference which he made to the report in the order, which I have read. I do not understand to whom the report would be made in view of the fact that it was the Registrar himself, who would deal with the matter. He had in fact made an order that upon the Registrar being satisfied that Purna Chandra Pal was a mortgagee the Official Assignee would be at liberty to sell. However that is not of much, if any, importance now, because on the 4th April the Appellant made an application to the Court and it appears that the application was for an order that the enquiry should be re-opened and the mortgage in favour of Purna Chandra Pal should be declared void and inopera-

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tive and that such other order should be made as the circumstances might require.

Upon that the Registrar came to the conclusion that as the mortgage was challenged he had no jurisdiction to deal with it. We therefore directed that the enquiry should be re-opened, and should be held before the learned Judge.

The matter came before my learned brother Mr. Justice Pearson. He made an order which, it is agreed, was made under a misconception of the application which had been made to him, and which was subsequently vacated. The matter finally came before the learned Judge on 14th of July 1925.

It appears that by this time the Official Assignee was taking steps under sec. 36 of the Presidency Towns Insolvency Act for the purpose of examining the alleged mortgagee with regard to the mortgage, the consideration therefor and so forth, and it now appears that the Official Assignee had withdrawn his consent to the application, which was made to the Court under r. 18 of the Second Schedule. The Official Assignee has informed us this morning that he did not put that withdrawal of consent into writing and that he did not give any formal notice of that withdrawal, as in my opinion he ought to have done. He informed us that he had told the parties, and that the Registrar was aware of the fact that he had withdrawn his consent. He pointed out that the fact that he was taking proceedings under sec. 36 of the Act would go to show that he had withdrawn his consent to the application made under r. 18; I am inclined to agree with him; at the same time in my judgment it would have been much better and in accordance with the usual course if he had expressly stated in writing that he had withdrawn his consent especially having regard to the fact

that it appeared in the order, to which I have referred, that his consent had been given to the application.

The learned Judge discussed the question as to whether the creditor, that is, the Appellant, had any *locus standi* in connection with the application under r. 18 of the Second Schedule. I do not think it necessary to express any definite opinion upon that question to-day, because it seems to me, with great deference to the learned Judge, that the order which he made should not be allowed to stand for reasons which I will presently give.

The order was as follows :—“ This Court does not think fit to make any order on this application except that the Registrar of this Court be at liberty to proceed with the enquiry now pending before him.”

In my opinion this order ought not to have been made for these reasons. It was known that the Official Assignee was proceeding under sec. 36 of the Presidency Towns Insolvency Act for the purpose of arriving at a decision whether he would take any proceedings under sec. 55 of the Insolvency Act or under any other provision with a view to set aside the mortgage or attack its validity.

It was also apparent that the Appellant was contesting the validity of the mortgage. In these circumstances, in my judgment, it was not right to refer the matter back to the Registrar to proceed with the enquiry upon the basis of the mortgage being a valid one, and upon the basis that there was no contest as to its validity, when it must have been clear that if the Official Assignee were to take proceedings in consequence of his enquiries, the result might be that the mortgage might be held to be invalid.

In my judgment the proper order which should be made in this case is

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that the proceedings under r. 18 of the Second Schedule of the Act should be stayed pending the proceedings which are being taken by the Official Assignee under sec. 36 of the Act. The Official Assignee will have one month from to-day (as we have now been informed that the proceedings under sec. 36 are now concluded) within which time he will decide whether he will take any proceedings for the purpose of setting aside the mortgage. If he comes to the conclusion that he will take such proceedings then the application under r. 18 will continue to be stayed until those proceedings are determined. If, on the other hand, the Official Assignee comes to the conclusion that he will not take proceedings for the aforesaid purpose, then he must give notice in writing to the Appellant that he does not intend to take further proceedings with respect to the mortgage. If that contingency arises, then the proceedings under r. 18 will be stayed for a further fortnight from the receipt of such notice in order that the Appellant may have that time within which to decide whether he will take any proceedings which he may be advised.

(After discussion.)

The order of the learned Judge must be set aside and there will be no order as to the costs of the proceedings before Mr. Justice Pearson; the reason for that direction is that the application was really for an adjournment and it is not possible to decide at the present moment whether that application for adjournment was justifiable.

We are of opinion that the Respondent Purna Chandra Pal must pay the costs of the Appellant as far as this appeal is concerned.

RANKIN, J.—The proceedings in the Court below show so much misconception

that it is perhaps worth while to attempt observations in the hope that they may be of some use in the future.

The present is a case where the adjudication order was made on the 24th of January 1925. The proceedings arise out of a mortgage document which purports to have been entered into on the 12th of March 1923, that is to say, within two years of the adjudication. I ignore the fact that some of the premises covered by the mortgage would appear to be moveable property. The mortgagee, on the 21st of February 1925, i.e., less than a month from the adjudication order, before the insolvent had filed any schedule, before any notices apparently had gone to the creditors, or the persons interested in the estate had any time to consider the position, made an application under r. 18 of Sch. II to the Presidency Towns Insolvency Act. The form of the application was that the Official Assignee be at liberty to sell the mortgage subjects and after the sale to pay the mortgagee's debt. The first thing that happened was that to that application the Official Assignee signed his consent, and accordingly the matter was dealt with by the Registrar in Insolvency and not by the Judge on reading that petition. The first order which under r. 18 might have been made, was an order appointing a certain time in the future as the date upon which the Court would enquire into the existence and validity of the mortgage. Nothing further should have been ordered at that stage. When the time came to hold an enquiry, if the mortgage had been substantiated, then the officer had it open to him to make another order, namely, declaring the existence of the mortgage and directing that certain account should be taken, if necessary; also by that order having declared the existence of the mort-

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gage he might direct a sale. In the present case the proceedings started by an order which was in my judgment improper and inexpedient, because it was an order which said that the Court was to enquire whether P. C. Pal was a secured creditor and so forth, and it was ordered that in the event of his finding that P. C. Pal was a mortgagee the Registrar would take the accounts and so forth and upon his making a report thereon "that the Official Assignee be at liberty to sell." All this was before there was any finding that there was a mortgage at all and in my judgment that is a bad practice and contrary to the plain terms of r. 18 itself which says:—"If it is found that such person is such mortgagee, and if no sufficient objection appears to the title of such person to the sum claimed by him under such mortgage, the Court shall direct such accounts and inquiries to be taken as may be necessary for ascertaining the principal, interest and costs due upon such mortgage, and if satisfied that there ought to be a sale (that is to say, at that stage there ought to be a sale), shall direct notice to be given" and so on. That is the first thing that was wrong. The next thing that was wrong, if I may say so, was this: the mortgagee may stand upon his security and ignore the bankruptcy altogether except to this extent that now he must recognise that the Official Assignee now stands in the place of the original mortgagor. He may, therefore, bring a suit like any body else upon the mortgage making the Official Assignee a Defendant mortgagor and if he does that, then all enquiries proper in a mortgage suit will be made by the Court. All the necessary parties will be present in Court and a good deal of time and expense will be incurred. But to facilitate the administration of an insolvent's estate, r. 18

of Sch. II of the Presidency Towns Insolvency Act gives the mortgagee the great advantage which one of the English Bankruptcy Rules, r. 72, has for many years past given to a mortgagee when the mortgagor is an insolvent; instead of bringing a suit a summary application may be made under the terms of this rule; and when a summary application was made at a time when the Official Assignee had had no occasion to make an enquiry into the circumstances of this insolvency, the first thing I should have thought to be done was that some endeavour should have been made to postpone the consideration of this application until the Official Assignee was fully satisfied that he knew enough about the dealings of the mortgagor to enable him safely to admit the mortgage.

However, the matter came before the Court as an unopposed application under r. 18 and the contention now before the Court on behalf of the mortgagee, as I understand it, is this: he says that only the mortgagee and the Official Assignee are recognised by that rule. If the Official Assignee likes to admit the existence and validity of the mortgage and consents to an order for sale then the Court has got no option and all that the Court can do is to go through the formality of hearing what these people have to say, and is bound to make an order, but no other person can possibly intervene at all. It is quite true that the mortgagee is not obliged under r. 18 any more than if he brings a suit to implead any creditor or any other person than the Official Assignee. But this summary procedure to enforce his rights is not intended to exclude people who may have rights contrary to his own and I would point out in particular that a duty is cast upon the Court by r. 18 of Sch. II to hold an independent enquiry

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not merely to determine issues between the mortgagee and the Official Assignee and to make order by consent. What the Court is to do is this; the Court shall proceed to enquire whether such person has such mortgage and for what consideration and under what circumstances; and, by the rule which follows immediately afterwards, the Court is entitled to summon people and examine them for the purpose of satisfying itself as to the circumstances under which the mortgage has been executed. It is perfectly absurd to say, to my mind, that in these circumstances it would not be open to the Court to send for any creditor or his witnesses and hear them. In addition to that, if the Official Assignee had known that any creditor was taking exception to this mortgage or if the Court had known that anyone was taking that course, it would be improper for the Official Assignee to allow that case to go by default or to take any steps to prevent the creditor and his information from being brought to the notice of the Court. In these circumstances what happened here was that the Registrar had gone so far as coming to the conclusion that the mortgage was proved subject to a translation being put in and he recorded that he was minded to make a report to that effect; and apparently he was minded that he would go and take the account. Before the report came into existence the present Appellant objected and his objections to the mortgage were brought to notice by a petition. Accordingly the Registrar, as I think very properly, sent the whole matter to the Judge. He never concluded his report, but sent the whole matter to the Judge to deal with it, because it had entirely changed its aspect. He was quite entitled to do that whether it was an opposed or unopposed applica-

tion at that stage. He thought that the Judge was the more proper person to deal with it in the circumstances.

The matter came before the learned Judge at a time when the Official Assignee no longer desired that any such summary order for sale should be made. The Official Assignee apparently did not get notice of the application made by the present Appellant. He did not formally withdraw his consent and ask for these proceedings to be stayed or postponed. The present Appellant as a creditor who had proved his debt in the meantime asked for such postponement. Then a point was taken that the present Appellant had no *locus standi* whatsoever, in other words, that although he was a person who was a *cestui que trust* and the Official Assignee was his trustee in the insolvency, and although he and the Official Assignee were at one and although it was desired by them that this enquiry should not be rushed through because there were matters to consider, the learned Judge sent the thing back to the Registrar apparently on the footing that he should complete his report to the effect that the mortgage was valid and take an account and that the sale should go on.

To my mind that order is entirely impossible. The learned Judge was administering an insolvent's estate and the rules of the Insolvency Court are to be given a meaning consistent with reasonable administration. I do not propose to decide now whether there is any objection to a question under sec. 55 being dealt with under r. 18 of Sch. II. The questions under sec. 55 are questions where a trustee claims by a higher title than the insolvent mortgagor. On the other hand, if a mortgagee takes proceedings under r. 18 the Court has no option but to make enquiries which that rule directs: and if

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objections under sec. 55 are brought to its notice, I do not at present see how it can purport to ignore it. But it may be that the most convenient and sensible course in such cases is for proceedings to be stayed to enable a bankruptcy motion (motion in insolvency) to be brought under sec. 55. Ordinarily it would be brought by the Official Assignee. If the Official Assignee being tendered a reasonable indemnity by a creditor unreasonably refuses to bring such proceedings under sec. 55, the Court has ample jurisdiction to authorize a creditor in one or the other or several different ways to take proceedings to give effect to the section. The learned Judge might perfectly well have stopped these proceedings and limited a time within which proceedings under sec. 55 should be dealt with. There were other ways of dealing with this matter. But the order made in this case, namely, to send the proceedings back in such manner that a conclusive decision between the mortgagee and the Official Assignee as to the validity of this mortgage might come upon the file of the Court without any enquiry into the real matter, was a proceeding which was both unnecessary and in my opinion unjustifiable.

I entirely agree in the order which the learned Chief Justice has proposed. It seems to me to be a beneficial order—a reasonable direction—enabling this matter to be tried upon proper materials by the Court, doing its duty to the creditors on the one hand and the mortgagee on the other.

For these reasons, I think the appeal should succeed.

Messrs. Nan & Das, Solicitors for the Appellant.

Messrs. Chatterjee & Co., Solicitors for the Respondents.

P. D.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE DECREE

No. 2042 OF 1922.

GREAVES, J.
CHAKRAVARTI, J.
1925,
2, March.

**KUMAR ARUN CHANDRA
SINHA BAHADUR and ors.,
Plaintiffs, Appellants,
v.
HEMANTA KUMAR
BANERJEE and ors., De-
fendants, Respondents.**

"Lot," in putni potta, significance of the term—Bengal Tenancy Act (VIII of 1885), sec. 105—Additional rent for additional area, if recoverable, where the putnidar is in possession of land according to the record-of-rights and the Plaintiff does not challenge the record of-rights in the suit.

Certain putnidars were in possession of the lands of three villages as recorded in the settlement record-of-rights. The landlord sued for additional rent on the allegation that the putni was originally in respect of the lands of one village only and the putnidars were in possession of more lands than they had taken settlement of. The landlords did not challenge the correctness of the record-of-rights, nor did they prove that the "lot" in the putni potta meant only one village:

Held—That the word "lot" in the parlance of putni potta usually meant a group of villages. As the Plaintiffs did not challenge the record-of-rights or prove that the "lot" in the putni potta comprised only one village and not more, the landlords were not entitled to additional rent for additional area.

This was an appeal against the decree of M. C. Ghosh, Esq., Special Judge of Zillah Jessore, dated the 19th of May 1922, affirming the decree of Moulvi Sadral Ola, Assistant Settlement Officer of Magura, dated the 3rd of January 1922.

The material facts will appear from the judgment.

KUMAR ARUN CHANDRA SINHA BAHADUR v. HEMANTA KUMAR BANERJEE.

Babus Jogesh Chandra Roy and Ramoni Mohan Chatterji for the Appellants.

Babu Prafulla Kamal Das for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHAKRAVARTI, J.—This appeal arises out of a suit under sec. 105 of the Bengal Tenancy Act, under which the present Appellants filed an application for additional rent for an additional area in a tenure. The record shows that the lands of three villages were within this *putni*. The landlord's case was that the *putnidars* were in possession of more lands than they took settlement of. The tenure was created by a deed, dated 1811. The Defendants' case was that they were in possession of the *putni* as recorded in the record-of-rights and that the *putni* potta shows that the *putni* comprised the land of Lot Sabek Khator. The Plaintiffs based their case on the ground that there were some other villages which were in the possession of the Defendants. The Plaintiffs even in this proceeding did not state that Lot Sabek Khator really included only one mouza of Sabek Khator and not more. Further than this the Plaintiffs at the trial stated that they did not wish to challenge the record-of-rights and in the plaint that they filed they had deliberately stated that the lands of this *jama* were of more villages than one. Besides the *putni* potta no further evidence was adduced in this case. On the point as to what the Lot Sabek Khator meant it is well-known that a "lot" usually in the parlance of *putni* potta means a group of villages. As I have stated the Plaintiffs did not start their case on the basis that Lot Sabek Khator only meant one village and not more. The Defendants are admittedly in possession now and were in

possession when the record-of-rights was made and no attempt was made to show that the Defendants had subsequently to the *putni* taken possession of these lands and included them in the *putni*. In this state of things the Courts below dismissed the Plaintiffs' suit. We cannot say that the Courts below were wrong. It was open to the Plaintiffs to challenge the record-of-rights and further it was open to them to explain the *putni* potta that the Lot Sabek Khator was included within one village and not more.

We think that the judgment of the lower Appellate Court was right and the appeal is accordingly dismissed with costs, hearing-fee, one gold mohur.

GREAVES, J.—I agree.

J. N. R.

Appeal dismissed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 158 of 1926.

CUMING, J.

PAGE, J.

1926,

Heard,

16, April.

Judgment,

19, April.

SALAM CHAND KANNY-
RAM, Petitioner,

v.

BHAGWAN DAS CHILHA-
NIA, Opposite
Party.

Civil Procedure Code (Act V of 1908), sec. 115—Interlocutory order, if may be revised—Irremediable injury—Other and adequate remedy existing.

Per CUMING, J.—The High Court has no power under sec. 115 of the Civil Procedure Code to interfere in revision with an interlocutory order.

Per PAGE, J.—It is well-settled, at any rate in this Court, that the High Court has jurisdiction under the section to revise interlocutory orders passed by Subordinate Courts from which no appeal lies to the High Court. The powers of revision with which the High Court is entrusted should not be restricted.

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But it is only when irremediable injury would be done and a miscarriage of justice would inevitably issue if the Court held its hand, that the Court ought to intervene in current litigation and disturb the normal progress of a case by revising an interlocutory order passed by a Subordinate Court:

Per CUMING, J.—This Court does not interfere as a general rule in revision where the aggrieved party has another and adequate remedy.

This was a Rule granted on the 19th February 1926 against an order, dated the 8th February 1926, of the Subordinate Judge of Nadia (A. D. Gupta, Esq.).

The facts of the case will appear from the judgment.

Dr. Dwarka Nath Mitter and Babu Haradhan Chatterjee for the Petitioner.

Babu Hira Lal Chuckerbutty for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows:—

CUMING, J.—The facts of the case out of which this Rule has arisen are these: The Petitioner who obtained the Rule brought a suit on the Original Side of this Court against the Opposite Party for Rs. 52,582 odd on the 27th November 1922. On the 25th June 1923 he applied that certain properties of the Opposite Party might be attached before judgment. These properties were apparently in the District of Nadia though that is not stated in the petition where the facts are set out very incompletely. The properties were duly attached on the 12th July 1923. The suit was decreed on the 18th February 1924. There was no appeal. Then on the same date, which again it is impossible to ascertain either from the petition or from the learned Counsel who has appeared for the Petitioner,

the decree was sent to the District Judge at Nadia for execution and the property was advertised for sale on the 8th February 1926.

A claim was then filed in the executing Court on the 26th January 1926 by one Bhagwan Das alleging that the property belonged to him. The Petitioner then appeared and objected that the Nadia Court had no jurisdiction to entertain the claim.

That Court held that he had the jurisdiction to entertain the application and ordered the parties to produce their evidence.

Against this order of the learned Subordinate Judge the Petitioner has moved this Court under sec. 115 and obtained this Rule. It has been contended by the Opposite Party that the order being an interlocutory order cannot be dealt with under sec. 115.

Speaking for myself and with great respect to the learned Judges who have held otherwise I have no hesitation in holding that sec. 115, C. P. C., has no application whatever to interlocutory orders. Let us take the plain words of the sec. 115, the material portion of which runs as follows:—

“The High Court may call for the record of any case which has been decided . . . and in which no appeal lies thereto.” The expression thus used is the record of a case which has been decided. The only meaning which I can attach to the expression “a case which has been decided” is the whole case.

If we are to suppose that the expression “case” means or includes, for instance, one issue in the case, then the section would run as follows:—

“The High Court may call for the record of any issue which has been decided by any Court.”

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It is perhaps difficult to say where the record of an issue that had been decided would be found. I have not myself the slightest doubt but that the legislature where it speaks of the case that had been decided meant the whole case which so far as the Court dealing with it was concerned had been finally dealt with.

I can conceive of the High Court sending for the record of the case. I cannot conceive of its sending for the record of an issue. The words seem perfectly plain. To decide a case is to decide the whole case and not to decide a part of the case. I am therefore of opinion that sec. 115 has no application to interlocutory orders.

This is the view which has commended itself to the High Courts of Bombay, Allahabad and Madras. *Motilal v. Rana* (1), *Harsaran v. Muhammad Raza* (2) and *In re Nizam of Hyderabad* (3).

The reason seems self-evident. To allow revision of interlocutory orders would have at once the effect of two Courts trying more or less simultaneously the same suit a cumbersome and expensive procedure. For if one interlocutory order can be dealt with under sec. 115, every interlocutory order can be the subject of an application under sec. 115. Our attention has, however, been drawn to a number of decisions of this Court which apparently hold the contrary view.

I think I should now consider the present case in the light of those decisions. The earliest case I have been referred to is the case of *Dhapi v. Rampershad* (4). Mr. Justice Norris in disposing of this case held that the word *case* in sec. 622, C. P. C. (now sec. 115) is wide enough to

include an interlocutory order and the words *record of any case* include so much of the proceedings in any suit as relate to interlocutory order. The learned Judge in coming to the conclusion referred to a number of cases in which a contrary view was taken.

Mr. Justice Tottenham concurred in making the Rule absolute but he seemed to doubt whether the matter could be dealt with under sec. 622 (now sec. 115).

The next case to which I have been referred is the case of *Chandi Ray v. Kripal Ray* (5). Mr. Justice Woodroffe in dealing with that case referred to the case of *Dhapi v. Ram Pershad* (4) and remarked :—

“ Speaking for myself, I should have thought that interlocutory orders did not come within the scope of this section. It is unnecessary to decide the point for reasons with which I shall deal later on.”

The learned Judge refused to interfere on the ground that there was another and adequate remedy open to the Petitioner.

We are then referred to the case of *Gobinda Mohan Das v. Kunja Behary Dass* (6), where Mr. Justice Mookerjee held that if the Court is satisfied that an interlocutory order has been made without jurisdiction or under circumstances that are likely to cause irreparable injury to one of the litigants, the High Court could set it aside under sec. 15 of the Charter (now sec. 107 of the Government of India Act). The learned Judge refused to consider the point as to whether it could come under sec. 115, C. P. C.

I have next been referred to the case of *Amjad Ali v. Ali Hossain* (7). There the

(4) I. L. R. 14 Cal. 768 (1887).

(5) 15 C. W. N. 682 (1911).

(6) 14 C. W. N. 147; s. c. 10 C. L. J. 407 (1909).

(7) 15 C. W. N. 353; s. c. 12 C. L. J. 519 (1910).

(1) I. L. R. 18 Bom. 35 (1892).

(2) I. L. R. 4 All. 91 (1881).

(3) I. L. R. 9 Mad. 256 (1886).

(4) I. L. R. 14 Cal. 768 (1887).

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same learned Judge Mr. Justice Mookerjee relied on apparently the case of *Gobinda Mohan v. Kunja Behary* (6) and stated that it was pointed out in that case that the test to be applied was whether irreparable injury would be caused to one of the litigants if the matter was not set right.

The learned Judge apparently dealt with the matter under cl. 15 of the Charter which corresponds to sec. 107, Government of India Act. It will be noted that the test the learned Judge would here apply in that case is more limited than the test the same learned Judge applied in the case of *Gobinda Mohan v. Kunja Behary* (6). Whether sec. 107 of the Government of India Act has any application it is not necessary to discuss. Speaking for myself and with great respect to the learned Judge I do not think it has. It is sufficient for the decision of the present Rule to accept the test as laid down in *Amjad Ali v. Ali Hossain* (7). Applying it to the present case there is no ground whatever for interference. The Petitioner by the order of the learned Judge holding he has jurisdiction to determine the matter has suffered no irreparable injury. In fact he has suffered no injury at all, for it is quite possible that the Judge may decide the claim case ultimately in his favour.

There is a further reason for not interfering. Even if ultimately unsuccessful in his claim case the Plaintiff has a further and adequate remedy for he can bring a suit. This Court does not interfere as a general rule in revision where the aggrieved party has another and adequate remedy.

(6) 14 C. W. N. 147 : s. c. 10 C. L. J. 407 (1909).

(7) 15 C. W. N. 353 : s. c. 12 C. L. J. 519 (1910).

The result is this Rule must be discharged with costs. Hearing-fee, 5 gold mohurs.

PAGE, J.—On the 27th November 1922, the Petitioner instituted a suit on the Original Side of the High Court against a firm trading under the name and style of Jugal Kishore Ramdeo for the recovery of Rs. 52,582-11-9, the price of goods sold and delivered. On the 12th July 1923, Greaves, J., passed an order for the attachment before judgment of the properties in dispute, and pursuant thereto the said properties were attached. On the 18th February 1924, Buckland, J., decreed the Plaintiff's claim in the suit, and from that decree no appeal has been preferred. Subsequently the decree was transferred for execution to the Court of the District Judge of Nadia, and in execution of the decree a sale of the property was fixed for the 8th February 1926. On the 26th January 1926 the Opposite Party preferred a claim to the property under Or. 21, r. 58. Thereupon, the Petitioner filed an objection to the Opposite Party's claim, *inter alia*, upon the ground that the Court had no jurisdiction to entertain the application. The Subordinate Judge of Nadia, having heard the parties, on the 8th February 1926 decided that the Court of Nadia had jurisdiction to entertain the Opposite Party's application under Or. 21, r. 58, and ordered notices to be served upon the parties that the claim case would be tried on the merits on the 13th February 1926. The decree-holder has now obtained this Rule under sec. 115 of the Civil Procedure Code.

The questions which fall for determination are : (1) Has the Court jurisdiction under sec. 115 to revise the order of which complaint is made, and (2) if the Court is competent to do so, ought the

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Court in the exercise of its discretion to interfere with the said order?

Now, the order under consideration, although not subject to appeal, is an interlocutory order, and it has strenuously been argued before us that inasmuch as the Court is entitled to exercise its power of revision under sec. 115, C. P. C., only in respect of a "case which has been decided," the Court is not empowered to revise an interlocutory order which *ex concessis* does not determine the rights of the parties. Indeed, it is alleged that so far from the case having been decided it has not yet even been heard, and, therefore, under sec. 115 the Court has no jurisdiction to entertain the present Rule.

There is, I think, force in this contention and some authority in its favour: *Buddhu Lal v. Mewa Ram* (8), *Bai Rani v. Jaga Dallabh* (9) and *In re Nizam of Hyderabad* (3) and *per Woodroffe, J.*, in *Chandi Ray v. Kripal Ray* (5); but the matter is not *res integra* and it is now well-settled, at any rate in this Court, that the High Court has jurisdiction under sec. 115 to revise interlocutory orders passed by Subordinate Courts from which no appeal lies to the High Court; see *Dhapi v. Ram Pershad* (4), *Gobinda Mohan v. Kunja Behary* (6), *Siva Prasad Ram v. Tricomdas Cooperji Bhoja* (10), *Sarajubala Debi v. Mohini Mohan Ghosh* (11), *Secretary of State for India v. Narsibhai Dadabhai* (12), *Somasundaram v. Manicka* (13), *Jagannatha v. Sara-*

thambal (14), *Nauratan Lal v. W. J. Stephenson* (15) and *Bolla Ram v. Mt. Ray* (16). In my opinion, the matter is concluded by authority. I am the less disposed to re-agitate the question or to cavil at the law as it now stands, because I deem it to be of great importance that the powers of revision with which the Court is entrusted should not be restricted; see *Bai Atiani v. Deepsing* (17); and even if I were not of this opinion very cogent arguments would have to be forthcoming to induce me to acquiesce in any limitation of the Court's authority. *Est boni iudicio ampliare jurisdictionem.*

The second question then arises, namely, are the circumstances of this case such that the Court in the exercise of its discretion ought at this stage in the proceedings to intervene in the claim case, and to revise the order in dispute? In my opinion, clearly not. The present Rule appears to me to be premature, for it may be that in the event the claim case will be dismissed; and it is also misconceived, for if the claim of the Opposite Party is allowed, it would be open to the Petitioner to challenge the title of the successful claimant in a separate suit (Or. 21, r. 63); and, in my opinion, it is only when irremediable injury will be done, and a miscarriage of justice inevitably will ensue if the Court holds its hand, that the Court ought to intervene in current litigation and disturb the normal progress of a case by revising an interlocutory order that has been passed by a Subordinate Court.

For these reasons, in my opinion, this Rule is misconceived, and should be discharged with costs.

(3) I. L. R. 9 Mad. 255 (1886).

(4) I. L. R. 14 Cal. 768 (1887).

(5) 15 C. W. N. 682 (1911).

(6) 14 C. W. N. 147; s. c. 10 C. L. J. 407 (1909).

(8) I. L. R. 43 All. 564 (F. B.) (1921).

(9) I. L. R. 44 Bom. 619 (1919).

(10) I. L. R. 42 Cal. 920 (1915).

(11) 28 C. W. N. 991 (1924).

(12) I. L. R. 48 Bom. 43 (1923).

(13) I. L. R. 31 Mad. 60 (1907).

(14) I. L. R. 46 Mad. 574 (1922).

(15) 4 P. L. J. 195 (1918).

(16) 4 Lahore Law Journal 71.

(17) I. L. R. 40 Bom. 86 (1918).

(CRIMINAL APPELLATE JURISDICTION.)

APP. No. 98 of 1926.

RANKIN, J.	}	JAHUR SHEIKH and anr.,
CHOTZNER, J.		Appellants,
1926,		v.
16, June.		THE KING-EMPEROR.

Jury, trial by—Charge to jury—Necessity of direction as to the applicability of exception in sec. 300, I. P. C., even if no case of provocation made by accused.

The mere fact that the accused persons do not admit their presence at the occurrence and raise a case of provocation or of that of passion or something of that sort does not render it unnecessary to give the jury a proper direction as to the exception in sec. 300, I. P. C.

The question is whether on any reasonable view of the facts certain of the exceptions can matter. If they can matter and if a proper direction is not given to the jury, then it is not open to the Court to guess and gamble as to whether or not the jury's verdict would have been different.

This was an appeal preferred on the 24th February 1926 against the conviction and sentence passed by the Additional Sessions Judge of Mymensingh, agreeing with the verdict of the majority of the jury, dated the 9th December 1925.

The facts of the case will appear from the judgment.

M. M. A. Quasem for the Appellants.

Mr. Khundkar and Babu Lalit Mohan Sanyal for the Crown.

The JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In this case, the two Appellants before the Court were convicted by a jury by a majority of 5 to 4. They were accused of having caused the death of one Abul Hossein otherwise called Munser Bap and the charge against them was, one under sec. 302 read with sec. 34, I. P. C. The case, in effect, is

that the deceased man together with one Mahomed Jan who lived in his house as a servant went from his own village to another village called Kaichipore, that these two men were returning in the evening and, just after sunset, they were met by the two Appellants, that after a word or two of conversation what happened was that Samiuddin—the second Appellant—struck Abul Hossein on or about his shoulder with an instrument which looked like a ruler and knocked him down on the road and that thereupon Jahur—the first Appellant—made after Mahomed Jan, the servant, with a *dao* and the servant ran home to his own village and meeting certain persons there told them what had happened. It appears that near to the scene of occurrence there were a good many houses of different people—some of whom appear to have been tenants of the deceased man. These people were not alarmed and they were not told anything about the matter at the time : but Mahomed Jan went back to his village and there, according to him, after having told his story, he was so overcome that he retired to bed in a state of unconsciousness. The first information report was given late in the night of the 30th of May, that is to say, the day of the occurrence and it was given by the deceased man's brother Faizuddin.

Now, what happened in this case, in effect, was that the jury were almost evenly divided. Four of them thought that the accused should be acquitted : five brought in a verdict of guilty under sec. 302 read with sec. 34, I. P. C. The learned Judge states that personally he should have given the accused the benefit of the doubt ; but he says also that the verdict of the majority of the jury is not perverse or unwarranted by the evidence. In order to justify a reference under sec. 307, Cr. P. C., it is not necessary that the

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Judge should be able to describe the jury's finding as perverse. The language of that section is reasonably plain and may be adhered to. No translation or substitution of other phrase is necessary. In the present case, the learned Judge says that the verdict of the majority of the jury is not unwarranted by the evidence and he was quite within his rights in not making a reference to this Court under sec. 307, Cr. P. C. The result is that this verdict is one with which we can only interfere provided that there has been a misdirection on a point of law or that the jury have misunderstood the law as laid down to them.

Now, it was pointed out to us at the opening of this appeal that the learned Judge had not explained to the jury the difference between murder and culpable homicide. He has not said a single word about culpable homicide and the way in which he left the matter to the jury is, in effect, this: He has carefully described to them the effect of sec. 34, I. P. C., and he has said that the jury ought to be satisfied in order to convict the accused that the two accused persons caused the death of Abul Hossein with a common intention either of causing his death or of causing such injury to him as they knew was likely to cause his death. That is all that the learned Judge has said. He has given the jury another direction, namely, that if they find that there was a common intention of causing grievous hurt, then the verdict which they should give against both the accused is one of guilty under sec. 326, I. P. C. But he has said nothing whatever by way of direction to the jury about any other possibility lying between murder on the one hand and grievous hurt on the other.

- It is said on behalf of the Crown that in this case when one looks at the facts any

question of the jury finding one or the other of the exceptions mentioned in sec. 300, I. P. C., is entirely academic and it is said that, in view of sec. 537, Cr. P. C., in any case, the verdict should not be interfered with by reason of this omission. Now, it may or may not be the law of this Court that, in every case of murder, all the exceptions mentioned in sec. 300, I. P. C., have to be dealt with by the Judge in his charge: but it is quite certain that the mere fact that the accused persons do not admit that they were there and raise a case of provocation or of that of passion or something of that sort does not render it unnecessary to give the jury a proper direction as to the exceptions. The question is whether on any reasonable view of the facts, certain of the exceptions can matter. If they can matter and if a proper direction is not given to the jury, then it is not open to the Court to guess and gamble as to whether or not the jury's verdict would have been different.

Now, what has happened in this case is that, according to the story for the prosecution, the last thing that was seen as regards Abul Hossein is that one of the two prisoners struck him with a stick which looked like a ruler and knocked him down. The jury might very well have been asked to consider whether, assuming they found that the accused had something to do with the death of the deceased, the circumstances on the whole would lead them to think that it was a sudden affray or whether it was a cold-blooded or premeditated murder after the manner which the prosecution evidence would indicate. Looking at the matter carefully, I am not of opinion that we can say either that the jury had sufficient direction upon this vital point in this particular case or that the insufficiency has led to no injustice. In my judgment, the

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trial must be dealt with on the footing that the learned Judge has not given a sufficient direction to the jury. Now, the learned Judge himself took the view that the correct verdict in this case on the facts would be that it was not proved that the accused had committed any offence whatever. We have had our attention called to the evidence of the main witness and the only eye-witness and we have had our attention called also to the evidence of those people who say that the names of the accused were mentioned to them directly after Mahomed Jan had got back to his own village and to the evidence of people who say that the two accused were seen on or about that evening in the neighbourhood of the occurrence. There are a great many observations that have to be made tending to discount the correctness or the truth of the story told by the eye-witness and I for myself have no hesitation in saying that, whatever the truth be as to the way in which Abul Hossein met his death, it is reasonably clear, in my opinion, that upon this evidence the verdict of guilty is not the safe verdict. The learned Judge was of that opinion and four of the persons also expressed the same view. It does not seem to me that, if this case is re-tried, there is a chance of the accused being rightly convicted, that is to say, that there is a chance of the evidence being such that the jury can safely and properly convict them. It is unnecessary and undesirable that these men should be put on their trial again. Under our powers given by sec. 423 of the Code I would reverse the finding and sentence and acquit and discharge both the accused without any further trial.

CHOTZNER, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 79 OF 1926.

SANDERSON, C. J
PANTON, J.

1926,
29, June.

SITARAM KHEMKA,
Appellant,
v.
HARIBUX FATEHPURIA,
Respondent.

Presidency Towns Insolvency Act (III of 1909), sec. 36 (5), application under—At whose instance—Insolvency Rules—Non-compliance with the procedure laid down by—Effect of.

An application under sec. 36 (5) of the Presidency Towns Insolvency Act can be entertained by the Court only at the instance of the Official Assignee and of nobody else. Therefore where an order was made under that section on the application of a creditor;

Held—Such an order was made without jurisdiction. It was not a case of mere irregularity which may be cured under sec. 118 of the Act.

Consequently an order for commitment to jail for non-compliance with such an order must be set aside.

This was an appeal preferred against an order, dated the 8th June 1926, passed by Mr. Justice Buckland, in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. S. M. Bose for the Appellant.

Mr. K. P. Khaitan for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

SANDERSON, C. J.—This is an appeal by Sitaram Khemka against an order made by my learned brother Mr. Justice Buckland, sitting on the Original Side in Insolvency on the 8th of June of this year, whereby he decided that Sitaram Khemka, son of the insolvent Khemkandas Khemka, had been guilty of con-

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tempt of Court for having wilfully failed to comply with an order, dated the 19th of March last and whereby it was ordered that Sitaram Khemka should stand committed to the Civil Side of the Presidency Jail. It was further ordered that a writ should issue to the Sheriff to attach the person of Sitaram Khemka and to deliver him to the Superintendent of the Presidency Jail.

It appears that the Respondent Haribux Fatehpuria obtained a decree against Khemkarandas Khemka in August 1924. On the 17th of March 1925 Khemkarandas was adjudicated insolvent.

On the 29th of July 1925 an order was made for the examination of Sitaram—the Appellant. This order no doubt was made in pursuance of sec. 36, sub-sec. (1) of the Presidency Towns Insolvency Act of 1909.

Sitaram was examined before the Registrar in Insolvency and on the 19th of March 1926 an order was made by the Registrar in Insolvency, which is the order referred to in my learned brother's order of the 8th of June 1926.

It appears from that order that Haribux Fatehpuria was represented by his attorneys and that, upon their application and upon hearing the evidence of Sitaram Khemka taken *ex parte*, it was ordered that the further examination of the witness should be adjourned until the 22nd of March instant. The order proceeds as follows :—“ It is further ordered that the said Sitaram Khemka do by Saturday, the 20th day of March instant, make over to the Official Assignee of this Court and Assignee of the estate and effects of the said insolvent the books of account, an inventory whereof was prepared by the attorneys for the said creditors Haribux Fatehpuria and of the said insolvent at the time when the said books were in the

custody of the said witness Sitaram Khemka.”

This order was not complied with. The result was that the attorneys for the creditor Haribux Fatehpuria, on the 20th of May 1926, issued a notice directed to Sitaram Khemka and the Official Assignee that an application would be made on the 8th June 1926 before the Court in Insolvency on behalf of Haribux Fatehpuria for an order that contempt proceedings might be taken against Sitaram Khemka and that he might be arrested and committed to jail for contempt of Court; and the grounds were stated to be (1) petition of Haribux Fatehpuria affirmed on the 20th day of May 1926 and (2) proceedings in the Insolvency matter.

There was a petition setting out the grounds upon which the creditor relied in respect of the application for an order for commitment and that petition was affirmed by Haribux Fatehpuria who said that the statements contained in all the paragraphs in the foregoing petition were true to his knowledge.

The matter came before the learned Judge on the 8th of June last when Sitaram Khemka appeared in person and the minutes of what took place were read to this Court yesterday. Sitaram said that he did not know that the application was to be heard that day. He denied having received notice of the application but he stated that, about two hours before the application was heard, he had been told by Mr. N. K. Bose that the application was to be heard that day. Then he was asked : “ Do you want to say anything about this matter?” And he said : “ No, I want ten days' time.” Then he was asked : “ Why don't you produce the books?” and he said he had none with him; whereupon the learned Judge made the order which I have already stated.

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We have not the advantage of any judgment of the learned Judge setting forth the reasons which induced him to make the order of committal.

The learned Advocate, who appeared on behalf of the Appellant, pointed out that these proceedings were what has been called "*quasi-criminal*" proceedings and that the procedure to be adopted should be in accordance not only with the Rules of this Court but also in accordance with the provisions of the Act, and he argued that in such proceedings as these he was entitled to rely upon any and every technical objection.

The first point, on which he relied, was that the order of the 19th of March 1926 which directed the Appellant to make over the books to the Official Assignee must have been made under sec. 36, sub-sec. (5) of the Presidency Towns Insolvency Act. I agree with the argument of the learned Advocate in that respect. The terms of the order make that clear. The order refers to the fact that the evidence of Sitaram Khemka was heard *viâ voce*. It states: "Upon the evidence of Sitaram Khemka taken *viâ voce* it is ordered." In my judgment, the order of the 19th of March could not have been made under any section other than sec. 36, sub-sec. (5).

The learned Advocate, who appeared for the Respondent, suggested that it might have been made under sec. 36, sub-sec. (1). In my opinion, it is clear that that sub-section did not authorize the order which was made on the 19th of March 1926.

Sec. 36, sub-sec. (5) runs as follows:—
"If, on the examination of any such person, the Court is satisfied that he has in his possession any property belonging to the insolvent, the Court may, on the application of the Official Assignee, order

him to deliver to the Official Assignee that property or any part thereof, at such time, in such manner and on such terms as to the Court may seem just."

The learned Advocate for the Appellant pointed out that the application, in respect of which the order of the 19th of March 1926 was made, was not made by the Official Assignee but was made by and on behalf of the creditor and consequently he argued that the Registrar in Insolvency had no jurisdiction to make the order of the 19th of March 1926.

On the other hand, the learned Advocate for the Respondent argued that it was a mere irregularity, that the Appellant had not been prejudiced thereby, and that consequently by reason of the provisions of sec. 118 of the Presidency Towns Insolvency Act, the Court should not regard the order of the 19th of March 1926 as ineffective or invalidated.

I am by no means satisfied that this is a matter of irregularity. It is to be noticed that under sub-sec. (1) of sec. 36 the application may be made either by the Official Assignee or by any creditor who has proved his debt. By sub-sec. (4) it is provided that, if on the examination of any such person, the Court is satisfied that he is indebted to the insolvent, the Court may, on the application of the Official Assignee, order him to pay to the Official Assignee the amount in which he is indebted. Sub-sec. (5), as I have already said, deals with the case, when it is found on the examination of any such person that he has in his possession any property belonging to the insolvent, then, on the application of the Official Assignee, the Court may order him to deliver to the Official Assignee such property: so that the legislature has drawn a distinction between the application to be made under sub-sec. (1), which may be made either

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by a creditor or by the Official Assignee, and the applications to be made under sub-sec. (4) and sub-sec. (5) which must be made by the Official Assignee.

It is not necessary to speculate as to the reason of such a provision, but it may be that the legislature thought that such a summary procedure as is indicated by the provisions of sub-sec. (4) and sub-sec. (5) of sec. 36 ought not to be instituted except upon the application of the Official Assignee himself.

There is the plain provision of sub-sec. (5). It has not been followed in this case; and, as I said before, I am by no means satisfied that it is a mere irregularity.

The proceedings in this case seem to have been as irregular as they could be from beginning to end.

R. 36 of the Insolvency Rules of this Court provides that "an application to the Court to commit any person for contempt of Court shall be supported by affidavit, and be filed in the Court in which the proceedings are."

That Rule was not complied with. I am not prepared to hold that, if this matter stood by itself, it would not be open to the Court to say that no injustice has been done by reason of the procedure which is laid down in r. 36 not having been followed.

Then, again, the procedure laid down by r. 37 of the Insolvency Rules of this Court has not been followed. The provision is that, when an application is made to commit a person, it is the Registrar who is to fix a time and place for the Court to hear the application, and notice is to be personally served on the person sought to be committed. No application was made to the Registrar in this case. The proceeding was initiated by an ordinary notice of motion.

I do not understand, when the Rules are

so plain, why those who are responsible for instituting and supervising insolvency proceedings cannot follow the Rules which are laid down by this Court.

The matter stands thus: The application, upon which order of the 19th of March 1926 was made, was not instituted by the Official Assignee or on his behalf. The proceedings subsequent to that were irregular; and, in my judgment, the Court ought not in a case of this kind to disregard such irregularities as occurred in this case and I think that that reason is sufficient to justify the success of this appeal.

It is only right to say that none of these matters were brought to the notice of the learned Judge sitting on the Original Side, for as I have already mentioned, the Appellant appeared by himself and was not in a position to draw the attention of the learned Judge to the irregularities, to which I have referred.

As regards the merits of the case, I am inclined to agree with the learned Advocate for the Appellant that the evidence before the Court is inconclusive and hardly sufficient to justify an order of commitment for contempt of Court. It is not necessary, however, for me to go into this matter at any length, for I am satisfied that, having regard to the failure to comply with the provisions of sec. 36 sub-sec. (5) of the Act and of the Rules of this Court, the order complained should not be allowed to stand.

The appeal is allowed with costs and the order of the 8th June 1926 of the learned Judge is set aside.

PANTON, J.—I am of the same opinion. There is nothing that I can usefully add to the judgment that has been delivered by my Lord the Chief Justice.

Mr. P. D. Himatsinghka, Solicitor for the Appellant.

SITARAM KHEMKA & HARIBUX FATEHPURIA.

Mr. Khaitan & Co., Solicitors for the Respondent.

S. N. B.

(CIVIL APPELLATE JURISDICTION.)
APPEAL FROM APPELLATE ORDER
No. 209 OF 1925.

SUHRAWARDY, J.

PAGE, J.

1926,

Heard, 8 and

9, March.

Judgment,

9, March.

PITAMBAR JANA,

Appellant,

v.

DAMODAR GACHAIT and
ors., Respondents.

Limitation Act (IX of 1908), Sch. I, Art. 182 (1)
—Execution of decree—Application for execution
returned for amendment—Formal defect—Applica-
tion amended but not re-filed within time allowed—
Application “in accordance with law”—*Limitation*
—Civil Procedure Code (Act V of 1908), Or. 21,
rr. 11 to 14, 17.

Where an application for execution filed on the 25th August 1923, which was in time, was returned on the ground that there were omissions with regard to the amount of interest and costs to which the decree-holder was entitled, and it was ordered to be re-filed within ten days after the necessary corrections, but it was not re-filed within that time, and on the 28th June 1924 a fresh application for execution was made giving the necessary particulars and the previous application of the 25th August 1923 was also filed along with it, and thereupon the Court ordered the return of the previous application on the ground that it was not necessary as a fresh one had been filed, and objection was taken by the judgment-debtors that the application filed on the 28th June was barred by limitation:

Held—That the application made on the 25th August 1923 was one “in accordance with law” under Art. 182 (5) of the Limitation Act and the present appli-

cation for execution was not barred by limitation.

The question whether an application for execution or for taking step in aid of execution is one “in accordance with law” is to be determined with reference to the circumstances of each particular case.

Per SUHRAWARDY, J.—The words “in accordance with law” in Art. 182 (5) should be taken to mean that the application, though defective in some particulars, was one upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, such an application is not in accordance with law. If upon the application the Court is able to take further steps in execution it cannot generally be said that such an application, if not defective in material and substantial particulars, is an application not in accordance with law. The only defect, in the present case, was the omission of certain sums which the decree-holder was entitled to receive from the judgment-debtors but which he did not mention in the application for execution and so there was no bar to the Court levying execution for the lesser sum claimed by the decree-holder.

If an application is presented to the Court and the Court takes judicial action upon it either in registering the application or by returning it for amendment, such an application, though not filed within the time fixed by the Court, should not be considered as not having been made.

Per PAGE, J.—Where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits or returns the application or allows such application to be amended.

PITAMBAR JANA *v.* DAMODAR GHACHAIT.

GOPAL SAH *v.* JANKI KOER (7),
MATHURA PROSAD *v.* MUSSAMAT ANU-
RAGO KOER (8), FUZLOOR RAHMAN *v.*
ALTAF HOSSEIN (14), ASGARALI *v.*
TRAILAKHYA NATH (GHOSE (11), BAL-
KISSEN DAS *v.* BEDENALI KOER (13),
GOPAL CHANDRA MANNA *v.* GOSAINDAS
KOLEY (9), RAM NANDAN *v.* PERIA LANBI
(4), RAMA *v.* VARUDA (3), RAMAZZAM *v.*
KADER BACHA SAHIB (5), NATESAR PILLAI
v. GANAPATHIA PILLAI (6), KIFAYET ALI
v. RAM SINGH (1), PIR JADE *v.* PIR JADE
(2), SADAI CHARAN JANA *v.* PARESH NATH
(GHOSE (10) and BHAGWAT PROSAD SINGH
v. DWARKA PROSAD SINGH (12) *referred to.*

This was an appeal preferred on the
13th of May 1925 against the order of P.
E. Cammiade, Esq., District Judge of
Zillah Midnapore, dated the 16th February
1925, reversing the order of K. P.
Bagchi, Esq., Munsif, 2nd Court, Tam-
luk, dated the 24th of November 1924.

The facts of the case will appear from
the judgment.

*Mr. S. C. Maity (Counsel), Babus
Tridib Nath Roy and Purna Chandra
Mukherji for the Appellant.*

*Babu Santosh Kumar Pal for the Res-
pondents.*

The JUDGMENT OF THE COURT was as
follows :—

SUHRAWARDY, J.—This appeal raises a

- (1) I. L. R. 7 All. 359 (1885).
- (2) I. L. R. 6 Bom. 681 (1882).
- (3) I. L. R. 16 Mad. 142 (1892).
- (4) I. L. R. 6 Mad. 250 (1888).
- (5) I. L. R. 31 Mad. 68 (1907).
- (6) I. L. R. 40 Mad. 949 (1916).
- (7) I. L. R. 23 Cal. 217 (1896).
- (8) 14 C. W. N. 481 (1910).
- (9) I. L. R. 25 Cal. 594 (F. B.) (1893).
- (10) 35 C. L. J. 82 (1921).
- (11) I. L. R. 17 Cal. 631 (1890).
- (12) I. L. R. 2 Pat. 809 (1923).
- (13) I. L. R. 20 Cal. 388 (1892).
- (14) I. L. R. 10 Cal. 541 (1884).

question relating to limitation and the law
on the point may safely be said to be still
in a nebulous state. It is necessary to
state some facts on which the considera-
tion of the question turns. The decree-
holder (the Appellant before us) obtained
a preliminary decree upon a mortgage in
his favour on the 20th May 1918. The
judgment-debtor Defendant appealed and
his appeal was finally dismissed by this
Court on the 18th May 1922. During the
pendency of the appeal in this Court the
Plaintiff decree-holder applied for and ob-
tained the final decree on the 20th August
1920. As the decision of the High Court
in the appeal against the preliminary de-
cree by the Defendant was pronounced
subsequent to the final decree the Plain-
tiff made an application for a fresh final
decree, which application was dismissed
on 25th August 1923 on the ground that
the final decree had already been passed.
On the same day, *viz.*, the 25th August
1923, the Plaintiff decree-holder presented
an application for execution of the final
decree and thereafter appealed against the
order refusing to draw up a fresh final
decree. That appeal was finally dismiss-
ed by this Court on the 23rd August 1924.
The application for execution filed by the
decree-holder on the 25th August 1923 was
returned to him on the ground that there
were omissions in the application, first,
with regard to the amount of interest to
which the decree-holder was entitled to
in column 7, and, secondly, with regard to
the amount of costs which the decree-
holder was entitled to in column 8 in the
form used for application for execution of
decrees, being form No. 6, Appendix E, C.
P. C. The order recorded on the back
of the petition was :—“Returned to be
re-filed within 10 days after the necessary
correction.” It appears that the applica-
tion returned to the decree-holder was

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not re-filed after the necessary corrections within the 10 days allowed by the above order. On the 28th June 1924 a fresh application was made giving all the necessary particulars and the application which was presented by the decree-holder on the 25th August 1923 was also filed along with it. On the application of the 25th August 1923 which was re-filed, the following order was recorded: "The previous application for execution is not necessary as a fresh one has been filed. Return." On these facts objection was taken on behalf of the judgment-debtors that the application for execution filed on the 28th June 1924 was barred by limitation since it was more than three years after the final decree was passed on the 20th August 1920. It was maintained on behalf of the decree-holder that the application for execution of the 25th August 1923 was valid to save limitation. It is not disputed that this application was in time, the Court being closed from 20th to 24th August 1923.

The Munsif in the execution Court held that the present application for execution was not barred by limitation. The learned District Judge of Midnapur on appeal reversed the decision of the Munsif and held that the application of the 25th August 1923 not being a proper application, the present application is time-barred.

The decree-holder appeals and on his behalf it is argued that the view of law taken by the learned District Judge is erroneous. The only question that arises for consideration is whether the application by the decree-holder of the 25th August 1923 was an application in accordance with law, under Art. 182 (5) of the Limitation Act. There is wide divergence of view of the Indian Courts on this matter. The High Court of Allahabad in the case of *Kifayet Ali v. Ram*

Singh (1) held that when an application is presented and returned to the decree-holder and not filed within the time allowed by the Court after the necessary amendments, it must be taken on the analogy of sec. 374 of the Code of 1882 (corresponding to Or. 23 of the Code of 1908) that there was no application presented for execution and that re-filing after necessary amendment after the time allowed must be taken as of no avail. The Bombay High Court in the case of *Pir Jade v. Pir Jade* (2) held that when an application is filed by the decree-holder and withdrawn with leave to file a fresh application, it must be taken that no application for execution was made by the decree-holder and that the application so made and withdrawn was not an application for execution. The Madras High Court has consistently taken a view which cannot be said to be uniform with the view taken by the Allahabad High Court. In *Rama v. Varuda* (3) that Court following its earlier decision in *Ram Nandan v. Peria Lanbi* (4) held that an application for execution, if defective in matters which cannot be said to be material or substantial, should be considered to be an application in accordance with law. The same view was taken by that Court in *Ramazzam v. Kader Bacha Sahib* (5) and *Natesar Pillai v. Ganapathia Pillai* (6). In this Court the view upon this question has not been always consistent. The question should be approached from two standpoints. In the first place, it has to be considered whether an application returned to the decree-holder under Or. 21, r. 17 for amendment and not filed

(1) I. L. R. 7 All. 359 (1886).

(2) I. L. R. 6 Bom. 681 (1882).

(3) I. L. R. 16 Mad. 142 (1892).

(4) I. L. R. 6 Mad. 250 (1883).

(5) I. L. R. 31 Mad. 66 (1907).

(6) I. L. R. 40 Mad. 949 (1916).

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within the time allowed by the Court can be taken to be an application for execution at all. In the second place, it has to be considered whether an application which has been rightly or wrongly returned to the decree-holder for amendment can be held by the Court executing the decree on a fresh application an application made according to law. As to the first point, there is no direct authority in this Court and it has not been considered apart from the second question. But the cases to which I will presently refer did not consider whether an application returned to the decree-holder and not re-filed in proper time should be totally negligible for reckoning the period of limitation.

On the second point the case which really presents any difficulty is the case of *Gopal Sah v. Janki Koer* (7). In that case an application was presented which was defective in not having complied with the provisions of s. 235 to 238 of the Code of 1882. It was returned to the decree-holder for amendment under sec. 245 within a week's time. The amended application was not put in within the time fixed but on a later date a fresh application was presented in due form with the previous application attached thereto. When the fresh application was presented it was more than three years from the date of the decree and the question therefore that arose in that case was whether the first application was one which could be considered as one in accordance with law within the terms of Art. 179, cl. (4) of Sch. II of the Limitation Act (XV of 1877). The learned Judges held that the first application was not in accordance with law; and in so holding instead of confining themselves to the facts before them they made some general observations which are pressed on our attention on be-

(7) 1 L. R. 23 Cal. 217 (1893).

half of the Respondents. Prinsep, J., pointed out the defects in the application and held that it was so defective that execution could not have been levied upon it. But in considering this question the learned Judge differed from the view taken by the Madras High Court in *Rama v. Varuda* (3) which held that if the defects in the application are only of a formal character it should still be regarded as an application made in accordance with law within the meaning of the article of the Limitation Act referred to above. Ghose, J., based his decision in that case not on the particular facts arising in it but upon the view which he took of the law on the subject, namely, that where an application was rightly or wrongly returned or amended and the Court considered that the petition in question was one which could not be admitted, if the decree-holder did not comply with the order of the Court within the time fixed for amendment, it cannot be held that the application should be regarded as a proper application. The learned Judge consequently held that when an application is returned for amendment by the Court, rightly or wrongly, it must be considered to be not in accordance with law. This view has been criticised in *Mathura Prasad v. Mussamat Anurago Koer* (8). The learned Judges observed thus with reference to *Gopal Sah's* case (7): "That it was unnecessary to lay down such a wide general rule excluding all equitable consideration which might hereafter arise for the decision of the case before them is clear. In that case the application did not contain the necessary materials under sec. 235 and there does not appear to have been any application capable of execution

(3) 1 L. R. 16 Mad. 142 (1892).

(7) 1 L. R. 23 Cal. 217 (1893).

(8) 14 O. W. N. 481 (1910).

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from the start. That alone seems to entirely distinguish it from the case now before us and that the wide rule laid down went too far is clear from the fact that Ghose, J., one of the Judges who delivered a judgment in that case, was also a party to the unreported case we have already referred to, in 1905, where it was held that where an application had been returned to rectify a mistake for which the decree-holder was not responsible and was not re-filed within the period of limitation, the execution Court was right to look into the merits and hold that the application was not barred." In considering as to the exact point on which the case of *Gopal Sah v. Janki Koer* (7) is an authority I may quote the following words from the judgment of Prinssep, J. : " One of the errors committed by the decree-holder was in mis-stating the amount of his decree in a lesser sum than he was given and the Subordinate Judge has consequently limited the execution to that smaller sum. If that had been the only defect, the decree would have been capable of being executed for the smaller sum. But in other respects, which it is unnecessary to mention, the application failed to comply with the requirements of secs. 235, 236, 237 and 238 applicable to the case." This observation limits the operation of the view expressed therein and when closely examined is an authority in favour of the Appellant before us. The only defect that was pointed here was the omission of certain sums which the decree-holder was entitled to receive from the judgment-debtors but which he did not mention in the application for execution. So that in terms of the judgment of Prinssep, J., the decree-holder has mis-stated the amount of the decree in a lesser sum than he was given

and so execution could be taken for that smaller sum. The authority of *Gopal Sah's* case (7) in my opinion has been considerably shaken by the subsequent Full Bench decision in the case of *Gopal Chandra Manna v. Gosaindas Koley* (9). In that case the defective application did not contain the right number of the suit and the date of the decree. The question arose when the subsequent application for execution was made whether the application, with the defects above-mentioned returned for amendment but not re-filed in time, was to be considered as an application in accordance with law. It was held by the Full Bench that material defects only could vitiate an application; and as the defects in the application for execution then before the Court were not material, it was valid to save limitation. The referring judgment was delivered by Banerji, J., and the learned Chief Justice in delivering the judgment of the Full Bench accepted the reasoning and the conclusion expressed by that learned Judge. That learned Judge observed as follows :— " The question whether an application for execution or for taking some step in aid of execution is one according to law within the meaning of Art. 179, cl. (4), has to be determined with reference to the circumstances of each case; and while on the one hand an application must be in substantial compliance with the law in order that it may be regarded as one coming within the meaning of cl. (4), on the other hand, it is not every informality that would vitiate an application and take it out of that clause. Were it otherwise, *bonâ fide* applications for execution would fail to save limitation owing to trivial defects of form—a result which I do not think the legislature could have

(7) I. L. R. 23 Cal. 217 (1896).

(9) I. L. R. 25 Cal. 594 (F. B.) (1898).

7. I. L. R. 23 Cal. 217 (1896).

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intended." With reference to the case of *Gopal Sah v. Janki Koer* (7) the learned Judge after quoting the passage which I have quoted observed: "These observations go to some extent to support the view I take, that it is only material defects that can vitiate an application." The Full Bench adopted the view, which must now be taken as settled, that if an application for execution returned for amendment and not re-filed within the time allowed by the Court under Or. 21, r. 17, Civil Procedure Code, is in substantial compliance with the provisions of the Code, being defective merely in omitting immaterial particulars, it should be taken as an application in accordance with law within the meaning of Art. 182 (5) of the Limitation Act. The application of the 25th August 1923 contained a prayer that the properties mortgaged should be sold and the decree-holder's dues realised therefrom. That is an invitation to the Court to take further steps in aid of execution of the decree. In this connexion reference may be made to the case of *Sadai Charan Jana v. Parash Nath Ghose* (10), where it was held that an application, even though it be deemed so defective as not to be an application for execution, must still be regarded as an application made to proper Court in accordance with law to take some steps in aid of execution. In my opinion, the law has been too broadly stated and it is not necessary for me to go so far as on the facts of the present case I am of opinion that the application made by the decree-holder on the 25th August 1923 was an application in accordance with law. On a consideration of the cases to which I have made reference and the other cases which have been cited at the Bar, the conclusion at

which I have arrived is that the expression "in accordance with law," in Art. 182 (5) should be taken to mean that the application, though defective in some particulars, was such upon which execution could be issued. If the omissions were such as to make it impossible for the Court to issue execution upon it, as was the case in *Isagarali v. Trailakhya Nath Ghose* (11), where the list of the properties to be attached and sold was not supplied with the application for execution, it should be held that such an application is not in accordance with law. But where the application is such as to enable the Court to take further steps in execution, it cannot generally be said that such an application, if not defective in material and substantial matters, is an application not in accordance with law. In the present case there was no bar to the Court levying execution for the lesser sum claimed by the decree-holder; and in this view I hold that the application made by the decree-holder on the 25th August 1923 was an application in accordance with law and therefore the present application of the decree-holder is not barred by limitation. I am further of opinion that, if an application is presented to the Court and the Court takes judicial action upon it either in registering the application or by returning it for amendment, such an application, though not filed in time fixed by the Court, should not be considered as not having been made. The view that I have above taken seems also to be supported by the decision of the Patna High Court in *Bhagwat Prosad Singh v. Dwarka Prosad Singh* (12).

In the result, this appeal is allowed, the order of the lower Appellate Court set aside and that of the first Court restored

(7) I. L. R. 23 Cal. 217 (1896).

(10) 35 C. L. J. 82 (1921).

(11) I. L. R. 17 Cal. 631 (1890).

(12) I. L. R. 2 Pat. 809 (1923).

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with costs. We assess the hearing-fee at four gold mohurs.

We are further asked to consider whether the present application should be limited to the execution of the amount mentioned in the previous application of the 25th August 1923. We have not had the advantage of the view of the lower Appellate Court upon this point as it dismissed the present execution on a view which in our judgment is not correct. We therefore do not consider it proper to express any opinion upon this matter at the present stage.

PAGE, J.—An application for execution of a decree or order must be made within three years from “the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the ‘decree or order’” [Act IX of 1908, Sch. I, Art. 182 (5)]. An application for execution in order to comply with the law must be made in accordance with the provisions of Or. 21, rr. 11 to 14. Such an application for all purposes need not conform in every detail with the provisions mentioned in rr. 11 to 14. It is sufficient in order to save limitation under Art. 182 (5) that the application for execution should be made in a form which substantially complies with the provisions set out in those rules. The question whether an application for execution or for taking some step in aid of execution is one “in accordance with law” is to be determined with reference to the circumstances of each particular case; and while on the one hand the application must be in substantial compliance with the provisions of the Code in order that it may be regarded as a valid application within the meaning of Art. 182, cl. (5), “on the other hand, it is not every informality that would vitiate an application, and take it out of the

clause. Were it otherwise, *bond fide* applications for execution would fail to save limitation owing to trivial defects of form—a result which I do not think the legislature could have intended.” The view I take is amply supported by the authority of decided cases of which I need only refer to the cases of *Balkissen Das v. Bednali Koer* (13) and *Rama v. Varada* (3); *per* Banerji, J., in *Gopal Chandra Manna v. Gosaindas* (9). Now, when the Court receives an application for the execution of a decree under r. 17, it is the duty of the Court to “ascertain whether such of the requirements of rr. 11 to 14 as may be applicable to the case have been complied with; and if they have not been complied with, the Court may reject the application or may allow the defects to be remedied then and there or within a time to be fixed by it.” In my opinion, if the Court holds that there is some material and substantial defect which vitiates the application, the Court ought to reject it and not allow the defect to be remedied, for if an invalid application is returned for amendment and not rejected, the applicant thereby may be misled, and may refrain from preferring a fresh application in substantial compliance with the law as he would have been able to do forthwith if the invalid application had been rejected. Further, I am of opinion that if the Court permits the defect to be remedied within a time fixed by it, at the expiration of that time the application, if unamended, ought to be rejected; see *Fuzloor Rahman v. Allaf Hossein* (14), and *Asgarali v. Trailakhya Nath Ghose* (11). I agree that in this case the application for execu-

(3) I. L. R. 16 Mad. 142 (1892).

(9) I. L. R. 25 Cal. 594 (F. B.) (1898).

(11) I. L. R. 17 Cal. 631 (1890).

(13) I. L. R. 20 Cal. 388 (1892).

(14) I. L. R. 10 Cal. 541 (1894).

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tion preferred on the 25th August 1923 was in substantial compliance with the law. It was strenuously contested before us, however, upon the authority of *Gopal Sah v. Janki Koer* (7) that if a Court holds that an application for execution does not conform with each and every provision set out in rr. 11 to 14, it must be taken that the application for execution will not be effectual to enable the decree-holder to evade the law of limitation. In that case Mr. Justice Prinsep observed that—"It was not an application in accordance with law, because it did not fulfil the requirements of the law. No Court can do otherwise than determine that fact. To find that what the law requires on matters of form need not be complied with to make an application one in accordance with law, seems to me to allow a transgression of the law, and yet to find that it has been complied with. I am aware that in *Rama v. Varuda* (3) a different opinion has been expressed, but with every deference and respect for the learned Judges of the Madras High Court, I cannot agree with them in their interpretation of the law." Now, the above observations of the learned Judge must be regarded as *obiter*, for the decision in that case proceeded upon the assumption that the application for execution was not in accordance with law; and, therefore, it was not necessary for the Court to consider what the result would be if an application substantially in accordance with the form prescribed was rejected or returned for the purpose of remedying certain informal defects which the Court held were inherent in it. In my opinion, the above observations of the learned Judge cannot be reconciled with the decision of the Full Bench in *Gopal Chandra's*

case (9) and cannot now be regarded as a correct exposition of the law.

The learned pleader for the Respondents urged a further contention before us that inasmuch as the application had been returned to the decree-holder for amendment, and the amendment was not effected within the time appointed by the Court, the application must be regarded as though it never had been made; and he cited *Gopal Sah's* case (7) in support of his contention. Prinsep, J., in that case observed that—"The Allahabad High Court has held in *Kifayet Ali v. Ram Singh* (1)—a case which is on all fours with the case before us—that when an informal application for execution has been returned for amendment under sec. 245, what has been done in the matter by the decree-holder has been undone by him, and the proceeding became to all intents and purposes as though no application had been put in." But it is to be observed in respect of the two cases of *Pir Jade v. Pir Jade* (2) and *Kifayet v. Ram Singh* (1), upon which the learned Judge founded his opinion, that in one case the application for execution had been dismissed, and in the other withdrawn, at the instance of the decree-holder. It is, of course, beyond controversy that where a decree-holder deliberately withdraws, or invites the Court to dismiss, his application, he cannot afterwards rely upon that application for the purpose of saving limitation in respect of a subsequent application for execution. But such cases differ *toto coelo* from cases in which the application for execution is returned *in invitum* to the applicant. In my opinion, having regard to the decision in *Rama v. Varuda* (3)

(1) I. L. R. 7 All. 259 (1885).

(2) I. L. R. 6 Bom. 681 (1882).

(3) I. L. R. 16 Mad. 142 (1892).

(7) I. L. R. 23 Cal. 217 (1896).

(9) I. L. R. 25 Cal. 594 (F. B.) (1898).

(3) I. L. R. 16 Mad. 142 (1892).

(7) I. L. R. 23 Cal. 217 (1896).

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which, although dissented from in *Gopal Sah's* case (7), was afterwards affirmed by a Full Bench in *Gopal Chandra Manna v. Gosaindas Koley* (9) and the observation of Mr. Justice Banerji in the Full Bench case, the true view is that where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits or rejects or returns the application or allows such application to be amended. For these reasons I agree that the appeal should be allowed, and an order made in the sense that my learned brother proposes.

H. C. S. *Appeal allowed.*

(CIVIL APPELLATE JURISDICTION.)

**APPEAL FROM APPELLATE DECREE
No. 503 of 1924.**

<p>B. B. GHOSE, J. CHAKRAVARTI, J. 1926, 30, March.</p>	}	<p>ADARPRIYA CHOU- DHRANI, Plaintiff, Appellant, v. RAMPROTAP AGARWALLA, Defendant, Respondent.</p>
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Order refusing to admit appeal as being out of time, if a decree—Limitation Act (IX of 1908), sec. 12—Time required for preparing copy of decree, if to be deducted when stamps and folios supplied sufficient for copy of decree only but not for both judgment and decree.

An order disposing of an appeal in the following terms:—"The appeal being time-barred is not admitted" amounts to a dismissal of the appeal and is a decree.

Where the judgment of the Munsif was pronounced on the 6th October and the same day the Appellant applied for a copy of the judgment and decree and put in a certain number of folios and stamps

by guess, which were sufficient for the copy of the decree only, and on the 8th October the actual number of stamps and folios required was notified and the Court was closed after the 8th October and re-opened on the 12th November and the remaining number of stamps and folios were filed on the 14th November and the copy of the decree was ready for delivery on the 16th November, and the appeal was filed before the District Judge on the 19th November;

Held—That the Appellant was entitled to deduct the period from the 6th October to the 16th November under sec. 12 of the Limitation Act.

That assuming that the actual number of folios for the copy of the judgment was not filed in proper time, that did not debar the Appellant from deducting the period required for the preparation of a copy of the decree for which the requisite number of folios had been filed.

When an application for extension of the period of time for presenting an appeal is made under sec. 5 of the Limitation Act, it is desirable that the lower Appellate Court should record its opinion as regards that application, even when it is rejected.

This was an appeal against a decree of the District Judge of Zillah Assam Valley District (R. E. Jack, Esq.), dated the 29th November 1923, refusing to admit the appeal against the decree of the Munsif of Gauhati (M. Zahurul Huq), dated the 18th February 1923.

The facts of the case will appear from the judgment.

Babu Anil Chandra Ray Chaudhury (for Mr. Syed Saidulla) for the Appellant.

Mr. Gunada Charan Sen and Babu Monmoth Nath Ray (Jr.) for the Respondent.

(7) 1, F. R. 23 Cal. 217 (1896).

(9) 1, L. R. 25 Cal. 594 (F. B.) (1898).

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The JUDGMENT OF THE COURT was as follows :—

B. B. GHOSE, J.—This is an appeal from what must be construed to be a decree of the District Judge with regard to an appeal which was presented to him from a decree of the Munsif of Gauhati. The order of the learned Judge runs thus : “The appeal being time-barred is not admitted.” The learned Advocate Mr. Gunada Charan Sen for the Respondent takes a preliminary objection that there is no appeal from this order as it is an order of the District Judge refusing to admit an appeal. But Mr. Sen has not been able to point out any rule or order in the Civil Procedure Code under which a Judge on appeal may pass such an order that an appeal should not be admitted. Obviously the meaning of the order of the learned Judge is that the appeal is dismissed as there is no doubt that the appeal was filed with all the necessary preliminaries required under Or. 44, r. 1 of the Code of Civil Procedure. The judgment, therefore, amounts to a dismissal of the appeal and it is a decree. There being thus a second appeal we have to see whether the decision of the learned Judge is right with regard to the question of limitation. In this case the judgment of the trial Court was pronounced on the 6th of October 1923. On that very day the Appellant before us who was also Appellant before the lower Appellate Court applied for a copy of the judgment and the decree of the trial Court and the Appellant also put in a certain number of folios and requisite stamps for copies. The decree had not then been signed by the learned Munsif so that it was not in existence and the requisite stamps must have been filed on the 6th October 1923 by guess by the Appellant. The decree was signed on the 8th October 1923, and on that date it

appears that it was notified to the Appellant's pleader as to the number of stamps and folios necessary for preparing copies of both the judgment and the decree. As we have already stated certain number of stamps and folios were delivered on the 6th October. The remaining number of stamps and folios were filed on the 14th November 1923. It appears that the Court was closed after the 8th October and re-opened on the 12th of November 1923. The copy of the decree was ready for delivery on the 16th November 1923, and the appeal was filed on the 19th November. It appears that the copy of the decree covered only three folios. It is quite probable that when the folios were filed with the application for copy on behalf of the Appellant on the 6th of October, at least three folios were filed along with the application. If that was so, then the Appellant was entitled to deduct the period from the 6th October to the 16th November 1923, when the copy of the decree was ready for delivery under sec. 12 of the Limitation Act. The learned Judge does not seem to have adverted to that question. What apparently was done on the 8th was that the Appellant was notified as regards the requisite number of folios to be filed for completing the copy of the judgment and the decree. The judgment appears to have required something like 27 folios. Assuming that the actual number of folios for the copy of the judgment was not filed in proper time, that does not debar the Appellant from deducting the period required for the preparation of a copy of the decree for which he must have filed the requisite number of folios on the 6th of October. The appeal, therefore, in the lower Appellate Court appears to have been filed in proper time, as deducting the period between the 6th October and the 16th of Nov-

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ember it was filed quite within the period of limitation.

The judgment and decree of the District Judge must, therefore, be set aside and the case is remanded to him to be heard on the merits. It is also necessary to observe that the learned Judge did not record his opinion as regards the application which was apparently made on behalf of the Appellant for extension of the period of time for presenting the appeal under sec. 5 of the Limitation Act. It is desirable that when such an application is made, the lower Appellate Court should record its opinion as regards that application, even when it is rejected.

Costs of this appeal will abide the final result.

CHAKRAVARTI, J.—I agree.

S. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1087 OF 1925.

GREAVES, J.	}	LOYDS BANK, LTD.,
PANTON, J.		Petitioner,
1925,		v.
1st, December.		SURJIMULL JALAR and ors., Opposite Party.

Amendment of pleadings—Discretionary power of trial Court—Circumstances justifying interference by the High Court in revision—Civil Procedure Code (Act V of 1908), sec. 115, scope of.

The question of amendment of pleadings is a question of discretion with the trial Court and unless the High Court is satisfied that the discretion was exercised on entirely wrong lines or in fact that the trial Court refused a jurisdiction vested in it, it would not be justified in interfering under sec. 115, C. P. C.

The extension of jurisdiction under sec. 115 for the correction of errors of law and not merely errors of procedure is not justified and the section should be confined and strictly confined to cases in which there

has been material irregularity so far as jurisdiction is concerned and either a failure to exercise a jurisdiction vested in the Court or a wrong exercise of such jurisdiction.

This was a Rule issued on the 21st of August 1925 against an order of the Subordinate Judge of Howrah (Mr. A. C. Banerji), dated the 24th August 1925, refusing an application of the Petitioner Bank for amendment of written statement.

The facts of the case will appear from the judgment.

Sir P. C. Mitter, Mr. Charu Chandra Biswas and Babu Lalit Mohan Sanyal for the Petitioner.

Mr. N. Sircar, Babus Rupendra Kumar Mitra and Rajendra Chandra Guha for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This Rule was granted at the instance of Lloyds Bank, Limited, who were Defendants in the suit. It is directed against an order of the Subordinate Judge of Howrah refusing an application by Lloyds Bank, Limited, to amend their written statement. The suit was brought to enforce a charge executed in favour of the Plaintiff. The Bank claimed certain charges in priority to those in favour of the Plaintiff and these are set out in the written statement which they filed in the suit. This written statement was filed so long ago as 28th June 1924. The amendment which is now sought is an amendment to enable the Bank to plead two other securities, dated the 15th of May 1922 and the 8th of January 1923, which the Bank allege are in priority to the Plaintiff's security. The failure of the Bank to plead these two securities was discovered by them in July 1924. They

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refrained at that time from making an application to amend their written statement for the reason that they were advised to commence another suit which has in fact been commenced on the Original Side of this Court. That suit was commenced so long ago as 17th November 1924 and pleads among other things these two further securities of 15th May 1922 and of 8th January 1923. But the Bank have been advised that it is also desirable for them to plead these two securities in the suit in which this Rule was obtained. They accordingly applied to the Subordinate Judge for amendment on the lines which I have indicated and on the 14th August 1925 the learned Subordinate Judge passed an order refusing to allow the amendment. So far as I understand he was influenced in his decision by the delay that had taken place and he was also not prepared to accede to the contention of the Bank that they were misled by the form in which the Plaintiff's charge was pleaded. It is not necessary I think for me to refer to these pleadings in detail, but apparently the learned Judge thought that there was no ground based on the form in which the Plaintiff's claim was formulated to justify the allegation that was made before him. Accordingly, the view which he formed was that these securities might have been pleaded when the original written statement was put in by the Bank. He says something about the delay being utilised for the manufacture of documents and he lays stress upon the fact that the two further securities sought to be pleaded were not registered documents. But we do not think that he means nor was it necessary for him to find that these two securities were not genuine documents and his observations were only general. We have been invited by the learned Advocate who appears

for the Bank to express an opinion with regard to this. But it is impossible on the materials before us to form an opinion as to whether these securities are genuine or not. I am perfectly content to assume for the purpose of this Rule that they are genuine securities. I have stated the real facts and circumstances under which the learned Subordinate Judge refused to allow the amendment, whether he was right or wrong in doing so or whether we ourselves under similar circumstances should have exercised our discretion in the same way I do not know. Certainly I am inclined to think, speaking for myself, that I should have been inclined to allow the amendment on such terms as I thought fit. But after all I think that the question of amendment is a question of discretion with the Subordinate Judge and unless we are satisfied that the discretion was exercised on entirely wrong lines or in fact that he refused a jurisdiction vested in him we should not be justified in interfering under sec. 115 of the Code of Civil Procedure. No doubt in certain cases in this Court that section has been given a wide application and it has been utilised to correct errors of law and not merely errors of procedure; but with all respect we think that this extension of jurisdiction under sec. 115 is not justified and that it should be confined and strictly confined to cases in which there has been material irregularity so far as jurisdiction is concerned and either a failure to exercise a jurisdiction vested in the Court or a wrong exercise of such jurisdiction. In spite of what has fallen from the learned Advocate who appeared for the Bank we find it impossible to say that there has been a failure in this case by the learned Subordinate Judge to exercise jurisdiction which was vested in him. He has applied his mind to the facts and circumstances

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with regard to those documents and in the exercise of his discretion he has refused to allow the amendment. . . . which was sought. This being so, although we might have exercised our jurisdiction in a different way to what the learned Subordinate Judge has done, that does not justify us in interfering under sec. 115 unless there has been, as we have already stated, a refusal of jurisdiction.

We were referred to the case of *Mani Lal v. Harendra Lal* (1) by which it was sought to show that in a case of this kind the Court does deal with such matters under sec. 115, but the learned Advocate who referred to that case seems to have not noticed that in that case an amendment had been granted and the Court refused to interfere in the matter. How that case can be called in aid to support our interference in the present case I fail to see.

For the reasons which I have indicated and considering that this is merely an exercise of discretion by the learned Subordinate Judge and not a refusal of jurisdiction, we think that we should discharge the Rule. If as a result of the suit the Bank is prejudiced by the refusal of the learned Judge, this is a matter that can be dealt with in any appeal that may be preferred to this Court from the ultimate decision.

The result is that the Rule is discharged with costs, one set; hearing-fee, five gold mohurs.

PANTON, J.—I agree.

S. C. M.

(1) 12 C. L. J. 556 (1910).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 109 of 1924.

CHATTERJEA, J.	}	CHANDI CHARAN DAS
PAGE, J.		and anr., Defendants
1926,		Nos. 1 and 2,
Heard, 14 and		Appellants,
15, June.		v.
Judgment,		DULAL PAIK,
16, June.		Plaintiff, Respondent.

Hindu law—Dedication of property to family idol—Appointment of members of family as shebait and allowing shebait to appropriate a small portion of the income as remuneration and to reside in the thakurbari with family, if affects absolute debutter character of the property—Consensus of family, if can convert debutter property into secular—Consensus, if to be that of all persons interested in the sheba or of shebait only.

The question whether an absolute debutter is created or there is merely a charge in favour of the deb sheba depends upon the terms of the deed and the circumstances of each case.

Where the language of a deed of endowment primâ facie showed that there was absolute dedication to a family idol, the mere fact that the donor by the deed appointed himself and other members of the family shebait in succession and provided that the shebait for the time being would at the end of every three years receive as remuneration a half of the surplus income of the endowed properties (which taking the income as at the date of the deed proved a trifling sum) and would be entitled to reside with his family in the thakurbari, in a portion of which only the thakur was located, did not affect the absolute debutter character of the endowment.

JADU NATH v. SITA RAMJI (1) applied.

SONATAN v. JUGGUT SUNDAR (2) and

(1) L. R. 44 I. A. 187; s. c. 21 C. W. N. 959 (1917).

(2) 5 M. I. A. 66 (1859).

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ASHUTOSH v. DURGA CHARAN (3) *referred to*.

Quære.—Whether in the case of a family idol, the consensus of the family can convert debutter property into secular? But if it can, such consensus must be of all the members, male and female, interested in the worship of the deity.

DICTUM of SIR MONTAGUE SMITH in DOORGANATH v. RAM CHANDRA (4) *commented on*.

GOBINDA KUMAR v. DEBENDRA KUMAR (5), SRI SRI GOPAL JIU THAKUR v. RADHA BINODE (6), PRAMATHA NATH MULLICK v. PRADYUMNA KUMAR MULLICK (7), MON-MOHAN v. SIDDESWAR (8) and DHARMA-DAS v. GOSTA BEHARI (12) *referred to*.

Per PAGE, J.—By absolutely dedicating property to a thakur, the founder divests himself of all right and title thereto. Having appointed himself the first and other members of his family the succeeding shebais, he as founder became functus officio.

GOURI KUMARI v. RAMANIMONI (10), NAGENDRA NATH v. RABINDRA NATH (11) and LALIT MOHAN v. BROJENDRA NATH (9) *referred to*.

This was an appeal preferred on the 19th May 1924 against a decree of the Subordinate Judge of Zillah 24-Per-gannahs (Babu Kunja Behari Biswas), dated the 7th March 1924.

(3) I. L. R. 6 I. A. 182 (1879).

(4) L. R. 4 I. A. 53; s. c. I. L. R. 2 Cal. 341 (1876).

(5) 12 C. W. N. 98 (1907).

(6) 41 C. L. J. 396, 426 (1924).

(7) I. L. R. 53 Cal. 809; s. c. 30 C. W. N. 25 (P. C.) (1925).

(8) 27 C. W. N. 218 (1922).

(9) I. L. R. 53 Cal. 251, 257 (1925).

(10) I. L. R. 50 Cal. 197 (1922).

(11) I. L. R. 53 Cal. 182; s. c. 30 C. W. N. 389 (1925).

(12) 16 C. W. N. 29 (1911).

The facts of the case will appear from the judgment.

Babus Girija Prasanna Roy Choudhuri and Abinash Chandra Ghose for the Appellants.

Babus Nagendra Nath Ghose, Panchanan Ghosal and Surjya Kumar Aich for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEE, J.—This appeal arises out of a suit for partition, accounts and for various other reliefs.

The Plaintiff-Respondent is the daughter's son of one Lokenath Mandal. Lokenath had two brothers, Tarak Nath and Hiralal. Lokenath left his widow Monmohini, his daughter Ramani, the Defendant No. 5, and his daughter's son Dulal Chandra, the Plaintiff. Tarak Nath's widow Uma Sundari was the Defendant No. 3 since deceased. Hiralal left two sons Chandi, the Defendant No. 1, and Kedar Nath, the Defendant No. 2, and a daughter Bhabini, the Defendant No. 4.

Lokenath established a deity Sree Sree Radha Krishna Jiu in his dwelling-house in May 1902. On the 20th July 1902 he executed an *arpannama* (deed of endowment). On the 26th July 1903 he executed a Will. On the 31st July of the same year he executed an *ekrar*. A codicil was executed on the 11th November 1904.

On the 4th December 1907 Monmohini obtained probate of the Will of Lokenath. In 1912, the Defendants Nos. 1 and 2 brought an administration suit against Monmohini and others. That suit was decreed in a modified form on the 5th September 1913 by the trial Court. There was an appeal by the Defendants Nos. 1 and 2 to the High Court in R. A. No. 19 of 1914. There was a compromise between the parties, and a decree was passed by

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consent on the 25th July 1916. Subsequently Monmohini brought an account suit (No. 9 of 1919) against Dulal, the Plaintiff. She died on the 10th November 1919 and the suit was continued by the Defendants Nos. 1 and 2 which, however, was dismissed on the 17th January 1921. The present suit was instituted on the 5th August 1921 by Dulal as stated above.

The *arpannama*, dated the 20th July 1902, was executed by Lokenath in favour of Sree Sree Iswar Radha Krishna Jiu and runs as follows:—"I, Lokenath Das Mandal, do execute this *arpannama* or deed of endowment to the following effect:—I have installed the idol Sree Sree Iswar Radha Krishna Jiu in my dwelling-house at No. 43, Beniapukur Lane on 8th Jaistha 1309 last after the performance of sacrifices, etc., and the said dwelling-house has come to be called a 'thakurbati.' I am now duly performing the *sheba* (service) and *puja* (worship), etc., of the said Sree Sree Radha Krishna Jiu. But in order that the *sheba* and *puja*, etc., of the said idol may be duly carried on after my death, I, with that intention, make over, or endow once for all, the properties mentioned in the schedule to the said Sree Sree Radha Krishna Jiu, and become divested of all rights thereto. The said Sree Sree Radha Krishna Jiu thus becomes the absolute owner of the properties mentioned in the schedule from this day. The *sheba* and *puja*, etc., of Sree Sree Radha Krishna Jiu shall be carried on and the management of the said *debutter* properties made and the expenses in connexion therewith on the score of revenue and taxes, etc., defrayed out of the income of the said properties. As it is necessary to appoint *shebait*s or trustees for duly performing the duties mentioned above, I appoint *shebait*s

under the following conditions and rules. The *shebait*s shall carry on the *sheba* and *puja* according to the rules set forth below. I shall perform the *sheba* and *puja*, etc., as the sole *shebait* of Sree Sree Iswar Radha Krishna Jiu so long as I shall be alive; on my death, my wife Monmohini Dassi shall be *shebait* of the said Sree Sree Iswar Radha Krishna Jiu and, on her death, my daughter Ramani Dassi and on the death of the latter, my nephew Kedar Nath Das Mandal and my daughter's son Dulal Chand Paik shall jointly act as *shebait*s; and on the death of both of them, their heirs shall become the *shebait*s in succession. The *shebait*s shall defray the expenses of *deb sheba*, etc., management of the properties and repairs, etc., out of the income of the properties hereby dedicated as per details given below, and shall credit the half of the surplus income, after deducting the expenses thus incurred, to the *tehibil* of Sree Sree Iswar Radha Krishna Jiu and shall, at the end of every three years, appropriate the remaining half of the surplus income, as remuneration for their labour. The *shebait*s shall live with their family in the 'thakurbati' and perform the *sheba*, etc., of the *thakurs* (idols). I, of my own accord and in sound health, execute this *arpannama* or deed of endowment to the above effect."

The properties dedicated were mentioned in the schedule to the deed, *viz.*, premises No. 14/1, Beniapukur Road which was let out at a monthly rent of Rs. 60, and the dwelling-house No. 43, now 53, Beniapukur Lane.

Various questions were raised in defence, one of them being whether the endowment was an absolute *debutter* or merely was an arrangement for the benefit of the family with a charge for the *deb sheba* upon the properties. The first

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question, therefore, for consideration is whether there was an absolute *debutter*. The *arpannama* states that Lokenath made over, or "endowed once for all, the properties mentioned in schedule to Sree Sree Radha Krishna Jiu and became divested of all rights thereto." Further on it states that Sree Sree Radha Krishna Jiu thus became the "absolute owner of the properties mentioned in the schedule." These provisions *prima facie* show that there was an absolute dedication. The contention on behalf of the Appellants that it is not absolute *debutter* is based upon the ground that half the surplus income is to be taken by the *shebait*s as remuneration for their labour, and that the *shebait*s will have the right to reside in the house No. 53, Beniapukur Lane.

It is urged that these two circumstances go to show that it was really a device for the benefit of the family and that there was merely a charge of the *deb sheba* on the properties.

The question whether an absolute *debutter* is created or there is merely a charge in favour of the *deb sheba* depends upon the terms of the deed and the circumstances of each case. In the present case the income of the property No. 1 which was the only property let out was Rs. 60 per month although the income has in recent times increased. But in considering this question we have to take the income of the property at the time of the execution of the *arpannama*. The expenses of the *sheba* of the deity stated in the schedule to the deed amounted to Rs. 527 per annum. That works out at about Rs. 44 per month. The *arpannama* provides that the *shebait*s after defraying the expenses of the *deb sheba*, etc., out of the income of the properties shall credit half of the surplus income to the *tehbil* of Sree Sree Iswar Radha Krishna Jiu and

shall, at the end of every three years, appropriate the remaining half of the surplus income as remuneration for their labour. It appears, therefore, that the *shebait*s were not to get anything under the deed for three years. That probably was to provide for any unforeseen contingency relating to the *deb sheba* expenses within three years, and it is only after the expiry of every three years that the *shebait*s would get half the surplus income. The total surplus income would not exceed Rs. 16 a month, one half of which is to be credited to the *debutter* fund. The amount, therefore, which would go to the *shebait*s is trifling and, moreover, this is to be enjoyed by them as their remuneration as *shebait*s.

In the case of *Jadu Nath Singh v. Thakur Sita Ramji* (1), the Judicial Committee observed as follows:—"The deed ought to be read just as it appears, and there is no reason why it should not be construed as meaning simply, what the language says, a gift for the maintenance of the idol and the temple, under which the idol is to take the property and, for the rest, the family are to be the administrators and managers, and to be remunerated with half the income of the property. If the income of the property had been large, a question might have been raised, in the circumstances, as throwing some doubt upon the integrity of the settlor's intention, but, as the entire income is only Rs. 800, it is obvious that the payment to these ladies is of the most trifling kind and certainly not an amount which one would expect in a case of that kind."

The learned vakil for the Appellants relied upon the decisions of the Judicial Committee in *Sonatan Basak v. Juggut*

(1) L. R. 44 I. A. 187; s. c. 21 C. W. N. 953 (1917).

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Sundar (2) and *Ashutosh Dutt v. Durga Charan Chatterji* (3). Both these cases are, however, distinguishable. As pointed out by their Lordships in the case of *Jadu Nath Singh v. Thakur Sita Ramji* (1), although nominally there was a gift in *Sonatan Basak's* case (2) at the beginning to the idol, that gift was so cut down by subsequent disposition as to leave it clear that the subsequent disposition ought to prevail rather than the earlier one, and that consequently there was no gift to the idol such as to make the property pass as an absolute and entire interest in its favour. With reference to the case of *Ashutosh Dutt v. Durga Charan Chatterji* (3), their Lordships observed:—"It was a question of the construction of a Will, taken as a whole, and it was said there was not a complete gift to the idol, it was cut down by the subsequent disposition to the family. Here there is no such cutting down. There is, in the beginning, a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple, and then the rest is only a gift to the idol *sub modo* by a direction that of the whole, which had already been given, part is to be applied for the upkeep of the idol itself and the repair of the temple, and the other is to go for the upkeep of the managers. There was no reason why the disposer should not nominate the members of his family as his managers and he has done so. And there is nothing in that which militates against the propriety of his earmarking a certain part of the money to remunerate them as managers so long as they so continue." These observations apply to the present case.

As for the provision that the *shebait*s would be entitled to reside in the house, it appears that only a portion of the house is required for the location of the deity, and there is nothing wrong in the provision that the *shebait*s should reside in the other portions of it. On the contrary, the residence of the *shebait*s in the house may be convenient for the proper performance of the *sheba* and *puja* of the deity.

On the whole we agree with the lower Court in holding that there was an absolute *debutter*.

It is contended that even if there was an absolute dedication the subsequent conduct of the members of the family goes to show that the property dedicated was treated as secular property, and that the consensus of the whole family might in the case of a family idol "give the estate another direction." This contention was founded on the terms of the Will and the compromise between the parties which provided that all the members of Lokenath's family were to have the right of residence although the *arpannama* merely provided for the residence of the *shebait* and his family.

The proposition that in the case of a family idol, the consensus of the whole family might "give the estate another direction" cannot be said to be settled. It is based upon an observation to that effect in the case of *Doorganath Roy v. Ram Chandra Sen* (4). But their Lordships did not decide the question. There was in fact no question of consensus of the whole family in that case, for their Lordships observed in the next sentence:—"No question, however, of that kind arises in the present case." The above

(1) L. R. 44 I. A. 187; s. c. 21 C. W. N. 953 (1917).

(2) 8 M. L. A. 66 (1859).

(3) I. R. 6 I. A. 182 (1879).

(4) L. R. 4 I. A. 52, 58; s. c. 1 L. R. 2 Cal. 341 (1870).

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observation has no doubt been followed in this Court by Rampini and Sharfuddin, JJ., in the case of *Gobinda Kumar v. Debendra Kumar* (5), where their Lordships said, following the above direction, that the properties dedicated to a family idol may be converted into secular property by the consensus of the family. In the case of *Sri Sri Gopal Jiu Thakur v. Radha Binode* (6), however, it was pointed out that "where there is a consensus of all the members of the family, there is no one to object to the diversion of the endowment to secular uses, but the question whether in a case of an absolute *debutter*, where the property is absolutely vested in the deity, the successors of the members of the family who give the estate another direction may not call in question the diversion of the estate, did not arise nor was considered by the Judicial Committee."

In considering this question, the rights of the deity in whom the properties have absolutely vested and the fact that a Hindu who endows a family deity does so for the worship of his descendants from generation to generation have to be taken into account. It is to be observed that in the recent case of *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (7), their Lordships directed a special guardian to be appointed of the deity in order to protect its interests.

But even if the consensus of the whole family can convert an absolute *debutter* property into secular property, such consensus must be of all the members, male and female, who are interested in the worship of the deity. See *Monmohan*

Ghose v. Siddeswar Dobey (8) and *Lalit Mohan Seal v. Brojendra Nath Seal* (9). In the present case the Defendant No. 4 did not join in the compromise. We are of opinion that the property which was made absolute *debutter* was not converted into secular property in the present case.

Having regard to our finding that there was an absolute dedication Ramani, Defendant No. 5, is the present *shebait* after the death of Lokenath and his widow Monmohini.

A question has been raised by the learned vakil for the Appellants that the present suit having been brought by Dulal, there could not be any decree passed in favour of Ramani, the Defendant No. 5, more specially as the suit was one for partition. That is so, but in order to decide which properties are liable to partition the Court has to decide whether some of the properties which are claimed as *debutter* are really absolute *debutter* or not, and as we have found that the properties mentioned in schedule ka of the plaint are absolute *debutter* properties, they will be excluded from partition. It is unnecessary to make any decree for possession in favour of Ramani (nor is it permissible in this suit to do so), as the Defendant No. 5 Ramani is already in possession as receiver and, as stated above, she is the *shebait* after the death of Monmohini.

It was contended by the learned vakil for the Appellants that Ramani's right as *shebait* was cut down by Lokenath in the *ekrar* subsequently executed by him. But it does not appear to be so. What was stated was that she was to take the advice of the executors and certain other persons. That, however, does not take away her rights as *shebait*.

(5) 12 C. W. N. 98 (1907).

(6) 41 C. L. J. 898, 426 (1924).

(7) 1 L. R. 58 Cal. 809 : A. C. 80 C. W. N. 85 (P. C.) (1925).

(8) 27 C. W. N. 218 (1902).

(9) 1 L. R. 58 Cal. 351, 257 (1905).

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It is also contended for the Appellants that in the suit as framed there could be no provision made for the maintenance, *jalpani* and annuity of certain members of the family. But the suit primarily relates to secular properties and the plaintiff prayed for direction as to maintenance, legacies and tiffin money; we think, therefore, that there is nothing to prevent the Court from giving the directions which it has given with respect to those matters, and we do not think that the decision of the Court below on those points is erroneous.

Then there is the question of the legacy of Rs. 3,000 in favour of the Plaintiff as mentioned in the Will. Two contentions have been raised by the learned vakil for the Appellants on this point. The first is that in the compromise decree there was no mention of the legacy at all and that, therefore, Dulal must be taken to have given up his right to this legacy. It is true that this legacy of Rs. 3,000 was not mentioned in the compromise decree, but after stating the terms contained in cls. 1 to 8 in the compromise decree, it was provided that all other rights of the parties in the litigation "would remain intact and unaffected." That being so, we do not think that the Plaintiff Dulal can be said to have given up his right to the legacy. It is further contended that the Plaintiff Dulal, having agreed to take one-third share of the property No. 14/1, Beniapukur Lane, must be taken to have given up his right to Rs. 3,000, because this legacy of Rs. 3,000 was to be realised by sale of the said property in case the money could not be raised by other means. We do not think that that is sufficient to show that Dulal agreed to give up his claim for Rs. 3,000, because the property might be divided into three shares subject to the charge for the

legacy. It is further to be observed that the arrangement under the compromise was to inure only for the life-time of Monmohini.

The second contention is that even if the Plaintiff is not to be taken as having given up his right to the legacy he was entitled only to the sum of Rs. 1,400, *i.e.*, after giving credit for the sum of Rs. 1,600 which had been paid over to him by Monmohini. There is a finding as to the said payment by Monmohini to Dulal in the judgment of the trial Court in the suit which came up to this Court, and which was compromised, but then that judgment was by consent of parties set aside and a consent decree was passed. In the circumstances, we think the question whether the Plaintiff received Rs. 1,600 from Monmohini should be enquired into.

The Defendants Nos. 1 and 2 claimed the expenses connected with the worship during the time they had performed the *sheba* of the deity and the Defendant No. 5 in her written statement prayed that the *thakur* might be made over to her. Strictly speaking, in the suit as framed, neither the claim for the possession of the *thakur* on the part of the Defendant No. 5, nor the claim of the Defendants Nos. 1 and 2 for the expenses in connection with the *deb sheba*, can be gone into.

The parties, however, have agreed that the Defendants Nos. 1 and 2 will make over the *thakur* together with ornaments and utensils (such as there might be) to the Defendant No. 5 within one week of this order being signed, and that Defendant No. 5 will make over the expenses of the *sheba* of the *thakur*, that is, the amounts of expenses incurred by the Defendants Nos. 1 and 2 for the period they have been performing the *sheba* since the death of Monmohini up to the date when

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they deliver possession of the *thakur* to the Defendant No. 5. The parties are agreed that the amount of expenses for the *sheba* will be taken at Rs. 25 per month with the result that the Defendant No. 5 will pay the sum of Rs. 1,987-8 annas to the Appellants.

The Defendant No. 4 states that the arrears of her maintenance should be paid out to her. The Court below has found that she is entitled to maintenance. She can apply to the Court below for a direction upon the receiver of the secular estate to pay her the amount of the arrears of her maintenance.

The decree of the lower Court with regard to other matters except the direction in the decree "and she do get *khas* possession of the *debutter* properties described in schedule *ka* and of the said idol.

"And that the Plaintiff do get Rs. 3,000 as legacy from the estate of Lokenath Das, for which portion of premises No. 14, Beniapukur Lane, may be sold, if necessary" will stand. But the case will go back to the Court below in order that the question whether the Plaintiff received Rs. 1,600 from Monimohini may be gone into. If he did receive it, the legacy payable to him will be reduced accordingly. It is further ordered by consent that the Defendant do pay the sum of Rs. 1,987-8 as. to the Appellants as the expenses of the *sheba* of the deity incurred by them during the period they had been performing the *sheba* and that the Defendants do make over the *thakur* together with ornaments and utensils (such as there might be) to the Defendant No. 5 within one week of this order being signed.

The Defendant No. 5, the contesting Respondent, will be entitled to costs, the hearing-fee being assessed at five gold mohurs to be paid by the Defendants

Nos. 1 and 2. Other parties will bear their own costs in this Court only.

The cross-objection is dismissed. No order as to costs.

PAGE, J.—I agree. We have come to the conclusion that under the *arpanama* Lokenath dedicated and transferred the two properties—14/1 and 43 (now 53), Beniapukur Lane—absolutely to the deity, and became divested of all right and title thereto. After dedication Lokenath possessed only such rights in relation to these properties as were expressly given to him under the *arpannama*. As founder he was *functus officio*, *Gouri Kumari v. Ramanimoyi* (10), and the only rights which he retained for himself under the *arpannama* were those that appertain to the office of *shebait*. What those rights are I endeavoured to explain in *Nagendra Nath v. Rabindra Nath* (11) and *Lalit Mohan v. Brojendra Nath* (9). The question as to who are the persons entitled to be *shebait*s in future was also canvassed before us at the hearing of the appeal. The answer to that question appears to me to present no difficulty. But until the death of Ramani no question as to the succession to the *shebait* can arise, for under the *arpannama* it is specifically provided that Ramani should be the sole *shebait* with an unfettered right to exercise her powers in that behalf. It would be premature, therefore, in this case and during the life-time of Ramani, to decide any question as to the right of succession to the *shebait* in the future which can properly be taken into consideration only after Ramani's death. A further contention was raised by the Appellants that there was a consensus of opinion among

(9) I. L. R. 53 Cal. 251, 257 (1925).

(10) I. L. R. 50 Cal. 197 (1922).

(11) I. L. R. 53 Cal. 132; a. c. 30 O. W. N. 389 (1925).

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all the persons interested in the worship of the deity that these two properties, which had been dedicated absolutely to the deity, should be treated as secular property. In my opinion it is clear upon the facts that no such consensus was proved. But it must not be taken that I should be prepared to hold that if all persons interested in the worship of the deity are agreeable, they can validly convert *debutter* into secular property, or that such a doctrine can be sustained as being in accordance with Hindu law. Although this is not the occasion to express a definite opinion upon this vexed and still unsettled question, it appears to me, as at present advised and subject to any further argument that hereafter may be presented when the question arises for determination, that this doctrine, which is based upon a mere *obiter dictum* of Sir Montague Smith in *Konwar Doorganath Roy's* case (4) is incompatible with the spirit that moves a pious Hindu to set up a *thakur* for his family to worship from generation to generation, and also with an absolute dedication of property to the deity; *Dharmadas Mandal v. Gosta Behari Mandal* (12) and *Monmohan Ghose v. Siddeswar Dobey* (8). See also Sarkar's Hindu Law, 5th Ed., at p. 710. *Gopal Jiu Thakur v. Radha Binode* (6) and *Pramatha Nath Mullick v. Pradyumna Kumar Mullick* (7). I concur in the order proposed.

N. G.

(4) L. R. 4 I. A. 52, 58; s. c. I. L. R. 2 Cal. 341 (1876).

(6) 41 C. L. J. 396 at p. 426 (1924).

(7) I. L. R. 53 Cal. 809; s. c. 30 C. W. N. 25 (P. C.) (1925).

(8) 27 C. W. N. 218 at p. 220 (1922).

(12) 16 C. W. N. 29 (1911).

PRIVY COUNCIL.

[APPEAL FROM PATNA.]

VISCOUNT DUNEDIN.

LORD BLANESBURGH.

SIR JOHN EDGE.

1926,

Heard,

4, February.

Judgment,

16, February.

SOURENDBA MOHAN
SINHA and ors.,
Appellants,

v.

HARI PRASAD SINHA
and ors., Respondents.

Neglect on the part of Defendants substantially successful in appeal before Privy Council to lodge Order in Council in High Court—Proper remedy for Plaintiffs to get execution—(Civil Procedure Code (Act V of 1908), Or. 45, r. 15 (1)).

Where the Defendants were substantially successful in an appeal before the Privy Council and in accordance with the ordinary practice the Order in Council was issued to them but they did not lodge it in the High Court and the Plaintiffs who could not therefore get execution applied to the Privy Council to vary the Order in Council:

Held (in rejecting the application)—That it was open to the Plaintiffs to apply to the High Court with a certified copy of the order and ask for a summary order on the Defendants to lodge the order which had been entrusted to them so that execution might follow in terms of the judgment of the Board.

This was a petition by the Plaintiffs-Appellants in an appeal from the High Court at Patna for variation of an Order in Council made on the 24th July 1925 in the said appeal.

The suit was brought by the Appellants to enforce a mortgage over properties situated partly in the District of Bhagalpur and partly in the Sonthal Parganas. The appeal which is reported in 30 C. W. N. raised questions as to the jurisdiction of the Subordinate Judge of Bhagalpur and as to the extent of the relief to which

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the Plaintiffs were entitled. The Judicial Committee advised His Majesty to reduce the sum for which judgment had been given by the High Court and to make that sum payable on the expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council.

The Order in Council was issued to the Defendants who failed to lodge it.

The present petition prayed that inasmuch as the Opposite Party had failed in their duty to lodge the Order in Council it might be amended by substituting for the words "expiry of eight months from the date of the receipt by the High Court of His Majesty's Order in Council herein" the words "31st March 1926."

Mr. Hyam for the Petitioners.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Defendants referred to Code of Civil Procedure, 1908, Or. 45, r. 15 and *Hurrish Ch. Chowdhury v. Kali Sundari Debi* (1).

THEIR LORDSHIPS' JUDGMENT was delivered by

VISCOUNT DUNEDIN.—This is an application to vary the Order in Council. The order has been already passed, and it could only be under exceptional circumstances that their Lordships could humbly advise that another order should be passed.

In the suit judgment was given for the Plaintiffs against the Defendants for a certain sum.

On appeal to the King in Council their Lordships humbly advised His Majesty to ~~reduce~~ substantially the sum for which judgment had been given, and to make the sum still decreed payable eight

months after the date of the receipt of the order by the High Court.

The Defendants having been substantially successful in the appeal, the Order in Council in accordance with the ordinary practice was issued to them: and in ordinary course ought to have been lodged by them in the High Court. They have not however done so and the Plaintiffs cannot therefore so far get execution. Hence this application. The Plaintiffs and Petitioners have not sufficiently adverted to Or. 45, r. 15 (1) of the First Schedule to the Code of Civil Procedure. When they found that the Defendants were delaying or refusing to lodge the order they could have applied to the High Court with a certified copy of the order and asked for a summary order on the Defendants to lodge the order which had been entrusted to them so that execution might follow in terms of the judgment of this Board. This they can still do. Their Lordships therefore cannot advise His Majesty to grant the prayer of the Petitioners: but as they are clearly of opinion that it was the duty of the Defendants in ordinary course to lodge the order there will be no costs allowed on the petition.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Petitioners.

Solicitors: *Messrs. Watkins & Hunter* for the Defendants.

[A cross-petition by the Defendants praying for their costs in the High Court was dismissed.]

G. D. M.

No. 1326 OF 1924.

(11) **J. L. R. 48 Cal. 138; s. c. 24 C. W. N. 723 (F. B.) (1920).**

B. B. GHOSH, J.—This is an appeal from the judgment and decree of the Subordinate Judge affirming the decree of the Munsif. The appeal is by the Plaintiffs and it arises out of a suit for arrears of rent claimed at the rate of Rs. 12-1-9 p. per year. The rent was at the rate of Rs. 3-8 annas per year in 1892, as it appears from a decree. In 1912 Plaintiffs brought a suit against the predecessors of the Defendants for enhancement of rent which ended in a decree passed on a compromise by which the rent was settled at the rate now claimed by the Plaintiffs. Plaintiffs have also produced an *ex parte* decree of a subsequent date under which they were allowed to recover rent at that rate. The present suit for rent was brought in April 1922 on the basis of the decree of 1912. The Subordinate Judge has held that the decree of 1912 was without jurisdiction and a nullity. He has also held that the subsequent *ex parte* decree being based on the previous decree on compromise which was a nullity, realisation of rent by the Plaintiffs at the rate claimed is of no assistance to them. On these findings he allowed the Plaintiffs a decree at the rate of Rs. 3-8 as. only as admitted by the Defendants. On appeal

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by the Plaintiffs it is contended on their behalf that the decision of the Subordinate Judge is erroneous and that the Plaintiffs are entitled to rent at the rate of Rs. 12-1-9 p. as settled by the decree of 1912.

The reason for which the decree of 1912 was held by the Subordinate Judge to be without jurisdiction and a nullity is that the Court in passing the decree in 1912 did not comply with the provisions of sec. 147A of the Bengal Tenancy Act, as applicable to Eastern Bengal and Assam. That section runs thus :—“ Notwithstanding anything contained in sec. 373 of the Code of Civil Procedure, if any suit between landlord and tenant as such is wholly or partly adjusted by agreement or compromise, the Court shall not pass a decree in accordance with such agreement or compromise unless it is satisfied for reasons recorded in writing, that the terms of such agreement or compromise are such that if embodied in a contract they could be enforced under this Act :

Provided that in the case of a suit instituted by the landlord to enhance the rent, the enhancement, if any, agreed upon may be decreed if the Court be satisfied for reasons to be recorded in writing, that such enhancement is fair and equitable and in accordance with the rules laid down in this Act for the guidance of Courts in increasing rents.”

The Subordinate Judge has found that in this particular case the Court did not record any reasons nor was it stated that the Court was satisfied that the enhancement was fair and equitable and in accordance with rules. He referred to the case ~~of~~ *Sarjugsharan v. Dukhit Mahto* (1), which laid down that under similar circumstances for not following the provisions of sec. 147A of the Act as applicable

to Bengal, the decree was held to be a nullity as without jurisdiction. It was argued before the Subordinate Judge on behalf of the Plaintiffs that there was a difference in the language of the sections as applicable to the two portions of the province and so the case cited had no application to this case. The Subordinate Judge did not accept that contention. That argument was repeated before us but I do not think that the difference in the language used in the two sections makes any difference in the principle enunciated in that case. We have therefore to examine the case referred to as to whether it laid down the correct principle which should be followed.

There cannot be any question that a decree passed without jurisdiction is a nullity. But the expression “ jurisdiction ” has not unoften been used with ambiguity, and the distinction between a judgment where jurisdiction is assumed by the Court where there is absolute want of it, and where the Court in the exercise of its jurisdiction acted wrongly in disregard of the law has not always been borne in mind. This want of discrimination in the use of the term has resulted in a good deal of confusion. The distinction between a defect of jurisdiction and an error or irregularity in procedure is pointed out in Hawes on the Jurisdiction of Courts thus :—“ In the former case the whole proceeding is *coram non jndice* and void : in the latter the proceeding cannot be impugned as a collateral action, even though it be erroneous upon its face, and even though it relates to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction. It is examinable only on a direct proceeding as by an appeal or by a proceeding in the nature of an appeal, and where there is no remedy of that kind, it concludes for ever.”

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In Hukum Chand's well-known treatise on the Law of *Res Judicata* (at page 473), the rule is stated thus:—"It is only when a Court of general jurisdiction undertakes to grant a judgment in an action or proceeding where it has not jurisdiction of the parties or the subject-matter of the action, and it appears from the record by its terms or necessary implication, or by the absence of something essential, that the judgment will be absolutely void and have no effect. When jurisdiction attaches in the original case, everything done within the exercise of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, and no order which a Court is empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity, merely because it was made improvidently or in a manner not warranted by law or the previous state of the case." In Woodroffe and Amcer Ali's Law of Evidence (8th Edition, page 413) the rule is thus summarised:—"It cannot be said that whenever a decision is wrong in law or violates a rule of procedure, the Court must be held incompetent to deliver it. It has never been and could not be held that a Court, which erroneously decrees a suit which it should have dismissed as time-barred or as barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree." This statement of the law was mainly founded on the judgment of Strachey, C. J., in the Full Bench case of *Caston v. Caston* (2) and was cited with approval by Stanley, C. J., and Burkitt, J., in *Nathu Ram v. Kalian* (3). The rule may also be formulated in this way, that if some essential preliminary is required

before a Court can entertain a suit or application and that does not exist, the judgment of the Court assuming jurisdiction in such a case is a nullity. The cases of *Nusserwanji Pestonji v. Meer Mynooddeen* (4) and *Raghu Nath Das v. Sundar Das* (5) are examples of this type. But where the Court has jurisdiction to entertain the matter but decides the case erroneously without having regard to the provisions of the law, the judgment is not a nullity but must have due effect if it is not set aside by appropriate proceedings. The cases of *Rewa Mahton v. Ram Kishen* (6) and *Malkarjun v. Narhari* (7) are examples of this. The case of *Alongul Purshad Dichit v. Girija Kant* (8) may also be referred to in this connection. There a Court of competent jurisdiction made an order of attachment in execution of a decree on an application which was evidently barred by limitation. Their Lordships of the Judicial Committee observed: "A Judge in a suit upon a cause of action is bound to dismiss the suit, or to decree for the Defendant, if it appears that the cause of action is barred by limitation. But, if instead of dismissing the suit, he decrees for the Plaintiff, his decree is valid, unless reversed upon an appeal; and the Defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." See also *Raja of Ramnad v. Velusami* (9).

(4) 6 M. I. A. 134 (1855).

(5) L. R. 41 I. A. 251; s. c. I. L. R. 42 Cal. 72; 14 C. W. N. 1058 (1914).

(6) L. R. 13 I. A. 100; s. c. I. L. R. 14 Cal. 18 (1860).

(7) L. R. 27 I. A. 216; s. c. I. L. R. 25 Bom. 337; 5 C. W. N. 10 (1900).

(8) L. R. 8 I. A. 123; s. c. I. L. R. 8 Cal. 51 (1881).

(9) L. R. 48 I. A. 45; s. c. 25 C. W. N. 581 (1920).

(2) I. L. R. 22 All. 370 (1899).

(3) I. L. R. 26 All. 522 (1904).

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In the case under consideration there is no doubt that the Court had jurisdiction to entertain the suit with reference to the subject-matter and the parties. It had the jurisdiction to pass a decree in the case. The law only provided that before passing a decree on agreement or compromise, the Court must have regard to certain things and give its reasons. Can it be said that because in passing the decree the Court disregarded the provision of the law in not recording its reasons in writing that it was satisfied with regard to certain matters, that its jurisdiction was ousted? I think that the principle which can be gathered from the authorities is that such a decree might be assailed in proper proceedings as erroneous but it cannot be said to have been passed without jurisdiction. This view also finds support in the Full Bench decisions of this Court—*Ashutosh v. Behari* (10), *Hridoy Nath v. Ram Chandra* (11) and *Gora Chand v. Prafulla* (12). In the last case it was laid down that where a decree was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court may refuse to execute it on the ground of its being made without jurisdiction. I think it is only in these classes of cases that a previous decree may be treated as a nullity. I may also cite as an illustration that under Or. 20, r. 4 (2) of the Code of Civil Procedure, provision is made as to what a judgment should contain. I do not think that any argument was ever advanced to the effect in a subsequent suit that a judgment given previously which

did not conform to that rule was void and without jurisdiction, because the reasons for the decision were not given. I therefore hold that the view taken in the case of *Sarjugsharan v. Dukhit* (1) cannot be supported and with great respect I must dissent from it. In my judgment the decree of 1912 is valid and binding on the Defendants and the Plaintiffs are entitled to a decree for rent at the rate settled by the former decree. The decree of the Court below must be modified accordingly, allowing the Plaintiffs a decree for rent at the rate of Rs. 12-1-9 p. per year and cesses at 6 pies in the rupee and 25 per cent. damages with costs in all Courts.

GRAHAM, J.—The question involved in this appeal is whether a decree for enhanced rent under the provisions of sec. 147A of the Bengal Tenancy Act can in a subsequent suit be treated as without jurisdiction and a nullity on the ground that the procedure laid down in that section for compliance by the Court was not complied with.

The facts of the case out of which the appeal has arisen have been stated by my learned brother, whose judgment I have had the advantage of reading, and it is not necessary for me to re-capitulate them.

The section in question requires that before passing a decree the Court shall be satisfied for reasons to be recorded in writing that the terms of the agreement or compromise are such that, if embodied in a contract, they could be enforced under the Act. That procedure was not complied with in the present instance and the Courts below following a decision of this Court, *Sarjugsharan Lal v. Dukhit Mahto* (1), held that the decree was without jurisdiction and a nullity. They accordingly gave a decree for rent at the rate of Rs. 3-8 only as admitted by the Defendants.

(1) 17 C. W. N. 496 (1913).

(10) I. L. R. 35 Cal. 61; s. c. 11 C. W. N. 1011 (F. B.) (1907).

(11) I. L. R. 48 Cal. 133; s. c. 21 C. W. N. 723 (F. B.) (1920).

(12) I. L. R. 53 Cal. 166; s. c. 29 C. W. N. 948 (F. B.) (1925).

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ants, and not at the enhanced rate claimed by the Plaintiffs.

It has been argued before us on behalf of the Plaintiffs-Appellants that the decision is erroneous, and that the Plaintiffs are entitled to rent at Rs. 12-1-9 in accordance with the decree of 1912.

In the case referred to above it was held that a decree for rent passed in accordance with a compromise in contravention of the provisions of sec. 147A of the Bengal Tenancy Act, *i.e.*, without recording evidence to show what the amount of rent was before the dispute arose, is made without jurisdiction and that the tenant is not bound to have it set aside.

That decision being the decision of a Division Bench of this Court would ordinarily be binding upon us and it would be our duty under the rules of the Court, if we differ from it, to refer the question to a Full Bench. There is, however, a special circumstance in this case which in my opinion renders the adoption of that course unnecessary, and it is this that since the case of *Sarjugsharan v. Dukhit* (1) was decided there has been a comparatively recent Full Bench decision of this Court, *Hridoy Nath v. Ram Chandra* (11), in which a different view was taken in regard to the principle involved. The question therefore which arises is how far the principle laid down by the Full Bench affects the decision in the previous case, and whether we ought to follow the previous decision, or be guided by the more recent decisions of the Full Bench. With great respect to the learned Judges who decided the case of *Sarjugsharan v. Dukhit* (1), I am constrained to admit that I have the doubt expressed by my learned brother as to the soundness of the

proposition of law there laid down, and as that decision seems to be clearly in conflict with the view subsequently taken by the Full Bench, I think that we ought to follow the Full Bench decision. As was pointed out in the latter case it is the authority to decide a case, and not the decision given therein which constitutes jurisdiction. Jurisdiction is the power to hear and determine, and does not depend upon the regularity of the exercise of that power, or upon the correctness of the decision pronounced, since the power to decide necessarily carries with the power to decide wrongly as well as rightly. In short, jurisdiction or the existence of jurisdiction is, as it seems to me, a fact, and it cannot be said to be non-existent because it has been irregularly exercised, or because there has been a failure to comply with some direction or directions as to the procedure which should be followed. Failure to comply with such directions cannot be held to deprive the Court of the jurisdiction which it possesses to make the decree. No doubt a decree passed without compliance with the procedure laid down can be challenged and set aside in an appropriate proceeding instituted for that purpose, but it cannot be impugned in a subsequent suit. Until it has been vacated it must be held to be operative and binding between the parties, and cannot be challenged collaterally in a different proceeding. Indeed it is obvious that, if decrees were allowed to be assailed upon such grounds, a vista of alarming consequences would arise, as decrees could then be challenged and set at naught by subsequent suit on the ground of failure to comply with the procedure prescribed, and there would be no finality. The inevitable result would be to greatly increase litigation, which it has always been the aim and endeavour of

(1) 17 C. W. N. 496 (1913).

(14) 1-L. R. 48 Cal. 138: s. c. 24 C. W. N. 773 (F. B.) (1920).

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the legislature as well as of the Courts to check rather than promote.

For the reasons stated I agree that the appeal succeeds and that the decree of the Subordinate Judge shall be modified in the manner indicated in the judgment of my learned brother.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER

No. 322 OF 1923.

JALIM CHAND PATWARI,

Decree-holder,

Appellant,

v.

YUSUF ALI CHOWDHRY,

Judgment-debtor,

Respondent.

SUHWARADY, J.

CUMING, J.

1924,

1, December.

Civil Procedure Code (Act V of 1908), Or. 21, r. 2, cls. 1 and 2—Certification of payment made out of Court—Application by decree-holder to Court, if necessary—Limitation Act (IX of 1908), Art. 18, if applies to certification of payment by decree-holder—Instalment decree—Application of Art. 75—Waiver on the part of decree-holder of the right to execute decree on default of payment of any one instalment by accepting payment of default instalment—Cl. 7, Art. 182—Time to run from date of actual default.

It is not necessary that the decree-holder should make an application to the Court within three years from the date of payment for certifying payment made out of Court in order to save limitation.

The word "certify" as used in cl. 1 of r. 2, Or. 21, is synonymous with the word "inform" as used in cl. 2 of that rule. It is not therefore incumbent upon the decree-holder to certify payment by making an application and as he is not required to make an application the residuary article of the Limitation Act (181) does not apply. In order to certify payment it is enough that the decree-holder mentions the fact of such payment in the

application for execution of the decree in respect of the balance.

The observations in *BALEY MAHOMED SHAH v. ALJANMAI* (1) are obiter dicta.

The principle of the law of limitation as laid down in Art. 75 of the Limitation Act has been applied to the case of instalment decrees and it is well-settled that waiver being allowed under cl. 7 of Art. 182, Limitation Act, time runs from the date of the actual default.

In an instalment decree in which it is provided that in default of one instalment the whole decretal amount would be recoverable, the right which accrues to the decree-holder from time to time from non-payment of any instalment may be waived by receipt of default instalments which the judgment-debtor neglected to pay in time.

This was an appeal preferred on the 27th June 1923 against an order of the District Judge of Zillah Midnapur (Mr. C. Bartley), dated the 17th May 1923, affirming an order of the Munsif of that place (Mr. S. K. Ghosh), dated the 13th August 1922.

The facts of the case will appear from the judgment.

Babus Giriya Prasanna Sanyal and Indu Prokash Chatterjee for the Appellant.

Babu Bansari Lal Sarkar for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

SUHWARADY, J.—This appeal is by the decree-holder against an order of dismissal of his application for execution made by the Court below on the ground that it is barred by limitation. The decree was an instalment decree, the amount of which was made payable in six equal in-

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instalments distributed over the months of Kartik and Chaitra of 1325-1326 and 1327. The first instalment was to begin on the 30th Kartik 1325 corresponding to the 15th November 1918, and it was agreed that on default of payment of any instalment, the whole decretal amount would become immediately payable. The decree-holder alleged that the judgment-debtor paid the first *kist* partly on the 30th Kartik 1325 and partly on the 1st Pous 1325: the second *kist* partly on the 30th Chaitra 1325 and partly on the 30th Bysakh 1926: the third *kist* partly on the 29th Kartik 1326 and partly on the 6th Pous 1326, corresponding to the 21st December 1919 which was the last payment made by the judgment-debtor.

The present application for execution was filed on the 20th January 1922 stating that Rs. 664-5-9 p. had been paid out of Court by the judgment-debtor. In these circumstances the learned District Judge in the Court of Appeal below has held that the application was time-barred. The ground which the learned Judge has given is that the payments made on the Kartik and Pous of 1325 were not certified within three years from the date of payment and as such the Court cannot take cognizance of them. The payments could not be certified on the day the application for execution was filed as being beyond three years from the date of payment and, therefore, it must be held that the whole amount became payable on the 1st Agrayan 1325, corresponding to 16th November 1918, that is, the first day after the first instalment became due. The learned Judge has further held that limitation was not saved under sec. 20 of Limitation Act, as admittedly no entry of payments were made by the person who had made them.

With regard to the first ground on which

the Court below has held that the present application for execution was time-barred, the view of the law that an application for certifying payments under Or. 21, r. 2, C. P. C., should be made within three years is supported by the decision in the case of *Baley Mahomed Shahy v. Aijanmai* (1). There the learned Judges held that as there is no period of limitation fixed by the Limitation Act for an application by the decree-holder for certifying payments made by the judgment-debtor out of Court, the residuary Art. 181 would apply. This point, however, did not directly arise in that case, and their Lordships were not called upon to decide it on the facts that were before them. In that case the final decree in the mortgage suit was passed on the 16th January 1916. On the 11th August 1919 the decree-holder applied for execution and alleged payment by the judgment-debtor on the 25th October 1917. The payment therefore was within three years before the application for execution was made and, therefore, it was not necessary to consider whether there was any period fixed by law within which the decree-holder should apply for certifying payments out of Court. Though the observations were clearly *obiter dicta*, coming from the learned Judges who decided that case, they are entitled to great deference, but I must respectfully decline to accede to the proposition. My reason is that Art. 181 applies to an application for which no period of limitation is provided in the schedule to the Indian Limitation Act. Or. 21, r. 2 (1) provides that where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court

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shall record the same accordingly. Under cl. (2) the judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. The difference in the language of these two clauses is apparent. In cl. (1) the decree-holder is required only to certify such payment, whereas in cl. (2), the judgment-debtor is required to inform the Court of such payment and also to apply to the Court to issue a notice to the decree-holder to show cause why such payment or adjustment should not be recorded as certified. The word "certify" as used in the two clauses above quoted is not defined in the Code, but has received judicial interpretation. It has been held in a number of cases of this Court, as well as in other Courts, that in order to certify payment it is enough that the decree-holder mentions the fact of such payment in the application for execution of the decree in respect of the balance: *Eusuffzenam v. Sanchia* (2), *Lakhi Narain v. Pelamani* (3), *Pandurang v. Jayya* (4) and *Muslimani v. Sethua* (5). The same view has been adopted by the Patna High Court in the case of *Mlahi Bux v. Nawab Lal* (6). If the view firmly established by these cases and others that followed them is correct, the word "certify" as used in Or. 21, r. 2 (1) becomes synonymous with the word "inform" as used in cl. (2) of that order. It is not, therefore, incumbent upon the decree-holder to certify payment by making an application, and if he is not required to make an applica-

tion it is difficult to argue that Art. 181 applies. In the case of *Baley Mahomed Shahy v. Aijanmai* (1), the learned Judges conceded the correctness of the law as stated above. But they proceeded to consider what period of limitation would be applicable to an application by the decree-holder to record payment. The use of the word "application" in connection with this matter might have misled the learned Judges. There is no case directly on the point in this Court as against the view adopted in the case, *Baley Mahomed Shahy v. Aijanmai* (1), but the question came up before the Bombay High Court in the case of *Pandurang v. Jayya* (4), where a similar objection was taken and overruled. In that case a decree was passed in 1906 making a certain quantity of paddy or its equivalent sum of money payable by instalments commencing in 1907. It was agreed that if two instalments were not paid the whole decree would be executed at once. The decree-holder filed an application for execution on the 10th September 1917 alleging that the first nine instalments from 1907 to 1915 had been paid to him regularly in January of each year as they fell due, and as two instalments of 1916 and 1917 had not been paid he asked that the decree for the balance should be executed. The judgment-debtor denied having made any payment at all, and as none of the alleged nine instalments had been certified and recorded by the Court, he contended that the execution Court should not take cognisance of those payments and therefore the entire amount fell due on the date of the first default and the execution was barred by limitation. The learned Chief Justice considered the question of limitation and came to the conclusion that

(2) I. L. R. 43 Cal. 207; s. c. 20 C. W. N. 272 (1916).

(3) 20 C. L. J. 181 (1915).

(4) I. L. R. 45 Bom. 91 (1921).

(5) I. L. R. 41 Mad. 251 (1917).

(6) 4 P. L. J. 159; [1919] Pat. 200 (1919).

(1) 35 C. L. J. 71 (1921).

(4) I. L. R. 45 Bom. 91 (1921).

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there was no time required for the decree-holder certifying payments already made under Or. 21, r. 2, C. P. C. The view taken in the case of *Lakhi Narain v. Felamani* (3) points to the same conclusion. There is no doubt that in that case payments were made within three years of the date of the filing of the application for execution, but the learned Judges observed that if there was no period fixed within which the decree-holder must certify part payment at any time, and if the payment was within time, so as to prevent the decree being barred, the execution could not be said to have been barred.

There is one other case which deserves a passing notice. In the case of *Bahubullubh Ray v. Jogesh Chandra Banerjee* (7) an instalment decree was passed in 1910, the condition being that in default of payment of one instalment the entire amount was to become recoverable. The decree was put to execution in 1916 and the decree-holder to avoid limitation alleged uncertified payment. The learned Judges remark that it is not proved that any instalment had been paid. They further observe: "The Appellant, the decree-holder, states he can certify the payments made at any time. That is quite true subject, of course, to the ordinary rule of limitation that the certification must take place within such time as is required to save the case from being barred by limitation. He cannot postpone the certification for a long period of years and then say that he will save the decree from being barred by limitation by certifying the payments then. The point that is raised in this case really turns on whether the decree was saved from being barred by reason of these alleged uncerti-

fied payments. There is nothing to show that it was." The last sentence is ambiguous, but if it is read with the previous finding of fact, that it was not proved that any instalment had been paid, the conclusion is perfectly correct. It is also right to say that the certification cannot be postponed indefinitely, for it must be made within three years before execution is applied for to save the decree from limitation under sec. 20, Indian Limitation Act, or on the ground of waiver. The decision is really in support of the view I take of the law. It is worthy of note that one of the Judges (Fletcher, J.), who decided this case, was a party to the decision in the case of *Lakhi Narain v. Felamani* (3). To my mind cl. (3) of Or. 21, r. 22 presents no difficulty, as certification of payments may be made by the decree-holder by stating them in his application for execution.

We are, therefore, clearly of opinion that Art. 181 does not apply to the present case and that the decree-holder is entitled to prove the payments alleged by him as made in Kartik 1325 and Pous 1325 and subsequent payments.

The next question that arises for consideration on the findings of the learned Judge is whether the application for execution is barred under sec. 20 of the Limitation Act. The last payment alleged to have been made by the judgment-debtor on the 6th Pous 1325, corresponding to the 21st December 1919, was clearly within three years of the date of the application for execution. It is not the decree-holder's case that this payment was entered in a way so as to bring it within sec. 20 of the Indian Limitation Act. But his submission is that the decree is an instalment decree, and that though it was provided therein that in default of one

(3) 20 C. L. J. 181 (1915).

(7) 23 C. W. N. 320 (1918).

(3) 20 C. L. J. 181 (1915).

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instalment the whole decretal amount would be recoverable, the right which accrued to him from time to time from non-payment of any instalment was waived by receipt of default instalments which the judgment-debtor had neglected to pay in time, and hence his right to execute the decree accrued from the date of default of 1326 Chait. In support of this argument reliance has been placed upon the case of *Surendra Nath v. Rishikesh Law* (8). The principle of the law of limitation as laid down in Art. 75 of the Limitation Act has been applied to the case of instalment decrees and it must now be taken to be well-settled that waiver being allowed under cl. 7 of Art. 182, Limitation Act, time runs from the date of the actual default. See the case of *Sital Chandra v. Hyder Mollah* (9). If the Plaintiff's allegations are correct, he had received payment of the *kists* for Kartik and Chaitra 1325 and of the Kartik *kist* of 1326. The next *kist* would be due in Chait 1326 (April 1920). Whether the period is counted from the end of Chaitra (15th April 1920) or from the last payment (21st Dec. 1919) when the decree-holder exercised his right of waiver, the present application is clearly within time. We, therefore, hold that the view taken by the Courts below, that the decree-holder's application is barred by limitation, is wrong and this appeal must be allowed.

The result is that this appeal succeeds, the order of the Courts below dismissing the decree-holder's application for execution must be set aside and the case must go back to the Court of first instance for trial of the question of payment or such

other questions that may arise in the case. Costs will abide the result.

We assess the hearing-fee in this Court at two gold mohurs.

CUMING, J.—I agree.

S. C. M.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL ORDER

No. 181 of 1924.

CUMING, J.

PAGE, J.

1926,

26, April.

RASIK MORAL,
Defendant, Appellant,
v.

KUMAR JYOTISH KANTHA
Roy, Plaintiff,
Respondent.

Civil Procedure Code (Act V of 1908), Or. 41, r. 14, Or. 5, r. 12—Words "on the Respondent" as used in Or. 41, r. 14, meaning of—Minor Respondent—Service of notice of appeal only upon guardian ad litem and not upon minor Respondent, if good service—Waiver of objections as to service by guardian ad litem.

In a case where there has been a guardian ad litem appointed by the Court on behalf of a minor, service of notice of the date of hearing of appeal on such guardian is sufficient. Or. 41, r. 14 read with Or. 5, r. 12 does not mean that the service must be on the minor himself and not on the guardian ad litem. The language of the Code does not admit that there should be service on both these persons.

SURESH CHANDRA WUM CHOWDHURY v. JUGAT CHUNDER DEB (1) and JATINDRA MOHAN PODDAR v. SRINATH ROY (2) referred to.

This was an appeal against the order of K. N. Chowdhury, Esq., Additional District Judge of Zillahi Khulna, dated the 1st of October 1923.

The facts material to this report are as follows :—

(8) 27 C. W. N. 893 (1923).

(9) I. L. R. 24 Cal. 281; s. c. 1 C. W. N. 229 (1897).

(1) I. L. R. 14 Cal. 204 (1886).

(2) I. L. R. 26 Cal. 267; s. c. 3 C. W. N. 261 (1898).

RASIK MORAL v. KUMAR JYOTISH KANTHA ROY.

Plaintiff brought a suit (T. S. No. 161 of 1920) for declaration of title and recovery of *khas* possession. The present minor Appellant was one of the Defendants. His proposed guardian not having appeared, the trial Court appointed a pleader of the Court as guardian *ad litem*. The said guardian sent a registered post card to the natural guardian of the minor but it was refused. Thereupon he submitted a report that no appearance was necessary for the minor and no written statement was filed on his behalf. The minor's brothers who were the other Defendants contested the suit and filed written statement.

The Munsif declared Plaintiff's title but disallowed the claim for *khas* possession. Against this decision the Plaintiff preferred an appeal to the lower Appellate Court. The notice of the appeal was served on the guardian *ad litem* of the minor Respondent, and he received the notice personally. The notice of the appeal was not served upon the minor Respondent. The guardian *ad litem* did not enter appearance in the appeal nor did he send any intimation of the appeal to the natural guardian of the minor or submit any report to the lower Appellate Court as he did to the Court of first instance. The appeal was decided *ex parte* against the minor Respondent and on contest against the other Respondents. The appeal was decreed against all the Respondents.

The minor Respondent, who is the present Appellant, thereupon, through his guardian, his sister's husband Sashi Bhusan Mandal, applied for the re-hearing of the appeal under Or. 41, r. 21 of the Civil Procedure Code, on the ground that the notice was not served upon him and he was not informed of the appeal by the guardian appointed by the Court.

The Court of Appeal below summarily rejected the application by the following order :—

"The Petitioner was represented in the original suit as also in the appeal by his Court-appointed guardian *ad litem* who received the notice of the appeal personally. The petition is therefore groundless and is summarily rejected."

Against this order the present appeal was preferred.

Babu Hemendra Chandra Sen for the Appellant.

Dr. Dwarka Nath Mitra (Advocate) with Babu Narayan Chandra Kar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CUMING, J.—This is an appeal against an order of the learned Additional District Judge of Khulna rejecting an application for re-hearing of an appeal under Or. 41, r. 21, C. P. C. It would appear that the present Petitioner and his brothers were Respondents in a certain appeal, the Petitioner who was a minor being represented in the appeal by a guardian *ad litem* appointed by the Court. The appeal was duly heard and was decreed against the Respondents. The present Petitioner then moved the Court and asked that the appeal should be re-heard on the ground that no notice had been served upon him, the Petitioner. The learned Judge has found and the fact has not been controverted that notice was duly served upon the guardian *ad litem* of the Petitioner in the case and he therefore refused the application for re-hearing.

The Petitioner, a minor, has appealed to this Court and Mr. Sen contends on his behalf that it is necessary that notice should be served not only on the guardian *ad litem* but also on the minor himself.

RASIK MORAL v. KUMAR JYOTISH KANTHA ROY.

What possibly could be the object in serving notice on a minor, Mr. Sen has not explained to us. His main contention is that the Code provides that notice must be served on the Respondent in person. He contends that by the words "on the Respondent in person" is meant "on the minor in person." Therefore it is necessary to serve notice personally on the minor. No doubt the Code uses the expression "on the Defendant in person." But I do not think it means that in a case where there has been a guardian *ad litem* appointed by the Court on behalf of the minor, service of notice must be not on the guardian *ad litem* but on the minor himself. For, it is quite obvious that the language of the Code does not admit that there should be service on both these persons. I do not think therefore that processes should be served on the minor and not on the guardian *ad litem*, the person in whose hand the conduct of the case is. It would be obviously absurd to serve notice on a child of, say, six months old, yet, if Mr. Sen's contention had any substance in it a child of six months old is the proper person to be served with notice and not any guardian *ad litem*. I think this is sufficient to dispose of the appeal.

Mr. Sen has drawn our attention to one decision of this Court in support of his contention. It is the case of *Suresh Chandra Wum Chowdhury v. Jugat Chunder Deb* (1). Mr. Sen has drawn our attention to page 215. There the learned Judge Mr. Justice Wilson remarked: "I should hesitate to say that service on a guardian *ad litem* is good service under the Code." With great respect to the learned Judge I may point out that this particular point, namely, whether service on a guardian *ad litem* was good ser-

(1) I. L. R. 14 Cal. 204 (1886).

vice was apparently not one of the points on which the appeal before the learned Judge turned. Therefore this remark must be taken as being an *obiter dictum*. But the learned Judge, however, went on to say: "But if the appointment of the guardian, however irregular, was not a nullity, it follows, I think, that the guardian has power to waive and by appearing and defending did waive all objections arising from want of service or defect in the service of summons." Now, it appears that in this case the guardian *ad litem* did appear and therefore by appearing waived all objections which might have arisen from want of service or defect in the service of summons. The finding of the learned Judge, I think, is correct and the service of summons on the guardian *ad litem* is good service for the purpose of the appeal.

The appeal must therefore be dismissed with costs. Hearing-fee, three gold mohurs.

PAGE, J.—I agree. The observation of Mackan, C. J., and Banerji, J., in *Jatindra Mohan Poddar v. Srinath Roy* (2) would appear to support the view we take.

H. C. S. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 484 of 1926.

B. B. GHOSE, J.	}	GOLAM RAHAMAN
CAMMIADE, J.		MONDAL, Petitioner,
1926,		v.
14, June.		SM. SABERJAN BIBI,
		Opposite Party.

Suit for registration of a conveyance—Valuation put by Plaintiff should determine the jurisdiction of the Court and not the real value of the property conveyed—Indian Registration Act (XVI of 1908), sec. 77

(3, I. L. R. 20 Cal. 227; 2, C. B. C. W. N. 281 (1892).

GOLAM RAHAMAN MONDAL v. SM. SABEKJAN BIBI.

The Petitioner brought a suit under sec. 77 of the Indian Registration Act in the Munsif's Court for the registration of a conveyance and valued the suit at Rs. 500 which was the value of the property as mentioned in the document. The lower Courts held that as the actual value of the property in question was more than Rs. 1,000 the Munsif had no jurisdiction to try the suit :

Held—That the Plaintiff was entitled to put his own valuation of the suit which was not with regard to any land or interest in land but the sole object of which was to get a document registered, and the Munsif had jurisdiction to try the suit.

RAMU AIYAR v. SUNKARA AIYAR (1) referred to.

This was a Rule granted on the 7th May 1926 against an order of the District Judge of Burdwan (Mr. A. M. Ahmed), dated the 12th April 1926, affirming an order of the Munsif of Kalna (Babu Bishnupada Ray), dated the 14th September 1925, returning the plaint in a suit for registration of a document, under sec. 77 of the Registration Act, for presentation before a competent Court.

The facts of the case are as follows :—

The Petitioners as Plaintiffs filed a suit in the Court of the Munsif at Kalna against the Opposite Party as Defendant for having a certain *kobala*, executed by the Opposite Party, registered under sec. 77 of the Indian Registration Act.

The consideration money for the said *kobala* was by mutual agreement settled at Rs. 500 and as the Opposite Party did not appear to register the document, registration was refused according to law. The Petitioners thereupon filed an appeal before the Registrar of Burdwan for getting the document registered, but regis-

tration was refused on 24th September 1924, under sec. 76 of the Act, and thereupon the suit mentioned above was instituted.

The Munsif instead of deciding the case on the merits under sec. 77 of the Registration Act found that the value of the property comprised under the *kobala* was above Rs. 1,000 and therefore he had no jurisdiction to decide the case and directed that the plaint should be returned to be presented to a proper Court for trial. An appeal from the said order was dismissed by the District Judge of Burdwan on 12th April 1926. He stated in his judgment : " The only question for determination in this appeal is whether for the purposes of jurisdiction the Plaintiff will be allowed to put his own value on the subject-matter of the suit which should be accepted by the Court or whether the valuation must be the valuation of the interest created by the deed. In view of the Madras Full Bench case in *Ramu Aiyar v. Sunkara Aiyar* (1), I think such suit should be valued for purposes of jurisdiction on the value of the interest created by such document and not on any arbitrary value given by the Plaintiff. If the above proposition of law be accepted to be correct, in the present case we find that the Plaintiff greatly under-valued the property covered by the deed to be registered. According to the admission of the Plaintiff No. 1 contained in his deposition in connection with Registration Appeal Case No. 56 of 1922, we find the value of the subject-matter of the suit, excluding plots Nos. 11 and 13 of schedule " Ka " of the plaint of which the valuation could not be given by the Plaintiff No. 1, to be Rs. 987. Thus there can be no doubt that the valuation of the subject-matter of the suit in question far exceeds

(1) I. L. R. 21 Cal. 89 (F. B.) (1907).

(1) I. L. R. 21 Mad. 89 (F. B.) (1907).

GOLAM RAHAMAN MONDAL v. SM. SABREKJAN BIBL

the pecuniary jurisdiction of the lower Court."

Against this order the Petitioners obtained the present Rule. When the Rule came on for hearing, it was contended that as the consideration money of the *kobala* which was sought to be registered was Rs. 500, a suit for the registration of the document was entertainable in the Court of the Munsif at Kalna and the question as to the real value of the property was immaterial.

Dr. Jadu Nath Kanjilal and Babu Subodh Chandra Dutta for the Petitioner.

Mr. Sarat Kumar Bose, Babus Nripendra Chandra Das, Dharma Das Set and Nikunja Behary Ray for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case we are of opinion that the Plaintiff is entitled to put his own valuation of the suit. The suit is not with regard to any land or interest in land. The sole object of the suit was to get a certain document registered. It was brought under sec. 77 of the Indian Registration Act. The Plaintiff valued the suit at the value of the property as mentioned in the document. Under the circumstances we are of opinion that the learned Munsif had full jurisdiction to deal with the matter. The Rule is therefore made absolute and the case is sent back to the Court of first instance for hearing on the merits.

The Petitioner is entitled to his costs of this Rule. Hearing-fee, two gold mohurs, costs of the lower Courts will abide the final result.

H. D. G.

[CRIMINAL APPELLATE JURISDICTION.]

APP. No. 348 OF 1926.

RANKIN, J.

MUKERJI, J.

1926,

30, July.

P. K. CHAKRAVARTY,
Appellant,

v.

THE KING-EMPEROR,
Respondent.

Criminal Procedure Code (Act V of 1898), sec. 108—Security for good behaviour for disseminating matter, publication of which punishable under sec. 153A, I. P. C.—Scope of the section—Intention to promote feelings of enmity between classes must be present—Mere tendency of matter disseminated to promote class hatred not sufficient—Facts not sufficient to prove guilt under sec. 153A, I. P. C., do not justify proceedings for security under sec. 108, Cr. P. C.—Penal Code (Act XLV of 1860), sec. 153A—Internal evidence and meaning of words used, not the only test of intention—Admissibility of other evidence for the purpose—Publication of news having tendency to promote class hatred without such intention not sufficient to bring publisher within the mischief of the section—Scope of restriction put by legislature on liberty of the press.

The Appellant who was the editor of a newspaper called the "Forward" published therein an article headed "Yellow Urdu Leaflet; Attempts at Incitement; Will Mahomedan Leaders Intervene?" in which he animadverted on a pamphlet in Urdu circulated for the benefit of the Mahomedans. In the body of the article an English translation of the pamphlet was printed as also a transliteration in English letters of the original Urdu and it was observed that the pamphlet was being circulated and it was not difficult to trace the source from which it emanated. The Appellant added :—"Let us wait and see what steps the guardians of law and order take in the matter."

For this the Appellant was proceeded against under sec. 108, Cr. P. C., and ordered to enter into his own recognizance in the sum of Rs. 500 to be of good behaviour:

Held—That the utmost that is warrant-

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cd on any view of sec. 108 of the Code of Criminal Procedure is that a person comes within its scope if he disseminates matter which reveals an intention to promote feelings of enmity between classes.

Where there is no such intention, the mere publication of news which is of such a character that it is possible to suppose that some people reading it may momentarily or foolishly be induced to entertain unreasonable feelings towards a class of other people is not enough to bring it within the mischief either of sec. 153A, I. P. C., or of sec. 108, Cr. P. C.

It is not for the Criminal Courts to abandon "intention," the ancient and statutory test and to put in peril of their process persons of innocent intention.

If the legislature meant to say that a Magistrate could proceed under sec. 108, Cr. P. C., against any person who was found to have disseminated matter which in the opinion of the Magistrate had a tendency to promote class hatred, it would have said this very plainly in terms very different from those which it has employed. If the person proceeded against under sec. 108 of the Code of Criminal Procedure is innocent under sec. 153A, I. P. C., he does not come under the former section as a person disseminating matter, the publication of which is punishable under sec. 153A, I. P. C.

Sec. 108, Cr. P. C., seems to assume that one has only to look at the matter to tell whether its publication is punishable or not. This is broadly true no doubt but it is not the truth and it ill consists with sec. 153A, I. P. C., under which no matter is set aside or classified except with reference to the intention of the particular person accused.

Sec. 153A, I. P. C., does not mean that any person who publishes words that have

a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be for the purpose or part of the purpose of the accused to promote such feelings and if it is no part of his purpose, the mere circumstance that there may be a tendency is not sufficient.

The internal evidence of the words used and the meaning of the words used will very generally be decisive of the question whether or not the Court is confronted with a successful or unsuccessful attempt to promote feelings of enmity. They will be decisive in all cases where the intention is expressly declared; also if the words used naturally, clearly and indubitably have such a tendency, then it must be presumed that the publisher intended that which is the natural result of the words used. But the words used and their true meaning are never more than evidence of intention and it is the real intention of the accused that is the test.

Whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves, but other evidence can also be looked at. The explanation to the section shows quite conclusively that in any matter on which other evidence could assist it may be taken.

An explanation is not the same as a proviso. The explanation to sec. 153A, I. P. C., cannot be used to enlarge the provisions of the substantive section any more than a proviso can be used to enlarge the provision to which it is a proviso. Such things are put in constantly to enable certain classes of people to feel safe that the section will not penalise them if they are acting in a certain manner.

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Held—That in publishing the article in question the newspaper has given its readers in the ordinary way a perfectly legitimate and sensible piece of news without any intention to utilise that piece of news for the purpose of promoting or furthering class hatred and even assuming the article to have in some sense a tendency to promote ill-feeling in the minds of certain persons, it is quite plain that the editor or the publisher was not attempting to do anything of the sort and the reasonable explanation of the publication of the matter in question was the ordinary desire of the editor to publish a fairly important piece of news likely to be of some genuine interest to reasonable readers.

That apart from the fact that the article does not come within the first part of sec. 153A, I. P. C., it is also within the terms of the explanation to that section which prima facie covers it, malice not being imputable without definite and solid reason.

Quere.—What is the effect of the amendment of sec. 108, Cr. P. C., by the introduction of the word “intentionally”?

This was an appeal preferred on the 7th June 1926 against an order of the Chief Presidency Magistrate of Calcutta (Mr. T. J. Y. Roxburgh), dated the 4th of June 1926.

The facts of the case will appear from the judgment.

Mr. N. K. Basu (Advocate), Babus Suresh Chandra Talukdar and Janhabi Charan Das Gupta for the Appellant.

Mr. A. K. Basu (Counsel) for the Crown.

THE JUDGMENT OF THE COURT was as follows :—

RANKIN, J.—In this case, the Appellant Mr. P. K. Chakravarty has been ordered to enter into his own recognizance in the sum of Rs. 500 to be of good be-

haviour under sec. 108, Cr. P. Code. The order has been made in respect of an article in the issue for the 27th April of this year of a newspaper called the “Forward” which is a newspaper printed in English and circulating in Calcutta. The circumstances at the time of the publication are shortly these: An outbreak of rioting having occurred some little time before in parts of this city, it was after some time brought to notice that one of the causes of this outbreak, or, at least of its continuance, was the fact that certain people were circulating inflammatory leaflets in the vernacular in the streets, leaflets calculated to incite members of different communities to violence against one another. The particular pamphlet which is animadverted on in the article in question was a pamphlet in Urdu printed on yellow paper and circulating apparently for the benefit of the Mahomedans. What the Appellant has done as editor is this: He has printed the pamphlet in an English translation. He has also given a transliteration in English letters of the original Urdu; and what he says is that this pamphlet was being circulated and that it is not difficult to trace the source from which it emanated. Then he adds: “Let us wait and see what steps the guardians of ‘law and order’ take in the matter.” The head-lines of the article are: “Yellow Urdu Leaflet; Attempts at Incitement; Will Mahomedan Leaders Intervene?” At the end of the translation, there is an extract from what appears to be a daily paper circulating among the Mahomedans. That extract does not seem to require a special description. It is not alleged that there is anything in the history of the “Forward” to give the article a special meaning or to be evidence of any special intention as regards this article. It so happened that,

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in the next column, there was printed an appeal signed by eminent Hindu and Mahomedan gentlemen earnestly praying the members of both communities to cease attacking one another; this appeal is also printed verbatim and all the signatures are copied out. One has, therefore, to approach this matter on the basis that, unless in the mere copying of the Urdu pamphlet there is enough to entitle the Chief Presidency Magistrate to make his order under sec. 108, Cr. P. Code, there is nothing else against the present Appellant and the order cannot be supported.

It will, I think, be convenient if I commence by giving an illustration. In the course of the recent riots, it has happened that a Hindu has been badly assaulted and murdered by a Mahomedan or that a Mahomedan has been assaulted and murdered by a Hindu. If the next morning in a newspaper printed in English and circulating in Calcutta there appeared a statement as an ordinary item of news to the effect that Babu so and so was going down a certain street and was attacked and murdered by men of the opposite community, no body would suppose that that piece of news, unless it was written up and made an excuse for incitement to ill-feeling, would of itself be any breach of the law. But it is perfectly plain that in some circumstances, such an item of news might have some tendency with some people to induce them to entertain feelings of hatred or enmity towards the class to which the offending person belonged. It is, therefore, of great importance that the Court should consider carefully whether it is really the law that any person who prints or publishes anything which, in fact, has any tendency to promote ill-feeling between classes has committed an offence or has rendered himself by that mere fact liable to proceedings under sec.

108, Cr. P. Code. In substance, my opinion of this case is that the newspaper here has given its readers in the ordinary way a perfectly legitimate and sensible piece of news without any intention to utilize that piece of news for the purpose of promoting or furthering class hatred and that even if the news is of such a character that it is possible to suppose that some people reading it may momentarily or foolishly be induced to entertain unreasonable feelings towards a class of other people, this is not enough to bring it within the mischief either of sec. 153A, I. P. Code, or of sec. 108, Cr. P. Code. In my judgment there is no reason to say that this editor because he has published the pamphlet itself and a translation of it for the benefit of his English readers has gone out of his way to utilize this information for an oblique purpose, namely, the promotion of class hatred. Apart altogether from the fact that the very next column contained an appeal in the contrary sense, the only comment that the editor made was—"Let us wait and see what steps the guardians of law and order take in the matter." That being my view of the facts of the case, I propose to say something about the law for the purpose of shewing why I do not think that the order made by the learned Chief Presidency Magistrate was justified.

It is settled law that sec. 153A, I. P. Code, does not mean that any person who publishes words that have a tendency to promote class hatred can be convicted under that section. The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings and, if it is no part of his purpose, the mere circum-

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stance that there may be a tendency is not sufficient. It is quite true that whether or not the promoting of enmity is the intention is to be collected in most cases from the internal evidence of the words themselves, but I know of no authority for saying that other evidence cannot be looked at; and it appears to me that the explanation shows quite conclusively that in any matter on which other evidence could as it may be taken. The learned Chief Presidency Magistrate has himself pointed out that, even on the question of likelihood to promote ill-feelings, the facts and circumstances of the time must be taken into account and something must be known of the kind of people to whom the words are addressed. Although other evidence is not excluded, it is true that from the nature of the case, the internal evidence of the words used and the meaning of the words used will very generally be decisive of the question whether or not the Court is confronted with a successful or unsuccessful attempt to promote feelings of enmity. They will be decisive in all cases where the intention is expressly declared; also if the words used naturally, clearly and indubitably have such a tendency, then it must be presumed that the publisher intended that which is the natural result of the words used [*In re Amrita Bazar Patrika Press, Ltd.* (1)]. But the words used and their true meaning are never more than evidence of intention and it is the real intention of the accused that is the test [*Joy Chandra Sircar v. Emperor* (2), *In re Amrita Bazar Patrika Press, Ltd.* (1) and *Besant v. Advocate-General of Madras* (3)]. I cannot assent to any doctrine of "constructive

intention" such as the Magistrate has in this case adopted. So much for the meaning of the substantive part of sec. 153A.

When we come to the explanation we have what the Judicial Committee has called "a delicate balancing of two important political considerations." "In applying these balancing principles it is inevitable that different minds may come to different results" [*Besant v. Advocate-General of Madras* (3)]. Now an explanation is not the same as a proviso, but this particular explanation cannot in my opinion be used to enlarge the provisions of the substantive section; any more than a proviso can be used to enlarge the provision to which it is a proviso [*cf. West Derby Union v. Metropolitan Life Society* (4)]. Such things are put in constantly to enable certain classes of people to feel safe that the section will not penalise them if they are acting in a certain manner. In this case the explanation says that it is not an offence "to point out without malicious intention and with an honest view to their removal matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes." Now, if the question were whether this article was hit by sec. 153A, I. P. C., in my opinion there would be two answers. I should say, first of all, that assuming it to have in some sense a tendency to promote ill-feeling in the minds of certain persons, it is quite plain to me that the editor or the publisher was not attempting to do anything of the sort and that the reasonable explanation of the publication of this matter was the ordinary desire of the editor to publish a fairly important piece of news likely to be of some genuine interest to reasonable

(1) I. L. R. 47 Cal. 229: s. c. 23 C. W. N. 1057 (1919).

(2) I. L. R. 38 Cal. 214 (1910).

(3) I. L. R. 43 Mad. 146: s. c. 23 C. W. N. 986 (P. C.) (1919).

(3) I. L. R. 43 Mad. 146 at p. 163: s. c. 23 C. W. N. 986 (P. C.) (1919).

(4) [1897] A. C. 647.

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readers. I cannot imagine that anybody desirous of promoting ill-feeling on the part of the Mahomedans against the Hindus would publish in his newspaper in English, and, with the preliminary observations here used, this pamphlet. I cannot suppose that the editor was desirous of effecting the result that the educated English-knowing Hindus reading this pamphlet would be inflamed against the Mahomedans as a class, rather than interested to know that this objectionable practice of incitement by pamphlet was being brought to the notice of the police. But, secondly, apart altogether from the fact that I do not think that it comes within the first part of sec. 153A, I. P. C., there is, in my opinion, no sufficient reason shown why it is not within the terms of the explanation which *prima facie* covers it, malice is not to be imputed without definite and solid reason.

I return now to sec. 108 of the Criminal Procedure Code. Broadly speaking, two views of its object have been canvassed before us. According to one view it applies only to a person who disseminates matter, e.g., publishes spoken or written words so as to commit an offence under sec. 153A. Such a person, it is said, is to be bound down to prevent his committing within the jurisdiction of the Magistrate a fresh offence against the section. According to the other view if the writer of an article had the intention to promote enmity the disseminator may under the section be bound down although he himself has had no such intention and has never been guilty of any offence under sec. 153A. In such a case he will usually be able to go on disseminating as before without incurring a forfeiture of his bond, which seems a little curious; but Counsel for the Crown contends that a person disseminating objectionable matter may be

regarded as a person likely to commit with the full intent an offence under sec. 153A or some similar offence and that this gives a meaning to the section as a preventive provision. A third view is that adopted by a Division Bench of this Court in *Sital Prosad v. Emperor* (5) that "in order to justify an order under sec. 108 (b) one has only got to find that there are words used in the leaflet or matter complained of, which are likely to promote feelings of enmity or hatred."

Now cl. (b) of sec. 108 uses the phrase "matter, the publication of which is punishable under sec. 153A." What sec. 153A says in effect is that the publication of matter is punishable if by such publication the person publishing is making a successful or unsuccessful attempt to promote enmity. This fits in awkwardly with the words employed in sec. 108 which require us to ask "of what matter is the publication punishable?" To the question so put the answer seems to be "matter which is the vehicle of an attempt to promote enmity." This seems to be the parallel to "any seditious matter" in cl. (a). In this way there drops out of sight the important fact that in theory at all events the publication of such matter is only punishable as regards the person or persons making the attempt, that many persons may be engaged in the publication of the same matter and that it will constantly happen that some of these have no such intention as the others. Sec. 108 seems to assume that one has only to look at the matter to tell whether its publication is punishable or not. This is broadly true no doubt but it is not the truth and it ill consists with sec. 153A under which no matter is set aside or classified except with reference to

(5) I. L. R. 43 Cal. 591—595; s. c. 20 C. W. N. 199 (1915).

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the intention of the particular person accused.

It may be observed that cl. (b) of sec. 108 does not say "the publication (or first publication) of which was punishable under sec. 153A" but "the publication of which is punishable under sec. 153A." As dissemination and publication do not seem to be different and as sec. 153A uses neither term, it may be that "the publication" means "the publication by the disseminator," though the language is in that case very cumbersome. Again the word "intentionally" was introduced into sec. 108 in 1923. The question arises whether this word was introduced in order to overrule the decision in the case of *Sital Prosad v. Emperor* (5) or merely to make clear that the dissemination of the matter in question is not done by mistake, or to require that the person disseminating had knowledge of the contents or of the character of the matter. The Chief Presidency Magistrate was of opinion that the word was introduced for the first of these purposes, but points out with great reason that if so the amendment fails to carry out the intention.

The present case can be decided without wrestling with all of these difficulties, but I desire to say that the rule laid down in the case of *Sital Prosad v. Emperor* (5) seems to me to be wholly inadmissible. The utmost that is warranted on any view of the section is that a person comes within its scope if he disseminates matter which reveals an intention to promote feelings of enmity between classes. Matter which has in fact a tendency to do so may be published *alio intuitu* or even with an honest view to stop class hatred, with an inadequate appreciation of the circumstances or feelings of the persons

to whom it is addressed, with an inadequate knowledge of the things discussed or by reason of insufficient care and caution. Some tendency to excite class hatred may be almost unavoidable save by keeping silent on certain topics. As the Magistrate need not take action in the end unless he deems it necessary, this may be no conclusive reason why sec. 108 should be inapplicable to such cases. But there certainly are some reasons. And as the legislature has passed upon the matter and drawn the line in its own way, it is not for the Criminal Courts to abandon "intention," the ancient and the statutory test and to put in peril of their process persons of innocent intention. I cannot help thinking that if the legislature had really meant to say that a Magistrate could proceed under this section against any person who was found to have disseminated matter which in the opinion of the Magistrate had a tendency to promote class hatred it would have said this very plainly in terms very different from those which it has employed.

This case, however, does not depend upon the Rule in *Sital Prosad's* case (5). The argument for the prosecution has been in this Court that what the Appellant has done is to disseminate the Mahomedan hand-bill, that this hand-bill was without excuse under sec. 153A and that it is enough that the Appellant has intentionally disseminated it. In my judgment this argument is unsound. What the Appellant was accused of disseminating and what he in fact disseminated was the article in the "Forward." There is nothing in sec. 108 or anywhere else to justify the distortion of his meaning, his purpose or his act by looking to a part only of the article. He has quoted the hand-bill and objected

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to it in order to get it stopped. If this is not a mere colourable pretence which cloaks a real intention to incite Mahomedans to violence against Hindus and if the article would not be taken by any reader in that sense, what difference can it make that the few vicious lines of rubbish have been quoted verbatim so as to be pilloried as well as reprehended? The word "disseminate" affords no answer; it would apply equally to a part of the hand-bill as to the whole unless the context altered the meaning of the part.

The present Appellant was the editor of the paper when the article appeared in it. If any one is responsible for its publication under sec. 153A he is the man. If he is innocent under that section, I cannot see how he comes under sec. 108 as a person "disseminating matter, the publication of which is punishable under sec. 153A."

There is yet another aspect of the case. The most important thing in the end is the question under sec. 118, Cr. P. C., whether it is necessary to order the person summoned to enter into a bond. In the present case, the Chief Presidency Magistrate took the view that, if the editor had admitted that he had committed an error in publishing the hand-bill, no action would have been called for at all. But because the editor contended before him that he had not brought himself within the purview of the law, the Chief Presidency Magistrate says: "In other words, he is still of opinion even after the matter has been brought to notice by these proceedings, that he can print pink and green leaflets to-morrow. I, therefore, think that it is necessary at least in the case of the editor to demand security." I cannot say that I approve of that way of deciding such a case as this. It may sometimes happen that the contention on the

part of the editor in such circumstances is so extravagant that the Magistrate may be justified in thinking that unless effective steps are taken, the editor intends, notwithstanding the decision of the Court, to go on as before. Merely because a person has insisted upon putting his case before the Court and taking its decision, to infer that it is necessary after the decision has been given to bind him down in order to prevent him from doing the same thing again is, I think, unwarranted. I cannot help feeling that, in any view of this matter, it is reasonably plain that there was no necessity in this case to order the execution of the bond. I quite appreciate that much damage may be done in times of riot by thoughtlessness as well as from an intention to promote class hatred. I quite see that the authorities were anxious to discourage as much as possible anything that would feed the spirit of the riots. But in this case we have to consider the matter from the point of view of the restriction which a careful legislature has thought fit to put upon the liberty of the press. I can express my own view in the matter by saying that, if the legislature intended to lay down that people could be proceeded against for publishing or disseminating any matter which, in the opinion of the Court, has a tendency—any tendency—to promote ill-feeling between classes, the legislature would have said so in plain terms, and that the Court is unable to infer from what the legislature has said in sec. 153A, I. P. Code and sec. 108, Cr. P. C., that the legislature has intended to go to that length.

For these reasons I am of opinion that the order of the learned Magistrate should be discharged and that the bond executed by the Appellant should be cancelled.

MUKERJI, J.—I entirely agree.

S. C. M.

PRIVY COUNCIL.

[APPEAL FROM THE SPECIAL COURT OF
SWAZILAND.]THE LORD CHANCELLOR
(VISCOUNT CAVE).|

VISCOUNT HALDANE.

LORD PARMOOR.

LORD PHILLIMORE.

LORD BLANESBURGH.

1926,

15, April.

SOBHUZA II,
Appellant,

v.

MILLER and ORS.,
Respondents.

British Protectorate, definition of—Sovereignty thereof and limitations thereon—Protected State (Swaziland) in South Africa—Semi-sovereignty—Foreign Jurisdiction Act, 1890 (53 & 54 Vict., ch. 37), secs. 1, 3 and 11—Acquisition of rights and territory by Crown thereunder—Order in Council and powers thereunder—Acquisition of land by Crown and extinction of native subjects' rights in South African Protected State by such Order—Act of State.

In the general case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government.

SIR HENRY JENKYN'S definition in "British Rule and Jurisdiction Beyond the Seas" at p. 165 referred to.

A Protected State is only a semi-sovereign State.

In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act of 1890.

The Foreign Jurisdiction Act appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest.

The case of the Appellant was that certain lands formed part of an area subject to a concession granted by the former King of the Swazis in 1889 to two Europeans, conferring exclusive right of grazing and agricultural and planting rights over the unoccupied land within the concession for 50 years but it provided that the grantees were in no way to interfere with the rights of the Swazi-King's subjects. The subjects of the Appellant and their predecessors had been for a long time in occupation of portions of the land included within the concession and the first Respondent, who was the manager of a Corporation to whom the grantees had transferred the area including the land in dispute, trespassed on the existing rights of native occupiers and caused them to be ejected from the land they occupied. Swaziland was formerly a protected dependency administered by the South African Republic and was treated as an independent Native State both by the South African Republic and by the British Government. The Convention of 1894 between Great Britain and the South African Republic recognised the latter's right of protection, legislation, jurisdiction and administration over Swaziland and the inhabitants thereof but it guaranteed the grazing and agricultural rights of the natives of Swaziland with a proviso that no law thereafter made was to be in conflict with the rights so guaranteed by the Convention. In 1903 by conquest South African Republic became British territory and Swaziland a British Protectorate. Thereupon the British Crown ordered that the Governor, administering Transvaal might exercise all powers and jurisdiction of the Crown and do all things that were lawful. The powers of the Governor were subsequently transferred to the High Commissioner of

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South Africa. Under an Order in Council of 2nd November 1907, portions of certain lands in Swaziland, the subject of concessions by the paramount Chiefs aforesaid, were set apart and demarcated by the High Commissioner for the exclusive occupation of natives and the remaining portions for being leased to Europeans claiming under such concessions. Under a Proclamation of the High Commissioner of the 16th March 1917 certain area including the land in the Concession of 1889 was proclaimed as Crown land and under a Crown grant of the same date, the High Commissioner granted to the second Respondents (the Corporation) a part of the land now in dispute, as compensation for lands which the Respondents had relinquished in his favour.

The Appellant contended that the Crown has no power over Swaziland except those which it had under the Convention aforesaid and those it acquired by the conquest of South Africa:

Held—That the limitation in the Convention of 1894 on interference with the rights and laws and customs of natives cannot legally interfere with the subsequent exercise of the sovereign powers of the Crown or invalidate subsequent Orders in Council.

The Order in Council of 1907, after providing for power to set apart certain lands, enabled the High Commissioner to acquire the remaining land and to deal with it. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act or as an act of State which cannot be questioned in a Court of law.

The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these are inconsistent with previous order.

REX v. EARL OF CREWE (1), SOUTHERN RHODESIA CASE (2) and AMODU TIJANI v. THE SECRETARY FOR SOUTHERN NIGERIA (3) referred to.

This was an appeal (No. 158 of 1924) from a judgment of the Special Court of Swaziland, dated the 27th May 1924, which dismissed the petition of the Appellant who is the King and paramount chief of Swaziland.

The petition alleged that certain lands were part of the said King's property and had been occupied by his subjects from time immemorial, and prayed for a declaration of rights.

The Respondent Miller was the manager of the Swaziland Corporation, Limited, and had admittedly ejected certain of the occupiers from the said lands, which were formerly subject to a concession granted by the Swazi King in 1889.

The questions at issue in the appeal are (1) whether the Crown has acquired the right or power to dispossess Swazi subjects of their lands and (2) if so, whether such right had been lawfully exercised in respect to the lands in dispute.

The history of the land, and the various proclamations and Orders in Council which dealt with it are discussed at length in the judgment of the Judicial Committee.

The petition was heard by the Special Court of Swaziland and was dismissed on 27th May 1924.

Mr. Horace Douglas for the Appellant. The Attorney-General (Sir Douglas Hogg, K. C.) and Mr. H. M. Viven for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT HALDANE.—This is an appeal

(1) L. R. [1910] 2 K. B. 579.

(2) L. R. [1919] A. C. 211.

(3) L. R. [1921] 2 A. C. 389.

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from a judgment of the Special Court of Swaziland by which a petition of the Appellant has been dismissed with costs. The petition was presented against the first Respondent, and the second Respondents, the Swaziland Corporation, Limited, were added at the trial on the footing that they claimed to own the land in controversy and that the first Respondent was acting as their manager. The substance of the petition was that certain lands, known as Farm 188, formed part of an area originally subject to a concession known as the "Unallotted Lands Concession," granted by the former King of the Swazis, Umbandine, on 26th July 1889. Under this concession the grantees bound themselves to respect all prior rights, and, further, in no way to interfere with the rights of the native subjects of the grantor. The concession of 1889 was expressed to have been made by the King with the advice and consent of his Indunas in Council in favour of two persons, Thorburn and Watkins, of exclusive grazing, and to have conferred agricultural and planting rights over the unoccupied land within the concession, for fifty years, with a right to renewal, at a yearly rent of £50. The King, in consideration of this, undertook to protect the concessionnaires in the exercise of their rights. The claim made in the petition was that the first Respondent had trespassed on the existing rights of native occupiers and had caused them to be ejected from the land they occupied.

Evidence was taken at the trial of the petition. It was found that certain natives and their predecessors had been for a long time in occupation of portions of the land included within the concession, and that they were now being ejected from the portions of the land other than such as had been demarcated for the sole

and exclusive use of the natives. The judgment of the Court set out that the original concession had been confirmed on 17th December 1890, by the High Court of Swaziland, a Court constituted by the King of the Swazis with the assent of the British Government and the South African Republic, and having jurisdiction to inquire into the validity of concessions such as that in question. But on the 19th September 1908, the concession was expropriated by the High Commissioner by notice to the concessionnaires under sec. 12 of Proclamation No. 3 (Swaziland), 1904. The judgment went on to state that by Order in Council of 2nd November 1907, the area of the concession became Crown land, as having been expropriated, and that a portion of it was granted to the Respondent Company, who claimed a clear freehold title under the grant. The natives, on the other hand, claimed that their rights of use and occupation under native law had not been affected. It was contended for them that the rights they possessed before and after the granting of the concession remained intact, and had been recognised later on by sec. 5 of the Order in Council made on 25th June 1903 and that these rights had not been subsequently cut down. The Court held that, at all events by the Order in Council made on 2nd November 1907, the ownership of the land had passed to the Crown, and that the effect of this was to extinguish any rights of use and occupation that were in the natives; and that the documents and circumstances showed that it was intended to extinguish all such rights. As matter of fact, the natives were given instead sole and exclusive rights over one-third of the land included in the concession, and the concessionnaires had been given such rights over the remaining two-thirds. In the opinion of

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the Court below, the Order in Council of 2nd November 1907 was validly made. Even if Swaziland was no more than a Protectorate, it was one which approximated in constitutional status to a Crown Colony, and the Crown had power to make laws for the peace, order and good government of Swaziland, and of all persons therein. Any original native title had, therefore, been effectually extinguished.

The question which their Lordships have to consider is whether this conclusion was right in point of law. Into any topic of policy they are, of course, precluded from entering. In order to come to a conclusion on the legal question it is necessary to look at the history and circumstances in which it has arisen.

Swaziland lies on the east of the Transvaal, between that country and the coast. It was treated as an independent native state both by the South African Republic and by the British Government, notwithstanding a good deal of interference by both in its affairs, and it was recognised, and still is recognised, as a Protectorate. But the South African Republic appears, from the terms of the convention made in 1894, to have become preponderant in the internal control. The relationship seems to have been recognised as being one in which Swaziland stood to the Republic as a protected dependency administered by the South African Republic. This Protectorate stopped short of incorporation, but apparently it was recognised by the convention of 1894 between Great Britain and the South African Republic (Art. II) as giving the latter, without incorporation, all rights of protection, legislation, jurisdiction and administration over Swaziland, and the inhabitants thereof. The natives were, however, guaranteed in their laws and customs, so far as not inconsistent with laws made pur-

suant to the convention, and in their grazing and agricultural rights, with the proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the convention.

The question which at once presents itself is, what is the meaning of a Protectorate. In the general case of a British Protectorate, although the protected country is not a British dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. This is the substance of the definition given by Sir Henry Jenkyns at p. 165 of his book on "British Rule and Jurisdiction beyond the Seas." Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected state becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a Protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of state, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act,

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1890. This statute provided, upon the preamble that by treaty, capitulation, grant, usage, sufferance, and other lawful means, the Crown has power and jurisdiction in divers countries and places outside its dominions, and that it was expedient that Acts relating to the exercise of such jurisdiction should be consolidated, that it should be lawful for the Sovereign to hold, exercise and enjoy any jurisdiction now or hereafter possessed within a foreign country in the same and as ample a manner as if the jurisdiction had been acquired by cession or conquest of territory, and that every act and thing done in pursuance of any such jurisdiction was to be as valid as if it had been done according to the local law then in force in that country. It was provided that any Order in Council made in pursuance of the Act should be laid before both Houses of Parliament within a limited time, and should have effect as if enacted in the Act. The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles. This view of it was also that taken in an important judgment of the Court of Appeal, *Rex v. Earl of Crewe* (1). There, by an Order in Council, the High Commissioner for South Africa had been authorised to provide in the Bechuanaland Protectorate for the administration of justice and for the peace, order and good government of all persons within that Protectorate and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a native tribe, was detained in custody under a proclamation

purporting to have been made by the High Commissioner under the powers so conferred. He applied for a *habeas corpus* against the Secretary of State for the Colonies. It was held that the Protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, and that the proclamation was validly made.

It was further held that the detention was lawful, inasmuch as the construction of the Act settled by practice rendered it impossible to limit its application to British subjects in the foreign country. Lord Justice Vaughan Williams considered that the proclamation under which the detention took place was valid as a law which the Act gave the Crown absolute power to make and apply, just as if the territory had been obtained by cession or conquest. He also held that the detention could be independently justified as an act of state. Lord Justice Kennedy concurred, definitely on the view that the detention could be justified as an act of state, as well as under the Foreign Jurisdiction Act. The stress in the judgment of Lord Justice Farwell, who arrived at the same conclusion as to the validity of the proclamation under which the detention was made, was laid on the construction of that Act, which he interpreted in a similarly wide sense.

In the *Southern Rhodesia Case* (2), Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially similar. He held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. Both of these cases imply that what is done may be un-

(1) L. R. [1910] 3 K. B. 576.

(2) L. R. [1919] A. C. 211.

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challengeable on the footing that the Order in Council, or the proclamation made under it, is an act of state. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable.

Such being the principle, it remains to ascertain whether it has been put in operation in the case under consideration. To answer this question it is first necessary to recall the true character of the native title to land throughout the Empire, including South and West Africa. With local variations, the principle is a uniform one. It was stated by this Board in the Nigerian case of *Amodu Tijani v. The Secretary for Southern Nigeria* (3), and is explained in the Report made by Chief Justice Rayner on Land Tenure in West Africa, quoted in the case referred to at p. 404. The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is Sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.

Turning next to the history of what was done in Swaziland by the British Government, the material events may be stated briefly.

Swaziland was originally under the rule of native kings, and concessions conferring rights in respect of land were granted by them to persons other than natives. The land in question was grant-

ed, by the concession known as the "Unallotted Lands Concession" of 26th July 1889, to Thorburn and Watkins, as already stated. The grant was made by King Umbandine, who reigned between 1875 and 1889. The grant, which was of farming and planting rights for fifty years, with a provision for renewal, at an annual rent of £50, bound the grantees in no way to interfere with the rights of the King's native subjects. There was conferred power to sublet or transfer.

In September 1890, Ungwane, the then King of the Swazis, set up by organic proclamation a Chief Court composed of three judicial members approved by the British High Commissioner and the President of the South African Republic, such Court to have full jurisdiction over all persons in Swaziland of European extraction, and over all questions, matters and things in which such persons were concerned. The Court was to undertake judicial inquiry into the validity of disputed concessions. In 1890 it confirmed the concession in question. By deed of cession the grantees transferred the area comprised in it, including the territory in dispute, but excepting certain distinct areas which had previously been transferred to others, to the second Respondents. Ungwane was succeeded by his son, Sobhuza, the Appellant, who is the present King or paramount chief.

When the Boer war broke out in 1899 Swaziland had for some years come to be under the protectorate of the South African Republic. This was the result of the convention of 1894 between the Republic and the British Government. After the conquest and annexation of that Republic, by Order in Council of 25th June 1903, the Crown, on the recital that by the conquest and annexation all rights and powers of the South African Republic

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had passed to the British Sovereign, ordered that the Governor administering the Transvaal might exercise all powers and jurisdictions of the Crown and take all such measures and do all such things as were lawful and in the interest of His Majesty's service, as he might think, subject to instructions, expedient. The Governor was expressly empowered by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order and good government of Swaziland, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. He was, in issuing such proclamations, to respect any native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection were regulated, except so far as the same might be incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. Such proclamations were to be published and might be disallowed or modified by the Sovereign.

By Order in Council of 1st December 1906, the powers given to the Governor administering the Transvaal were transferred to the High Commissioner for South Africa.

By a subsequent Order in Council of 2nd November 1907, on the recital that it was intended that portions of certain lands in Swaziland, the subject of concessions or grants made by paramount chiefs and confirmed by the Chief Court under the organic proclamation of 1890, should be set apart and demarcated for the exclusive use and occupation of natives, and that the remaining portions should be granted or leased to European persons claiming rights under such concessions or should be held by the High Commissioner

for South Africa, His Majesty, by virtue of the powers vested in His Majesty under the Foreign Jurisdiction Act or otherwise, ordered that all rights in any land in the said territory, not being land set apart and demarcated by the authority of the High Commissioner for the sole and exclusive occupation of the natives, and proclaimed as Crown lands, and also in any land within the territory lawfully transferred to or expropriated by the High Commissioner in exercise of the powers vested in him by proclamation or otherwise for the peace, order, and good government of the territory, should vest in and be exercised by the High Commissioner, who might make grants or leases of such lands.

By proclamation of the High Commissioner made on 16th March 1917, certain areas were proclaimed as Crown lands, and among these areas was a portion of the lands included in the Unallotted Lands Concession of 1889. This had been in 1908 expropriated by notice given by the High Commissioner under the powers vested in the Governor of the Transvaal by the Order in Council of 25th June 1903, the exercise of which he had provided for by Swaziland Proclamation No. 3 of 1904. Under a Crown grant of 16th March 1917, the High Commissioner granted to the second Respondents a part of the land subject to the concession and now in dispute, as compensation for lands which they had relinquished in his favour. By proclamation promulgated on the same date the High Commissioner had proclaimed to be Crown land the portion of the unallotted land included in the original Unallotted Lands Concession, and this portion included the land granted as compensation to the second Respondents and now in dispute.

The principles of constitutional law laid down in the earlier part of their

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Lordships' judgment render it in their opinion impossible to maintain the argument submitted for the Appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and those which it acquired by the conquest of the South African Republic. The limitation in the convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. But if this be true it makes an end of the Appellant's case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had therefore full power to make the Crown Grant of 16th March 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of state which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the question involved is concerned with constitutional issues and is of far-reaching public interest, they will advise, following precedents in other cases that there should be no costs of the appeal.

Solicitor: Mr. E. F. Hunt for the Appellant.

Solicitor: The Treasury Solicitor for the Respondents.

G. D. M.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION
No. 32 of 1925.

GREAVES, J.

RANKIN, J.

1926,

Heard, 12 and

13, January.

Judgment,

13, January.

SHAMSUD ALI

v.

MIRIAM ELIAS and ors.

Limitation Act (IX of 1908), sec. 19—Acknowledgment, when to be made—What it should be—Doctrine of English law—Difference between the Indian and English law.

Per GREAVES, J.—Other requirements being complied with, under sec. 19 of the Limitation Act, it is sufficient to take a case out of the statute if there is an acknowledgment of the liability, even if that acknowledgment is not necessarily made to the Plaintiff or to some body through whom he claims.

MYLAPORE v. YEO-KAY (1) considered.

MONIRAM SETH v. SETH RUP CHAND (2),
SUKHAMONI v. ISHAN CHUNDER (4),
MAJUMDAR HIRALAL ITCHHIALAL v. DESAI
NARSILAL CHATURBHUJAS (3) and GURU
CHARAN SAHA v. SURENDRA KRISTO ROY
(5) referred to.

Per RANKIN, J.—Sec. 19 of the Limitation Act is free from the doctrine of English law which puts the value of an acknowledgment upon its being the equivalent of a new promise to pay. All that is required under that section is that there must not be any doubt about the identity of the debt. Once it is clear that the Defendant admits that he owes the

(1) L. R. 14 I. A. 168; a. c. I. L. R. 14 Cal. 801 (1887).

(2) I. L. R. 33 Cal. 1087; a. c. 10 C. W. N. 874 (P. O.) (1906).

(3) 17 C. W. N. 573 (P. O.) (1913).

(4) 2 C. W. N. 402 (P. O.) (1898).

(5) 19 C. W. N. 233 (1913).

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money and it is clear what debt he has admitted, it is no answer to say that the acknowledgment is not made to the Plaintiff or to any person through whom the Plaintiff claims.

This was an appeal preferred on the 27th March 1925 against a judgment of Mr. Justice Buckland, dated the 21st of January 1925, passed in the exercise of Original Civil Jurisdiction.

The facts of the case will appear from the judgment.

Mr. Pugh for the Appellant.

Mr. S. N. Banerjee (with *Mr. A. K. Roy*) for the Respondent Miriam Elias.

Mr. P. N. Mallick (with *Mr. S. C. Roy*) for the Respondent Hira Lall Hoti Lall.

THE JUDGMENT OF THE COURT was as follows :—

GREAVES, J.—This is an appeal by the first Defendant against a decision of Mr. Justice Buckland. The facts are not in dispute and I may state them very shortly.

The claim in the suit was for a sum of Rs. 20,000 based on an agreement, dated the 28th of August 1919, and the agreement came to be under the following circumstances :—One Abdul Gunny between the 25th of September 1918 and the 2nd of April 1919 executed ten promissory notes and hundis for Rs. 22,100 in all in favour of the Plaintiff Miriam Elias and also one promissory note, one for Rs. 1,100, in favour of the Plaintiff Jonah Reuben Jacob. These were assigned by Miriam Elias and Jonah Reuben Jacob on the 2nd of July 1919 to the Defendant Alce Coyne for realization. Coyne instituted two suits to recover the amounts due on the hundis and the promissory note. He obtained a decree in the first suit for a sum of Rs. 22,495 odd, but before the second

suit was brought to trial an agreement was arrived at between the parties which is the agreement sued upon. This is dated the 28th of August 1919. The parties thereto were Alce Coyne, the Defendant, Abdul Gunny and the Appellant Shamsud Ali. By the terms of the agreement Shamsud Ali was to pay a sum of Rs. 28,000 in full satisfaction of the amounts due to the Defendant Coyne. Rs. 8,000 was paid in part performance of the agreement on the 14th of October 1919. Then subsequently the Defendant Hira Lall Hoti Lall attached the balance in Shamsud's hands for the payment of a debt due from Alce Coyne to Hira Lall Hoti Lall and thereupon the Plaintiffs commenced a declaratory suit for a declaration of their title to the sum of Rs. 20,000. The suit was decreed on the 13th of February 1923 and it was thereby declared that the Plaintiffs were entitled to the sum of Rs. 20,000 in the hands of Shamsud Ali and the Plaintiffs agreed to pay out of this amount a sum of Rs. 6,000 to Hira Lall Hoti Lall.

The plaint in this suit is dated the 10th of March 1923 and the only point that arises in the appeal is whether the claim in the suit is barred by limitation.

The agreement, as I have stated, is dated the 28th of August 1919 and the suit was not commenced until March 1923. Consequently the claim, on the face of it, is barred by limitation unless there has been an acknowledgment of the debt which is sufficient to take the case out of the provisions of the statute. The acknowledgment relied upon by the Plaintiffs is contained in the letter, exhibit (c), dated the 15th March 1920. That letter is written by Mr. S. M. Dutt who was acting as an attorney for the Defendant Shamsud Ali. The letter after referring to the agreement and to the pay-

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ment of Rs. 8,000 by Mr. Coyne goes on to state that the writer's client had all along been and was still ready and willing to pay the balance amounting to Rs. 20,000 upon his getting a proper release executed by the client of the person to whom the letter was addressed.

The letter then goes on further to state that the clients of the addressee according to writer's instructions were only to get Rs. 2,295 odd out of Rs. 20,000 and the letter further denies the suggestion that Coyne was a *benamdar* for the Plaintiffs. The letter is addressed to Messrs. Fox and Mondal, the attorneys for the Plaintiffs. As I have already stated the only question which arises in this appeal is whether this is sufficient acknowledgment of the debt under the provisions of sec. 19 of the Indian Limitation Act, so as to avoid the operation of the statute of limitation. That section provides that where before the expiration of the period prescribed for a suit an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. Explanation (I) to the section provides that an acknowledgment may be sufficient, *inter alia* if it is addressed to a person other than the person entitled to the property or right and according to Explanation (II) "signed" means signed either personally or by an agent duly authorised in this behalf.

The three specific points urged in this appeal are as follows:—First, it is said that Mr. S. M. Dutt was instructed by Ghulam Ali who was an agent of Shamsud Ali and there was nothing to show that Ghulam Ali was authorised to make any

acknowledgment or to give the attorney any instruction for the making of an acknowledgment and it is suggested that his authority was confined merely to paying the money. Secondly, it is stated that upon the true construction of the letter of the 15th March 1920 there was no sufficient acknowledgment within the meaning of sec. 19, that is to say, that there was no acknowledgment of the indebtedness to the Plaintiffs in the suit but merely to Coyne, which, it is said, upon sec. 19 of the Act is not sufficient. Thirdly, it is said that in any case the claim of the Defendants Hira Lall Hoti Lall is barred as they claimed to receive Rs. 6,000 in their own right and there was no acknowledgment even suggested so far as they are concerned. Turning to the first point it seems to me that there is really no substance in this. The letter of the 15th March states that the letter to which it is a reply was addressed to the writer's client Shamsud Ali and had been handed over to him by his agent. The letter is clearly written by or on behalf of Shamsud Ali and the mere fact that it was actually handed over to the attorney by the agent does not seem to me to make any difference. I think, therefore, that the acknowledgment must be taken to have been made by a duly authorised agent of Shamsud Ali.

So far as the third point is concerned I do not understand that Hira Lall Hoti Lall's claim on the facts is to recover Rs. 6,000 direct although it is true that in their written statement their claim is so put, but it seems to me as a result of an arrangement which was arrived at in the declaratory suit, a declaration of the Plaintiffs' right to Rs. 20,000 was made and Hira Lall Hoti Lall's right to receive Rs. 6,000 thereout was also declared. This being so, it seems to me that the true

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position is that Hira Lall Hoti Lall, once Rs. 20,000 is paid to the Plaintiffs, are entitled to recover from the Plaintiffs Rs. 6,000 out of that amount and no question of any acknowledgment of that really arises. It is sufficient if the acknowledgment relates to the Rs. 20,000 which the Plaintiffs claim, even if on the receipt of that money some portion is paid over to Hira Lall Hoti Lall.

The second point remains which presents more difficulty. The case mainly relied on by the learned Counsel for the Appellant was the case of *Mylapore Iyasawmy Moodalier v. Yeo-Kay* (1). In that case a suit was brought for a declaration that the Plaintiff was entitled in his own right and as executor to the estate of one Moorogasum Moodhiar to 2/5ths of certain land and property in Rangoon. The suit was brought in the year 1883, Moorogasum Moodhiar died so long ago as 1864. The claim was accordingly barred by limitation unless there was any acknowledgment which could be relied on by the Plaintiff in the suit. The acknowledgment which he relied on was an admission alleged to have been made by a Mr. Bennett in a conveyance of 1874 and in a recital in that conveyance. Now, Mr. Bennett had been in possession from the year 1864 but it was alleged on behalf of the Plaintiff that this was not adverse possession as Mr. Bennett was holding as a mortgagee or a position similar to that of a mortgagee and that the testator was not absolutely entitled to the estate and we think that the case must be read in the light of these facts and of the admission which was there relied on. Now, what is stated in the judgment of the Judicial Committee, which was delivered by Sir Barnes Peacock, is that the admission

relied upon was not sufficient as it did not satisfy the provisions of sec. 19, as Sir Barnes Peacock points out that the liability referred to in sec. 19 must be a liability to a person who is seeking to recover possession or some person through whom he claims and accordingly he says that the recital in the conveyance of 1874 was not an admission to the Plaintiff, or to any one through whom he claims. Turning once more to the admission in the letter of 15th March 1920 I am not sure myself, even if you apply the test laid down by Sir Barnes Peacock, that the admission contained in this letter does not satisfy that test. The admission seems to me to be an admission that the sum of Rs. 20,000 is due to Coyne, the *benami* transaction not being admitted. But turning to the declaratory suit we find that it has been established that Coyne was merely in the position of a *benamidar*, that is to say, he was really a trustee for the Plaintiff who was his beneficiary, and it seems to me, therefore, that the acknowledgment of the indebtedness to Coyne is an acknowledgment of indebtedness to a person through whom the beneficiary, that is to say, the Plaintiff, claims. Therefore I am inclined to think myself that upon the true construction of the letter of the 15th March 1920 there is a sufficient acknowledgment within the meaning of sec. 19 to satisfy the test which Sir Barnes Peacock has laid down in *Mylapore v. Yeo-Kay* (1). But there are various cases to which we have been referred in the course of the argument, and cases of the Judicial Committee, some of which have laid down that a general acknowledgment is sufficient and that it is not necessary that it should be addressed to the

(1) L. R. 14 I. A. 168; s. c. I. L. R. 14 Cal. 501 (1887).

(1) L. R. 14 I. A. 168; s. c. I. L. R. 14 Cal. 501 (1887).

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person who is an assignee or to anyone through whom he claims. The first of these cases is the case of *Moniram Seth v. Seth Rup Chand* (2). At page 1058 this passage occurs: "The acknowledgment is not addressed to the person entitled but according to the 'explanation' given in sec. 19 this is not necessary." Accordingly, it seems to me that this case which is a decision of the Judicial Committee gets over the first difficulty that was raised, namely, that it is necessary that the acknowledgment should be addressed to the person entitled or to the person through whom he claims. It is suggested, however, that *Moniram v. Seth Rup Chand* (2) is not inconsistent with the construction put upon sec. 19 by the decision in *Mylapore v. Yeo-Kay* (1) as the admission in *Moniram v. Seth Rup Chand* (2) was one of a liability made to the executor of the deceased. The next case to which we were referred by the Respondents was the case of *Majumdar Hiratal Itchhalal v. Desai Narsilal Chaturbhujdas* (3). There Lord Macnaghten in delivering the judgment of the Judicial Committee states that the acknowledgment was a clear acknowledgment that the payment to which he refers had been received and that the interest of the persons sought to be charged was that of mortgagees. The entries relied on as acknowledgments rose in the following way: There were in the District of Broach certain Desaigiri Dastur and "pasaeta" lands and when this District came under the British rule the British Government made a vatan settlement by which the

Desaigiri Dastur in Broach was commuted into a fixed money allowance payable from the Treasury. The suit to which the judgment relates was instituted on the 16th October 1901 and the acknowledgments relied on to take the matter out of the statute had been made so long ago as 1843. They were acknowledgments made by the mortgagees of the Desaigiri Dastur in the Collector's books of money received by them in respect of the annual allowance made to those whose original rights had been commuted and received by them as mortgagees. This, as I have already stated, was held to be a sufficient acknowledgment so as to enable the mortgage suit to be brought by the mortgagee after a long lapse of time and if one considers the nature of the acknowledgment, then one sees that it was not an acknowledgment that was addressed to any particular person but merely a general statement of the capacity in which the money was received. We were also referred to another Privy Council case in *Sukhamoni Chowdhurani v. Ishan Chunder Roy* (4), where Lord Hobhouse in delivering the judgment of the Judicial Committee states at page 404 that it is not required that an acknowledgment within the statute should specify every legal consequence of the thing acknowledged. We think, therefore, that this must be taken as an authority that it is sufficient to take the case out of the statute if you have an acknowledgment of the liability even if that acknowledgment is not necessarily made to the Plaintiff or to somebody through whom he claims and that this is the view which has been taken of the present state of the law in this Court as shown in the case of *Guru Charan Saha v. Surendra Kristo Roy*

(1) L. R. 14 I. A. 168; s. c. I. L. R. 14 Cal. 801 (1887).

(2) I. L. R. 33 Cal. 1047; s. c. 10 C. W. N. 874 (P. C.) (1906).

(3) 17 C. W. N. 573 (P. C.) (1913).

(4) 2 C. W. N. 402 (P. C.) (1898).

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(*Chowdhury* (5), where Mr. Justice Carn-duff in delivering the judgment of the Court states at page 265 that it is now settled that an acknowledgment to whomsoever made, if it be an acknowledgment pointing with reasonable certainty to the liability in dispute or the right out of which that liability arises as a legal consequence, is an acknowledgment of liability within the meaning of sec. 19 and Mr. Justice Carn-duff refers to the various cases to which I have already referred in the course of this judgment. Therefore, it seems to me, first of all, that the letter does satisfy the test laid down by Sir Barnes Peacock in *Mylapore v. Yco-Kay* (1). Moreover, I am inclined to think, that having regard to the recent Privy Council decision to which we have just referred, that decision must be taken as applying to the actual facts of that case, and that having regard to the concluding words of Explanation (1) to sec. 19 the well-considered view of the Judicial Committee is that a general acknowledgment is sufficient and that it is not necessary that it should be addressed to the person claiming or to somebody through whom he claims, and, this being so, we think that the judgment of Mr. Justice Buckland is right and this appeal is dismissed with costs, one set of costs to each of the appearing Respondents.

RANKIN, J.—I agree.

In this case the firm of solicitors to whom the letter of the 15th of March 1920 was addressed was a firm who on the 9th of March 1920 had written stating that they were acting on behalf of the present Plaintiff. No question, therefore, arises in this case as to the person to whom the letter of the 15th of

March, if it be an acknowledgment, was addressed.

The question, and in my opinion, the only substantial question, in this case is that raised by Mr. Pugh on behalf of the Appellant to the effect that the liability which is acknowledged by the document must be a liability to the Plaintiff, that is to say, the person who is seeking to assert the right that is in suit. As to that there is undoubtedly the authority of Sir Barnes Peacock in the case of *Mylapore v. Yco-Kay* (1). That authority has been somewhat obscured by the circumstance that in the concluding passage of the judgment he uses a phrase *per incuriam* which has misled some Courts in India to think that he was discussing the question of the person to whom the acknowledgment was addressed. As a matter of fact, the only point (as a fair reading will show) which Sir Barnes Peacock is making is this—"What liability does this mean? It must mean a liability to the person who is seeking to recover possession or some person through whom he claims." The fair meaning of the letter of the 15th of March, in my judgment, is this: You, the Plaintiff, are saying that Coyne is a mere trustee for you. I do not admit that. I admit that you have some beneficial interest to the extent of some Rs. 2,295 or thereabouts, but I am told that Coyne has a beneficial interest of his own. I am not going to pay unless I get a complete discharge from you and everybody else, but I do admit that the man who you say holds his right on your behalf is the man to whom I do, in fact, owe the sum of Rs. 20,000.

We are concerned with the question of an acknowledgment under sec. 19—a section which is undoubtedly free from the

(1) L. E. 14 I. A. 168; s. c. I. L. E. 14 Cal. 801 (1887).

(5) 19 C. W. N. 203 (1913).

(1) L. E. 14 I. A. 168; s. c. I. L. E. 14 Cal. 801 (1887).

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doctrine of English law which puts the value of an acknowledgment upon its being the equivalent of a new promise to pay. No doubt, the English requirement of a good acknowledgment is greater than that of the Indian law. You can argue from the fact that an acknowledgment is good under English law to show that it will be good under Indian law, but you cannot argue the other way about. We have to look for the purpose of sec. 19 upon this Defendant merely as a debtor. There must be no doubt about the identity of the debt. Once it is clear that he admits that he owes the money and it is clear what debt he has admitted, it does not seem to me on the authorities to be any answer to say, "Oh yes, he admitted that he owed your trustee but did not admit that you were the sole beneficiary." It seems to me that what Sir Barnes Peacock said in the case cited is wide enough to cover the present case. But, apart from that, I agree that the decisions of the Privy Council in the cases of *Majumdar Hiralal Itchhalal v. Desai Narsilal Chaturbhujdas* (3) and *Guru Charan Saha v. Surendra Kristo Roy* (5) are authorities which cover the present case.

For these reasons, I agree that this appeal should be dismissed.

Messrs. G. K. Dutt and N. K. Dutt,
Solicitors for the Appellant.

Messrs. Fox & Mondal, Solicitors for
the Respondents.

S. N. B.

(3) 17 C. W. N. 573 (P. C.) (1913).

(5) 19 C. W. N. 263 (1913).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 2648 OF 1922.

NEWBOLD, J. CHAUDHURY UPENDRA-
GRAHAM, J. NANDAN DAS MAHA-
1925, [PATRA and anr., Defend-
Heard, 22 and ants, Appellants,
23, June. v.

Judgment, UPAI SER and ORS.,
29, June. Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 105—Settlement of fair and equitable rent—Operation of sec. 188, B. T. Act, as to the maintainability of a suit under sec. 105—Jurisdiction of Revenue Court, when to be challenged.

The Defendants-Appellants who were the landlords applied under sec. 105, Bengal Tenancy Act, for settlement of fair and equitable rent of certain holdings including one held by the Plaintiffs-Respondents which were recorded in the record-of-rights as appertaining to their estate. The issue was raised before the Revenue Officer whether the suits were barred by sec. 188, Bengal Tenancy Act, and was decided in favour of the Appellants, it being held that it was not proved that the Appellants were landlords jointly with others. Some of the Defendants in those suits appealed against the decision of the Revenue Officer and were successful on the ground that the Appellants were landlords jointly with others, but the Plaintiffs-Respondents did not file any appeal. The Plaintiffs-Respondents subsequently brought a suit for declaration that the decree of the Revenue Officer was without jurisdiction and null and void:

Held—That the Revenue Officer had jurisdiction to decide whether or not the Appellants when they made the application to him under sec. 105, Bengal Tenancy Act, were joint landlords and his decision on this point not having been

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questioned by the Plaintiffs-Respondents by appeal was final and binding on them.

That the decision of a Court ... favour of a jurisdictional fact and therefore of its own jurisdiction cannot be impeached collaterally and is conclusive of jurisdiction except against a direct attack.

HRIDOY NATH ROY v. RAM CHANDRA BURMA (1) *discussed and approved.*

This was an appeal preferred on the 13th of November 1922, against the decree of S. N. Ray, Esq., I. C. S., Additional District Judge, 1st Court of Zillah Midnapore, dated the 1st of June 1922, reversing the decree of Babu Dharendra Kumar Mukherjee, Munsif of Dantan, dated the 28th of February 1921.

The facts of the case will appear from the judgment.

Mr. Gunada Charan Sen and Babu Prosantha Bhusan Gupta for the Appellants.

Babus Gopendra Nath Das and Biraj Mohan Majumdar for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

The Appellants are the proprietors of the estate bearing Touzi No. 598 in the Midnapore District. Their property including this estate came under the management of the Court of Wards in 1905 and at their instance a record-of-rights was prepared which were finally published in 1911. The Plaintiffs-Respondents are the owners of a holding of which, according to their case, the proprietors of estates Nos. 597 and 598 are the superior landlords in equal undivided shares. In the record-of-rights of 1911 the Plaintiffs' holding was recorded as appertaining to estate No. 598 only. The Appellants

then applied under sec. 105 of the Bengal Tenancy Act, for settlement of fair and equitable rent of this and other holdings. The application in respect of each holding was numbered as a separate suit and these suits were heard together by the Revenue Officer. At the trial before him the first of the issues which were framed was : " Does sec. 188 of the Bengal Tenancy Act operate as a bar to the maintainability of these suits under sec. 105 " ? This issue was decided in favour of the present Appellants on the finding that the tenant Defendants in those suits had failed to make out their case that the Plaintiff (*i.e.*, the Court of Wards manager who sued on behalf of the Appellants) was a co-sharer landlord. He decided other issues against the tenant Defendants and fixed rents which were higher than those recorded in the record-of-rights. Appeals were preferred by some of the tenant Defendants but the Plaintiff, Respondent in the present appeal, did not appeal against the decree against him. These appeals were successful. The Special Judge held that the Plaintiff in those suits, when he filed the applications under sec. 105, Bengal Tenancy Act, was a joint landlord with his co-sharers within the meaning of sec. 188 of that Act and as such was not competent to file the applications singly. After second appeals by the landlords to the High Court were unsuccessful the Plaintiffs brought the suit out of which this appeal arises for a declaratory decree that the decree of the Revenue Officer was without jurisdiction and null and void.

The first Court held that the present suit was barred under sec. 109 of the Bengal Tenancy Act. On appeal this decision was reversed. The learned District Judge held that the present Appellants were not the sole landlords of the Plaintiffs

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and were therefore incompetent to make the application under sec. 105 of the Bengal Tenancy Act and consequently the decision of the Revenue Officer was clearly without jurisdiction and as such not binding.

On behalf of the Appellants it was contended that the question whether they are sole or joint landlords of the Plaintiffs cannot be re-agitated, that the finding that they are joint landlords is erroneous and that the suit is barred by limitation.

On behalf of the Plaintiffs-Respondents a preliminary objection was taken that the appeal was incompetent. This objection was based on the fact that Respondents Nos. 4 and 12 died during the pendency of this appeal and their heirs were not substituted. On an examination of the pleadings it appeared that these Respondents were not necessary parties to the appeal and the objection was not further pressed.

In our opinion the first contention of the Appellants must succeed. The Revenue Officer had jurisdiction to decide whether or not the Appellants, when they made the application to him under sec. 105 of the Bengal Tenancy Act, were joint landlords. His decision on this point not having been questioned by the Plaintiffs by appeal is final and binding on the parties to that suit. "It appears to be generally agreed upon that the decision of a Court in favour of a jurisdictional fact, and therefore of its own jurisdiction cannot be impeached collaterally, and is conclusive of jurisdiction except against a direct attack." (Hukam Chand on *Res Judicata*, p. 438). The Plaintiffs in this suit not having directly attacked this decision of the Revenue Officer by an appeal cannot impeach it collaterally by a separate suit. The learned District Judge in

his judgment has referred to the Full Bench ruling in *Hridoy Nath Roy v. Ram Chandra Burma Sarma* (1). We are unable to agree that it is not opposed to his decision. The following passage at p. 149 supports our view:—"When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision the Court would be without jurisdiction and the ruling itself void. Such is not the law and it matters not what may be the particular question presented for adjudication, whether it relates to the jurisdiction of the Court itself or affects substantive rights of the parties litigating, it cannot be held that the ruling or decision is without jurisdiction or is beyond the jurisdiction of the Court." Here a question relating to the jurisdiction of the Revenue Officer was presented for adjudication to him and even if he decided it wrongly, he still had jurisdiction to decide it. That decision is final between the parties and the Plaintiffs cannot question it in order to support their plea that the Revenue Officer's decree was void for want of jurisdiction.

Taking this view it is unnecessary to decide the other contentions urged on behalf of the Appellants. The appeal is decreed. The judgment and decree of the lower Appellate Court are set aside, and the decree of the Munsif dismissing the suit is restored. The Appellants will get

(1) 1. L. R. 48 Cal. 139; s. c. 24 C. W. N. 733 (F. B.) (1930).

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their costs from the Plaintiffs-Respondents in this and the lower Appellate Court.

H. C.

(CIVIL APPELLATE JURISDICTION.)

APPEAL FROM APPELLATE ORDER

No. 2064 OF 1923.

SUBRAWALDY, J.
MUKERJI, J.
1925,
Heard,
18, December.
Judgment,
21, December.

NISHI KANTA CHAUDHURY *alias* N. CHAUDHURY, Defendant,
Appellant,
v.
GOPESWAR CHATTERJEE and ors., Plaintiffs,
Respondents.

Bengal Municipal Act (II of 1888)—Eligibility of person qualified to vote, but whose name not entered in the voters' list to be a candidate—Framing of rules under sec. 15 of the Act—Election Rules; of 1896—Rules 2, 4 to 12, 13, 14—Effect of sec. 15 and rule read together—Specific Relief Act (I of 1877), sec. 42—Declaratory suit for election, if maintainable—"Legal character," whether wide enough to include right of franchise and right of being elected.

Unless the name of a candidate is in the voters' list he is not entitled either to vote for election, or to stand as a candidate for election.

IN THE MATTER OF W. CORKHILL (1) distinguished.

BUDGE *v.* ANDREWS (2) and STOWE *v.* JOLLIFFE (3) discussed.

RAGUNATH SARMA *v.* JIRAN CHANDRA SARMA (4) followed.

This was an appeal preferred on the 1st of August 1923, against the decree of Babu Kumud Nath Roy, Subordinate Judge of Assansole of Zillah Burdwan, dated the 23rd of April 1923, affirming the decree of Babu Kunja Behary Ballav,

Munsif of Assansole, dated the 17th of February 1923.

The facts of the case will appear from the judgment.

Mr. Sarat Chandra Bose and Babu Nirode Bandhu Roy for the Appellant.

Babu Jyotish Chandra Sarkar for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff was a candidate for election as a Municipal Commissioner in one of the wards of the Assansole Municipality. The election was held on the 4th November 1922. The largest number of votes was secured by Mr. Haridas Goswami, the *pro formâ* Defendant No. 2, next, in order, was the Plaintiff, then the Defendant No. 1 and last, in order, was another gentleman. There were two vacancies and Mr. Goswami and the Defendant No. 1 were declared duly elected. The Plaintiff then instituted this suit for a declaration that the election of the Defendant No. 1 was not legal but void and that he, the Plaintiff, is a duly elected Municipal Commissioner. The suit was decreed by the trial Court and that decree has been affirmed on an appeal preferred by the Defendant No. 1. The Defendant No. 1 has preferred this appeal.

The first ground urged on behalf of the Appellant is that the Courts below have erred in holding that his election was not valid. The Courts below held that the election of the Appellant was void as his name did not appear on the voters' list. It is urged that the Appellant possesses the requisite qualifications and that the omission of his name in the voters' list cannot deprive him of his status to vote or stand as a candidate, and is a matter which is purely one of form and not of substance. For this argument reliance

(1) 1, L. R. 22 Cal. 717 (1895).

(2) [1878] 3 O. P. D. 510.

(3) [1874] 9 O. P. 784.

(4) 27 O. W. N., 312 (1923).

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has been placed upon the decision, *In the matter of W. Corkhill* (1). That was a case under the Calcutta Municipal Consolidation Act (II, B. C., of 1888) and the rules issued by the Local Government under sec. 19 of the Act. In that case the Court construed the different sections of the Act dealing with matters relating to election and found that as regards persons qualified to vote there was nothing specific in the Act which prevented or disentitled a person who was qualified to vote under sec. 8 from exercising his right in the event of his name not appearing in the revised list of voters, that the only prohibition of the nature which existed was that to be found in the rules issued by the Local Government under sec. 19, but at the same time there was no similar prohibition to be found in the rules which would disentitle or disqualify a person qualified to vote under sec. 8 from exercising his right of either becoming a candidate or proposing or approving the candidature of some other person. The wording of the sections of Act II (B. C. of 1888) or the rules referred to above are not the same as those of the relevant sections of the Bengal Municipal Act, as it stands at present, or the Bengal Municipal Election Rules of 1896 under which the election in the present case was held. Sec. 15 of the Act imposes upon the Local Government the duty of laying down rules not inconsistent with the provisions of the Act for the conduct of elections and relating to the qualifications required to entitle any person to vote at an election and embodies in it a proviso specifying the condition which would entitle a person to vote at the election. R. 2, while laying down the qualifications of voters, repeals and enlarges the provisions of sec. 15 and makes it a condition of eligibility

(1) I. L. R. 22 Cal. 717 (1896).

to vote that the person has been duly registered as provided in rr. 4 to 12. R. 11 lays down that the register prepared and amended in conformity with the earlier rules shall be deemed to be the final register of voters entitled to vote whether at a general election or at any bye-election. R. 13 in laying down the qualifications of candidates says that any person qualified to vote under the rules and not disqualified under sec. 57 of the Act shall be qualified to be elected as a Commissioner. It is noticeable that r. 13 says: "Any person qualified to vote under these rules," while rr. 11 and 12 say "persons entered in the final register are entitled to vote." From this a plausible argument has been advanced that a person who is qualified to vote, that is to say, possesses the requisite qualification of a voter, is qualified to be elected a Commissioner, although his name not being in the register, he may not be entitled to vote. This argument, however, overlooks the provision which is to be found in sec. 15 itself and which runs in these words: "No person who is not entitled to vote at the election of the Commissioners of a Municipality shall be deemed qualified for election to be a Commissioner of such Municipality." The only possible view, if the Act and the rules are read together, is that unless the name of the candidate is in the list, he is not entitled to vote for election nor qualified to be elected. It is said that this interpretation will result in an anomaly, as under r. 14 the nomination has to be sent in not less than 21 days before the election, and the final register is not prepared until much later, and therefore it would not be possible at the time of sending in the nomination to know who would or would not be entitled to vote or stand at the election. R. 13, however, speaks only of the quali-

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ification required at the time of election and not at the date of the nomination. Rules which are of similar import were considered in the case of *Budge v. Andrews* (2), where it was held that a candidate's name must be on the rolls at the time of the election but it is not necessary that it should be on the rolls at the time of nomination. In an interesting judgment in the case of *Stowe v. Jolliffe* (3), Lord Coleridge reviewed the history of the establishment of registers of voters by the Reforms Act, in connection with voting under the Ballot Act of 1872, under sec. 7 of which the entry of the name of a voter on the register was a condition precedent to the exercise of a franchise by him, and observed that the register was established by the Reforms Act expressly for the purpose of obviating long and expensive scrutinies. Dealing with a case of election of the head priest of a temple under a scheme framed by the Court, this Court had occasion to refer to the Bengal Municipal Act and the election rules under that Act in the case of *Raghunath Sarma v. Jiban Chandra Sarma* (4) and the following observations appear in the judgment: "A similar provision (meaning similar to that contained in sec. 7 of the Ballot Act of 1872) will be found in the rules framed on the 21st November 1896 under the Bengal Municipal Act. These rules are so framed as to make no person eligible to vote unless he has been previously duly registered in accordance with the rules prescribed for the maintenance of register of voters." This is the view that we take of the rules and we are accordingly of opinion that the Appellant's first contention cannot succeed.

The next contention of the Appellant is to the effect that the Plaintiff was not entitled to a declaration that he was a duly elected candidate. That a suit for a declaration that the election of the Defendant was void is maintainable under sec. 42 of the Specific Relief Act cannot be disputed. R. 29 which says that all disputes arising under the rules shall be decided by the Magistrate and his decision shall be final and r. 23 which says that the presiding officer shall then and there declare such candidates as have the largest number of votes to be duly elected and which authorizes the presiding officer to adjourn the proceedings in the case of a dispute which he is unable to decide and to report to the Magistrate and makes the decision of the Magistrate on the dispute final, cannot be taken to oust the jurisdiction of the Civil Court in view of the proviso to sec. 15 of the Bengal Municipal Act. That proviso runs in these words: "Provided that nothing contained in this section nor in any of the rules made under the authority of this Act shall be deemed to affect the jurisdiction of the Civil Courts." In this suit no consequential relief but only declarations have been asked for and the question is what are the declarations which the Plaintiff is entitled to obtain. The Plaintiff asks for two declarations, *viz.*, that the election of the Defendant No. 1 was illegal and void, and that he himself was the duly elected Commissioner. Under sec. 42 of the Specific Relief Act, the Court may make a declaration that the Plaintiff is entitled to a legal character or to a right as to some property, and the other declarations that may be incidentally made are merely ancillary to the declaration sanctioned by the section which limits it to specific legal character or right to property [*Ramdas v. Secre-*

(2) [1878] 3 C. P. D. 510.

(3) [1874] 9 C. P. 784.

(4) 27 C. W. N. 312 (1922).

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tary of State (5) and *Kunhiamma v. Kunhumi* (6)]. There is some authority for the proposition that the Plaintiff in a suit under sec. 42 of the Specific Relief Act may obtain a declaration that he was duly elected [*Sabhapat Singh v. Abdul Gaffur* (7)]. That was a suit instituted by a person who had secured the largest number of votes and whose election was set aside by the Magistrate on the ground that he was not a person qualified to stand as a candidate. He instituted the suit for a declaration that he was a person qualified to vote and stand as a candidate and for a declaration that he was duly elected. The learned Judges held that the words "legal character" in sec. 42 of the Specific Relief Act are wide enough to include the right of franchise and also a right of being elected as Municipal Commissioner. So far as this declaration is concerned, it clearly comes under sec. 42 of the Act. As regards the declaration that the Plaintiff was duly elected the learned Judges proceeded to consider the merits found that there was a grave irregularity and refused to grant the declaration being of opinion that they ought not to do anything to validate an election which was open to so grave an objection. This certainly suggests that, in their opinion, such a declaration could be given in the suit. The matter, however, does not appear to have been contested or argued and in the result the declaration was not granted. The right to declare a candidate as duly elected being entirely in the presiding officer or the Magistrate, whether the Civil Court in a suit under sec. 42 of the Specific Relief Act and which is not of the character contemplated by sec. 45 of the Act, is entitled to make such a

declaration is a matter which is open to doubt. The authority of the decision in the case of *Sabhapat Singh v. Abdul Gaffur* (7) has been doubted by the Madras High Court in the case of *Nataraja Mudaliar v. The Municipal Council of Mayavaram* (8) and the observations of the learned Judges as to the second declaration have been held to be in the nature of *obiter dicta*. Assuming, however, that in *Sabhapat Singh's* case (7) such a declaration might legally be made as the Plaintiff has secured the largest number of votes and would have been duly elected but for the Magistrate's order holding that he was disqualified to stand as a candidate, I am clearly of opinion that the Plaintiff in the present suit is not entitled to a declaration to that effect. He has succeeded in showing that the election was void, and the necessary consequence of his success in this respect is that he cannot get any benefit out of it. A person who was not entitled to stand as a candidate was allowed to have votes recorded in his favour and though the Plaintiff obtained the next smaller number of votes, it is impossible to foresee what the result of the poll would have been if the Defendant No. 1 was not allowed to stand. This declaration therefore the Plaintiff was not entitled to obtain in the present suit but only a declaration that the election was void as the Defendant No. 1 was not qualified to stand as a candidate and a declaration that the Plaintiff was entitled to participate in the election after the exclusion of the Defendant No. 1 as his rival candidate. The decree passed by the Munsif which has been upheld by the Subordinate Judge should accordingly be altered in the manner indicated above.

(5) 17 O. L. J. 75 (1912).

(6) I. L. R. 16 Mad. 140 (1892).

(7) I. L. R. 24 Cal. 107 (1897).

(7) I. L. R. 24 Cal. 107 (1897).

(8) I. L. R. 36 Mad. 120 (1911).

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The appeal succeeds to the extent indicated above, but in the circumstances of the case each party should bear his own costs in this Court.

H. C.

[CRIMINAL APPELLATE JURISDICTION.]

APP. NO. 184 OF 1924.

NEWBOULD, J.	}	BISHNUPADA DEB,
B. B. GHOSE, J.		Accused, Appellant,
1924,		v.
28, August.		THE KING-EMPEROR.

Criminal Procedure Code (Act V of 1898), sec. 370—Conviction by a Presidency Magistrate—Omission to record all the particulars required by section, whether an illegality or irregularity when such omission is not of real importance—Reference in recording reasons on re-trial to those recorded on the first occasion, propriety of.

A Presidency Magistrate has not to write a judgment in accordance with the provisions of sec. 367, Cr. P. C. All that he is required to do is to record certain particulars laid down in sec. 370 and in case of conviction and sentence of imprisonment or fine exceeding two hundred rupees, a brief statement of the reasons for the conviction.

Where the Magistrate did not strictly comply with sec. 370 and did not record the various particulars required to be recorded in the usual way on the printed form provided for the purpose, but the omissions were of no real importance:

Held—That the omission to comply with the provisions of sec. 370 was no more than an irregularity and was not an illegality which vitiated the trial.

Where the Magistrate in recording reasons under sec. 370 in a re-trial held under orders of the High Court referred to those recorded by him when the case had been tried in the first instance:

Held—That since the Magistrate is

only required to record brief reasons for the conviction there was no serious objection to his referring to a document on the record instead of taking the trouble to re-write those portions of it which should have been included in his final order.

This was an appeal against a conviction and sentence by one of the Honorary Presidency Magistrates of Calcutta.

The facts of the case will appear from the judgment.

Babus Satindra Nath Mukherjee and Jahnabi Charan Das Gupta for the Appellant.

Mr. Khundkar for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Appellant Bishnupada Deb has been convicted on four charges. The first is a charge of having conspired with the other persons to cheat one Horey Kristo Routh. The other three charges relate to three specific acts of cheating committed in pursuance of this conspiracy. On the charge of conspiracy the Appellant has been sentenced to one year's rigorous imprisonment and to pay a fine of rupees 1,000 or in default rigorous imprisonment for six months. On the other three charges he has been sentenced to one year's rigorous imprisonment on each charge, all the substantive sentences of imprisonment to run concurrently.

This case was instituted by a complaint which was laid as long ago as the 24th October 1921. At the first trial before the Honorary Presidency Magistrate there was a serious error in the framing of the charges which necessitated the conviction and sentences of the Appellant and his co-accused being set aside by this Court and a re-trial on a properly framed charge ordered. At this re-trial the two

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co-accused of the Appellant pleaded guilty at a late stage. The hearing of this appeal has lasted more than two days. Having regard to the length of time that has been occupied by the trial we are anxious not to delay the final disposal of this case. To-day being the last day of the term in order that we may sign the judgment before the Court closes, it is impossible for us to deliver such a lengthy judgment as we should have done under other circumstances. But though we shall deal with the case somewhat briefly we have carefully considered the able defence set up on behalf of the Appellant by the learned Vakils who appeared on his behalf, and the shortness of our judgment does not mean that these arguments have not received careful consideration. Our task is rendered easier by the great care with which the learned Honorary Magistrate has tried the case and we find ourselves in substantial agreement with all his findings.

The main facts of the case are as follows:—We are satisfied on the evidence that the firm of William Anderson and Co., of which the Appellant and one of his co-accused Mears and one Dhirendra who turned King's evidence were partners, was a firm which did very little real business but was making money by the unlawful method of ordering goods on credit and selling them at a lower price than the cost price but at a higher price than any sum actually paid in part payment by the firm. The complainant Routh was induced to believe that the firm was a genuine firm doing a large business and his first transaction with them was to agree to supply them with a number of barrels of cement. On entering into this contract he was told that Dhirendra, the informer, would supply part of the cement to the firm ~~on~~ his behalf and that Haren-

dra Ghose, one of the co-accused, would supply the remainder. The understanding was that he should pay cash to these two persons and recover the amount payable by the firm at a later date. In pursuance of this agreement he paid several thousand rupees to Dhirendra and Harendra but never received any money from the firm. When he pressed for payment he was induced to take up the post of *banian* of the firm on the understanding that he must pay rupees 50 thousand into the firm. To gain this agency he paid a sum of nearly rupees 20 thousand. Subsequently he was induced to substitute the arrangement that he should be a *banian* for partnership arrangement and the deed of partnership was actually drawn up. Then finding that he was getting nothing from the firm he complained to the Deputy Commissioner of Police.

We have not the least doubt that the story told by Routh is substantially true nor have we any doubt that the Appellant was a member of the conspiracy to cheat Routh and that he actually took part in the separate incidents of cheating which are the subject of the other three charges.

The main points which were argued on behalf of the Appellant were as follows:—It was first contended that the judgment of the lower Court was not in accordance with law. Sec. 370, Cr. P. C., however, does not require that a Presidency Magistrate should write a judgment. All it requires is that instead of recording a judgment he should record certain particulars, and in case of conviction and sentence of imprisonment or fine exceeding rupees 200, a brief statement of the reasons for the conviction. It is to be regretted that the learned Presidency Magistrate did not strictly comply with sec. 370.

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The various particulars required to be recorded have not been recorded in the usual way on the printed form provided for the purpose. We find on the record that all the important items of these particulars have been recorded and the omissions are of no real importance. So far as there had been any omission to comply with the provisions of this section it was no more than an irregularity and was not an illegality which vitiated the trial. Objection has been taken more particularly to his reference in his so-called second judgment to his previous judgment. There would be considerable force in this argument had it been necessary that he should write a judgment in accordance with the provisions of sec. 367, Cr. P. C. But since he is only required to record brief reasons for the conviction we see no serious objection to his referring to a document on the record instead of taking the trouble to re-write those portions of it which should have been included in his final order. We have satisfied ourselves that there is no force in the contention that in deciding the case finally the learned Magistrate was influenced by the evidence of the witnesses who could not be recalled for cross-examination after the amended charge.

The case depends largely on the weight to be attached to the evidence of the complainant Routh. We have carefully considered the case from this point of view and the bearing of the other evidence, oral and documentary on his veracity. There can be no doubt that Routh was a man of no great intelligence and was more easily deceived because he was desirous of making money easily. But the probabilities are in favour of his story and against the Appellant. On the case for the Appellants their firm was one with a very small capital. According to them the

original capital was rupees 4,000. This we may say we do not believe to be true. But even accepting it as a fact it is impossible to believe that Routh would have agreed to put rupees 50 thousand into the firm and have actually paid nearly rupees 20 thousand if he had known the true nature of the firm. In order that he should have done this he must have been deceived into believing that the firm was doing a far larger business than the documentary and other evidence show. If he was deceived in believing this, there seems little reason for doubting that he was deceived in the manner he has described. That the present Appellant was taking a leading part in the conspiracy and in the actual deception of Routh is also clear from the evidence. As one out of other incidents we may refer to his visit to Bhadrak to induce the complainant to provide further money. No reasonable examination other than that suggested by the prosecution has been given why he should have gone to this place.

As regards the individual charges it is urged that it is not proved that there was any conspiracy prior to the 15th July when the complainant was first brought into negotiations with the Appellant's firm. The date of the conspiracy is given in the first charge as between the 4th July 1921 and the 3rd day of September 1921. It was not necessary for the prosecution in support of this charge to give evidence that there was conspiracy during the whole of that period. It is sufficient that they were able to establish that the Appellant and his co-conspirators were parties to a criminal conspiracy at some period between these two dates.

As regards the other three charges it is urged that the evidence is insufficient to prove that the Appellant himself was actually concerned with these three tran-

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sactions. But once his partnership in the conspiracy is established there is very little more to be proved to establish his connection with these definite acts and there is in our opinion sufficient evidence to establish that he was an active party in all these three acts of cheating.

We are asked to reduce the sentence passed on the Appellant mainly on the ground of the long period of his anxiety owing to the protraction of these proceedings. We find from the order-sheet that the Appellant himself was to some extent to blame for the delay. On several occasions the case had to be adjourned owing to his failure to appear. The matter too has already been taken into consideration by the trying Magistrate who had passed a sentence of two years' rigorous imprisonment at the original trial. We can see no ground for further reduction of sentence.

This judgment does not deal fully with all the points that have been argued or all the points that have been considered, but we have, as already stated, given the most careful consideration to the evidence on the record and the arguments of the learned Vakils for the Appellant who did the best that could be done for their clients in a most difficult case.

The appeal is dismissed. The Appellant must surrender to his bail and undergo the unexpired portion of his sentence.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 37 of 1926.

C. C. GHOSH, J. DUVAL, J. 1926, 9, March.	}	DWARIKA NATH MISRA, Accused, Petitioner, v. THE KING-EMPEROR, Opposite Party.
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*Opium Act (V, B. C., of 1909), rule under—
Possessing more than one tola of guli: (opium mix-*

ture for smoking)—Opium diluted in water, if smoking mixture.

Under the rules under the Excise Act a person cannot be convicted of having an excess of a mixture of opium for smoking when the quantity of smoking mixture found in his possession is not beyond that allowed by the rules but over and above that quantity he has a quantity of opium diluted in water. Such solution cannot be held to be an admixture for the purpose of smoking.

This was a Rule against an order of conviction and the sentence passed on the Petitioner under sec. 9 (c) of the Opium Act I of 1878, by the Deputy Magistrate of Midnapore, dated the 4th November 1925, which order was affirmed on appeal by the Sessions Judge of Midnapore.

The facts of the case will appear from the judgment.

Babus Probodh Chandra Chatterji and Arun Ch. Bose for the Petitioner.

Mr. Khundkar for the Crown.

THE JUDGMENT OF THE COURT was as follows:—

The accused has been convicted and sentenced on appeal by the Sessions Judge to a fine of one rupee and the few days' imprisonment already suffered before the hearing of the appeal on the ground that he had an excess of a mixture of opium for smoking not allowed by the rules in his house at the time of its search.

The facts appear to be that at the time of the search there were found 53½ grains of opium, 52 grains of *guli*, i.e., an admixture of opium and guava leaves for smoking and 1½ tolas of opium and water in a bottle. Under the rules a person is allowed to possess three tolas of ordinary opium and one tola of a smoking mixture. The Judge found that a technical offence

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has been committed as the so-called liquid opium plus the *guli* amounts to more than one tola and that these two are admixtures for smoking. As a matter of fact he had only 52 grains of *guli* in a form fit for smoking, and the only point is whether the mixture of opium and water to the extent of $1\frac{1}{2}$ tolas kept in a bottle will amount to admixture of opium. We can find nothing in support of such contention, and in this connection we have been referred to the case of *Upendra Nath Biswas v. Emperor* (1), where the Judges remark in reference to denatured spirit: "We are not prepared to hold that pure dilution of denatured spirit with water is a process for the manufacture of an excisable article." In the present case we have a dilution of opium in water, and it is admitted that if this is not an admixture, the accused cannot be convicted. We do not think that we can hold that opium diluted in water can be held to be an admixture for the purpose of smoking. It is obvious that much more preparations would have to be made before a mixture mainly consisting of water could be smoked.

In this view of the matter we make the Rule absolute and set aside the conviction and sentence. The fine, if paid, will be refunded.

S. C. M.

(1) I. L. R. 41 Cal. 694: s. c. 18 C. W. N. 486 (1913).

[CRIMINAL REVISIONAL JURISDICTION.]

Full Bench Reference

No. 1 of 1926

IN

MIS. CASE No. 94 OF 1926.

CHATTERJEE, J.

GREAVES, J.

RANKIN, J.

PANTON, J.

MUKERJI, J.

1926,

11, August.

MUHAMMAD SULEMAN
and ors., Petitioners,

v.

THE KING-EMPEROR,
Opposite Party.

Calcutta Police Act (IV, B. C., of 1866), sec. 76—Deputy Commissioner's power to detain in police custody person arrested without warrant—Such person, if can be detained for longer time than necessary, to bring him before a Presidency Magistrate—Such detention, if can be continued for furtherance or completion of police investigation.

A Deputy Commissioner of Police in Calcutta by virtue of his powers as a Justice of the Peace or otherwise cannot lawfully order the detention in police custody of a person arrested without warrant for any longer time than is necessary to enable such person to be brought before a Presidency Magistrate.

Such officer cannot lawfully order that the detention of any such person as aforesaid at a police-station or in police custody shall continue until the police investigation shall have been (a) further advanced or (b) completed, notwithstanding that the time within which such person might have been brought before a Presidency Magistrate has elapsed.

This was a Rule issued on the Commissioner of Police, Calcutta, on the application of the Petitioners who were arrested and detained in police custody pending an investigation. The Rule came on for hearing before Rankin and Chotzner, J.J., who made a Reference to the Full Bench.

The ORDER OF REFERENCE was as follows:—

RANKIN, J.—This is a Rule issued on

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the 29th June 1926, at the instance of fourteen Petitioners, calling upon the Commissioner of Police to show cause why directions of the nature of a *habeas corpus* should not be given under sec. 491 of the Criminal Procedure Code.

It appears that on the 21th June last one Butto Kristo Das was stabbed in Colutolla Street; that on the 26th June nineteen persons including the Petitioners were arrested under sec. 54 of the Criminal Procedure Code on suspicion of being concerned in the assault; that they were detained in custody at the Jorabagan lock-up; that on the 28th June application was made by Counsel on behalf of the Petitioners for bail to Mr. Hunt, a Deputy Commissioner of Police; that this application for bail was refused; that they were sent back to the lock-up without being brought before any Presidency Magistrate; and that they were still there on the afternoon of the 2nd July when this Rule was heard. The offence in respect of which the arrests were made is stated to be laid under sec. 326 of the Indian Penal Code and is a non-bailable offence.

It is contended on behalf of the Petitioners that their detention in police custody has been wholly illegal; that as persons taken into custody by a Police officer without a warrant their rights in this respect are defined by sec. 76 of the Calcutta Police Act (Bengal Act IV of 1866); and that there is no authority in a Deputy Commissioner of Police to detain them in police custody for any longer time than is required to bring them before a Presidency Magistrate.

On behalf of the Commissioner of Police it is argued that sec. 76 confers no right upon arrested persons to be sent before a Presidency Magistrate forthwith; that the Deputy Commissioner as a

Justice of the Peace has power under sec. 7 of the Act to postpone the time at which arrested persons shall be brought before a Presidency Magistrate; that no limit of time is prescribed by the Act to fetter his discretion; that a person arrested without a warrant can be kept by him in police custody until the Police investigation is complete, and the case is ready for hearing by a Presidency Magistrate; that in some cases Police custody of the accused is necessary for identification and other purposes; and that, while the High Court may have the right to correct abuse of this power of detention, the present case is not of this character upon the facts. Reliance is placed upon the rule-making power vested in the Commissioner of Police by sec. 9 of the Act. It is said, moreover, that the Police have acted on these principles for many years and that in one case at least a Division Bench of this Court has confirmed the practice—*Srilal Agarwalla v. Emperor* (1)—Suhrawardy and Duval, JJ.

The affidavit of Mr. Hunt in opposition to the present Rule states as follows:—

9.—“That bail was refused because the offence was a non-bailable one and because further investigation was considered necessary and because I apprehend that the Petitioners or some of them may abscond or otherwise hamper the completion of the investigation.”

10.—“That as soon as the investigation which is now proceeding has been completed, they will either be discharged or produced before a Court.”

It is only right to say that the view taken by the Deputy Commissioner seems to be in entire accordance with the views expressed in the case of *Srilal Agarwalla v. Emperor* (1)—“I am not prepared to

(1) Cr. Mis. Case No. 51 of 1926, decided 1st April 1926. Unreported.

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hold that under the law it is the duty of the Deputy Commissioner, a Justice of the Peace, to place an offender forthwith before a Magistrate, for in the first instance there is no period mentioned in the Calcutta Police Act within which this must be done, and in the second place as a Justice of the Peace the Deputy Commissioner is entitled to take such steps as may be necessary to complete an investigation before placing the matter before a Magistrate" (per Suhrawardy, J.).

It has been explained to us that the practice in Calcutta is for accused persons, detained as these Petitioners have been, to be brought before the Deputy Commissioner every morning who discharges them, sends them for trial or sends them back to the lock-up, according to the state of the investigation reports. A not too favourable specimen of such proceedings is described in the report of a case tried by Mukerji, J., at the Sessions in 1924 [*Panchkari Dutt's* case (2)] where the learned Judge had to consider the admissibility and value of a confession made after a fortnight in Police custody. He doubted the legality of the proceedings but did not require to decide the point. He referred to a previous decision of Walmsley, J., where the detention was apparently held to have been improper in the circumstances of that case, but no decision was given as to the legality of any such detention.

In my judgment the question before us must be determined solely by a construction of the Act of 1866. That Act can be construed on its own language, and no real help is obtained by comparison of the language of any other Act. But it may be worth while as a precaution against false inferences and anachronism

to point out that the language of every section with which we are here concerned is at least as old as Act XIII of 1856 which applied to the three Presidency Towns and to other places. Many sections of this Act are simply borrowed from one or other of the several Police Acts passed in England in 1839. It would seem that sec. 76 and the following sections of the Calcutta Act of 1866 with which we are chiefly concerned is an adaptation of sec. 69, and the following sections of the Metropolitan Police Act of 1803 (2 and 3 Vict., cap. 47). Nothing, however, is gained by referring from the one to the other. It may be noted that different English Acts have dealt with this matter in different ways—Town Police Clauses Act, 1847, sec. 15 (10 and 11 Vic., cap. 89), Summary Jurisdiction Act, 1879, sec. 38 (42 and 43 Vic., cap. 49).

It is not in doubt that the right to be taken out of Police custody by being brought before a Magistrate is a right given in the interest of the accused. It is given for more reasons than one. It prevents arrest and detention with a view to extract confessions, or as a means of compelling people to give information. It prevents police-stations being used as though they were prisons—a purpose for which they are unsuitable. It affords an early recourse to a Judicial Officer independent of the Police on all questions of bail or discharge. These matters are not in doubt. The question is as to terms in which the right is given and its exact extent.

Now a first principle of the Calcutta Police Act of 1866 as of its predecessor (Act XIII of 1856) is that the Commissioner or his Deputy is not in ordinary times a Magistrate of Police and by sec. 3 the word "Magistrate" means a "Magistrate of Police"—in the more

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modern terms provided by the Criminal Procedure Code a "Presidency Magistrate." This is the meaning in sec. 76 and sec. 78.

Sec. 76 is as follows:—Every person taken into . . . custody without a warrant by a Police officer shall be taken to the police-station in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognizances with or without sureties for his appearance before a Magistrate.

His detention at the police-station is to be until he can be brought before a Presidency Magistrate or until he shall enter into recognizances for his appearance before a Presidency Magistrate. Sec. 78 tells us that every recognizance shall be conditioned for the appearance of the person thereby bound before the Presidency Magistrate at his next sitting. Neither section involves the need for any order of a Justice of the Peace. In the case, therefore, of every offence in respect of which bail is accepted, it seems plain that the accused can get before the Presidency Magistrate at his next sitting. The investigation may be complete or incomplete. The accused may or may not be wanted to point out a place, to identify property or to have his foot-prints taken.

If he is not allowed bail or cannot find the bail, what then? Sec. 76 appears to say that he is to be detained at the police-station until he can be brought before a Presidency Magistrate. It puts this duty on the officer in charge of the station, whatever his rank may be. It is contended in defence of the present practice that this is not meant literally; that it cannot point to the earliest moment at which it is physically possible for the accused to be produced in Court; that it is an elastic expression which takes some

account of convenience; that this lets in the powers of a Deputy Commissioner *qua* Justice of the Peace; that he has a discretion as to the convenient time; that no limit in hours or days has been put to this discretion; that so long at all events as he does not go too far he can insist on completing his investigation first specially if he wants the presence or the assistance of the accused.

I do not know whether this statement succeeds in representing fairly the case made in opposition to this Rule. I have tried to state the argument in its most reasonable form. But in my judgment it is a bad argument, however it is put. What the section requires is that the man shall be brought before a Presidency Magistrate as soon as his production is practicable. It is not a physical limit in the sense that he is to be taken by the shortest route and the fastest vehicle, by day or by night, without stopping to record his name and address, whether or not he is ill or has become unconscious. The reference is to the ordinary daily routine of a police-station on the one hand and of a Magistrate's Court on the other. It requires something to be done as soon as a reasonable man minded to make no delay can manage in the ordinary course of his daily duty. There is no room here for an unlimited discretion to postpone; for the doctrine that the investigation of the grounds for suspicion must be completed; for delay on the chance that further evidence may be forthcoming; for time to test or to consider the evidence that has led to the arrest. The simple English notions of the thirties or the fifties may be out of date, but they are not obscure: and if the legislature has not changed or supplemented them they must be enforced. If the man enlarged on bail is to be brought before a Presidency

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Magistrate at his next sitting, it is difficult to suppose that the man who fails to find the bail demanded is to be exposed to a greater delay. Still more difficult is it to suppose that the man who is given no chance to find bail has lesser rights in this respect. It must needs be that a man's right to be enlarged on bail should depend upon the gravity of the charge. This right has to be decided before guilt or innocence can be determined. But his right to be before a Magistrate independent of the police who are accusing him can hardly depend upon the gravity of the charge which they bring forward, or upon their need of further evidence. If there is anything in the charge, a remand can presumably be had on some terms not unduly hard on the accused. Sec. 344 of the Criminal Procedure Code expressly provides power to postpone the commencement of any enquiry or trial. No one supposes that at this stage the prosecution is required to frame a charge in its final form.

Whence then comes the notion that though the police have power to arrest without warrant upon suspicion no one shall be brought before a Presidency Magistrate until the police investigation is complete? It does not come from the Calcutta Police Act of 1866; and in my judgment, it is wholly inconsistent with the terms and the principles of this enactment. I do not profess to know where it comes from unless it has been imported from another system meant for widely different conditions. The exact language of sec. 76 was on the Indian statute book in 1856 before the first Criminal Procedure-Code was passed (*cf.* sec. 90 of Act XIII of 1856). The bad drafting of what is now sec. 167 of the Criminal Procedure Code may seem to give some support to the theory that the police investigation

should be complete before the accused is brought before a Magistrate competent to hold the trial or inquiry, but the decisions under that section should disabuse anyone of that idea. The mere fact that the police investigations are not complete is no reason whatever for detaining an accused in police custody under the Code [see *Amir Khan's case* (3)], and if it were a reason the reason has no possible application under the Calcutta Police Act.

There is, I think, a similar confusion in drawing inferences on the ground that "sec. 61 of the Criminal Procedure Code does not apply to the Calcutta Police" as it stands, the last thing one would expect is that it should apply, it seems so unsuited to Calcutta. But in interpreting the Act of 1866 which does apply, it is certainly noticeable that the Act adds in sec. 76 no hard-and-fast limit stated in terms of hours or days. In this it follows the Metropolitan Police Act, 1839, of which secs. 69 to 70 have been used as a model for the Calcutta Act. Curiously enough the Calcutta Suburban Police Act (Bengal Act II of 1866) of the same year as the Act now in question retains in sec. 45 the same words as occur in sec. 76 of the Calcutta Police Act and adds by way of an improvement "any person so detained and not entering into recognisances with or without such sureties shall be carried before the Magistrate within twenty-four hours from the time of his being taken into custody." Let it be assumed that the omission to insert a fixed limit of time into the Calcutta Act was deliberate. There may be many reasons for that.

In the first place, the suburbs of Calcutta had been under the new Code, and it may have seemed right to take away no privileges. In the case of Act IV, it may

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have been thought that what was considered sufficient for London in 1839 had worked well enough in Calcutta since 1856. Again, one would require, for this kind of speculation to be useful, a very detailed knowledge as to the class of officer who in 1866 was in charge of outlying or suburban police stations, the class of prisoner they were likely to have and the kind of accommodation for prisoners that they provided.

In a city like Calcutta occasions may arise when arrests are numerous, when Magistrates are busy. The man arrested on a Saturday evening may have to take his turn with others on the Monday. Persons arrested in the streets of a busy city may quite frequently be incapable from wounds or illness of going before a Magistrate. Twenty-four hours may be too little in some cases, while in others it may be unnecessarily great. One would require to know a good deal about the conditions of 1866 in the city of Calcutta to base any argument on the fact—if it be a fact—that a hard-and-fast limit of time was thought unnecessary or undesirable. The officer-in-charge of a police-station in the city itself is always under the eye of superior authority and may have been as a rule the most senior and experienced of officials in 1866. All this, however, is speculation. It is not construction of the statute. In what way does the absence of a fixed time limit show that the words employed in sec. 76 were not intended as a limit, or that there exists any power to extend the common-sense limit which they impose? The concluding words of sec. 74 contain exactly the same turn of phrase with exactly the same intention. When the Indian Legislature in 1856 first enacted the words which in 1866 were repeated by the present Act, it was legislating for several

different places—doubtless with very different conditions.

Now if this construction of sec. 76 of the Calcutta Police Act be correct, the case in opposition to this rule is, in my opinion, at an end. It cannot be contended that rules made under sec. 9 can abrogate or qualify the right of an accused under sec. 76. Nor can that be done by virtue of the powers of any Justice of the Peace. It was open to the Indian Legislature in 1866 to borrow the language of sec. 15 of the Town Police Clauses Act, 1847 (10 and 11 Vic., c. 89) if it had wanted to. Still less can it be done by virtue of powers restricted specially and of set purpose as regards the detention of offenders to detention “in order to their being brought before a Magistrate of Police.” The Commissioner of Police may by rules impose upon his Deputies duties of investigation into offences, but neither he nor they can override or qualify the statutory right of an arrested man to go before a Magistrate of Police. If in some cases that right stands in the way of convenience or even of efficiency as regards the making of investigations, this is a consideration for the legislature. It can have no weight with the Court.

Learned Counsel for the Petitioners contended that even if the Deputy Commissioner had power to make remands to police custody, his power in this case had been abused. His main point was that the unfortunate victim of the assault having stated to the police that on the 24th June, “a Muhammadan, aged about 25 years, of medium complexion and thin build, came out of the hotel with a big knife in hand and stabbed him on his right side,” it was unreasonable for the police on the 26th to arrest the proprietor and persons then inside the hotel to the number of nineteen. He suggested that

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in these circumstances this was a case of arrest to get information and that the powers given to the Commissioner by sec. 78A of the Act of 1866 were the proper powers to use. The facts, however, do not sufficiently appear upon the affidavits, and as the Deputy Commissioner was justified in supposing that he was entitled to arrest and to complete his investigation on the principles laid down in *Srilal Agarwalla's* case (1), I will confine myself to the remark that on any view of the facts the case is an excellent example of what, in my opinion, the legislature of the fifties and the sixties intended to prevent.

We are informed this afternoon by the learned Counsel for the Petitioners that six of the Petitioners have since the second instant been released from police custody upon recognizance of some sort, and that the remaining eight of the fourteen Petitioners before us are still detained in police custody—a custody which, in my view, is wholly illegal. In dealing with the present application, we are under the unfortunate necessity of differing upon a point of law from the decision in *Srilal Agarwalla's* case (1) to which I have referred, and the correct practice according to the rules of this Court in such a case is that the point or points of law should be stated for the decision of a Full Bench of this Court, and that the case should go to the Full Bench to be dealt with. We have, therefore, the duty of holding our hands and declining to dispose finally of this Rule. We are neither able to make the Rule absolute, nor to discharge it. What we propose to do is to state the points of law upon which we differ from the decision in the case of *Srilal Agarwalla v. The Emperor* (1) for the decision of the Full Bench and to refrain from

making any final order upon the Rule. But as we have before us eight Petitioners who, in our opinion, are illegally detained by virtue of powers alleged to exist in a Justice of the Peace, we think it right to make an *ad interim* order, and the order we make is that each one of the persons in custody now—namely, the eight Petitioners, Muhammad Suleman, Salamat, Yar Ali, Jamir, Kamaruddin, Bangal, Wali Muhammad and Abdul Aziz—be forthwith enlarged upon their own recognizances of five hundred rupees each for their appearance before the Full Bench of this Court at the time when that Bench sits to dispose of the rule. The points of law which we refer to the Full Bench are as follows:—

I. Whether upon a true construction of the Calcutta Police Act (Bengal Act IV of 1866) a Deputy Commissioner of Police, by virtue of his powers as a Justice of the Peace or otherwise, can lawfully order the detention in police custody of a person arrested without a warrant, for any longer time than is necessary to enable such person to be brought before a Presidency Magistrate?

II. Whether a Deputy Commissioner of Police can lawfully order that the detention of any such person as aforesaid at a police-station or in police custody shall continue until the police investigation shall have been (a) further advanced or (b) completed, notwithstanding that the time within which such person might have been brought before a Presidency Magistrate has elapsed.

CHOTZNER, J.—I have had the advantage of reading my learned brother's judgment, and fully agree with his decision and the reasons he has given for it. But as the matter at issue involves a question of great public importance, I think that

(1) Cr. Mis. Case No. 51 of 1926, decided 1st April 1926. Unreported.

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I may usefully add one or two observations.

The point for determination in this Rule is the construction to be placed on sec. 76 of the Calcutta Police Act (Bengal Act IV of 1866). This section says :— " Every person taken into custody without a warrant by a police officer shall be taken to the police station in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognizances, with or without sureties, for his appearance before a Magistrate."

The controversy here is as to the meaning of the words " may be detained until he can be brought before a Magistrate." This in the process of time has apparently been interpreted by the Calcutta Police as giving a Deputy Commissioner power to detain in custody a man arrested without a warrant, subject only to his being produced before him every day with a report on his case, and the further power not to bring the man before the Magistrate until the investigation has been completed. The idea underlying this procedure seems to be that a Deputy Commissioner is a Justice of the Peace, and consequently when a man arrested without a warrant is brought before him, that is tantamount to his being brought before a Magistrate within the meaning of sec. 76, and the Deputy Commissioner can remand him to police custody *de die in diem*. That view has been accepted in this Court in *Srilal Agarwalla v. The Emperor* (1), decided by Suhrawardy and Duval, JJ. In the course of his judgment Suhrawardy, J., observed : " I am not prepared to hold that under the law it is the duty of the Deputy Commissioner, a Justice of the Peace, to place an offender

forthwith before a Magistrate, for in the first instance, there is no period mentioned in the Calcutta Police Act within which this must be done, and in the second place, as a Justice of the Peace, the Deputy Commissioner is entitled to take such steps as may be necessary to complete an investigation before placing the matter before a Magistrate."

With great respect to the learned Judges, I feel it my duty to say that I do not agree with their decision.

The proposition laid down is twofold :—

(a) That a Deputy Commissioner being a Justice of the Peace has for the purposes of this section the same powers as a Magistrate ; and

(b) that as no period has been fixed within which an offender is to be placed before a Magistrate, the Deputy Commissioner can make an order for his detention in police custody until the investigation is complete.

Both the Commissioner and the Deputy Commissioner of Police derive their powers as Justices of the Peace from sec. 7 of the Calcutta Police Act. This section says : " The Commissioner of Police shall be appointed a Justice of the Peace, but unless he is vested with the jurisdiction of a Magistrate of Police, he shall act as a justice only so far as may be necessary for the preservation of the peace, the prevention of crimes, and the detection, apprehension and detention of offenders in order to their being brought before a Magistrate of Police and, so far as may be necessary, for the performance of the duties assigned to the Commissioner by the Act. The Deputies to the Commissioner of Police may be appointed Justices of the Peace, and, if so appointed, shall act in that capacity subject to the above restriction."

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A "Magistrate of Police" is now the same as a Presidency Magistrate.

Now, reading this section as a whole, it seems to me difficult to say that a Commissioner or Deputy Commissioner of Police who is invested with the powers of a Justice of the Peace, for the particular and restricted purposes specified in the section, is also a "Magistrate of Police" or a Presidency Magistrate within the meaning of the section.

Sec. 14 (4) of the Criminal Procedure Code which deals with the appointment of "Special Magistrates" limits the investment of police officers with magisterial powers to an officer of a particular grade, i.e., one not below the grade of Assistant Superintendent of Police, and further limits the exercise of those powers to the performance of certain duties which are defined in practically the same terms as in sec. 7 of the Calcutta Police Act.

The same provisions as in sec. 76 of the Calcutta Police Act also appear in sec. 45 of the Calcutta Suburban Police Act (Bengal Act II of 1866).

The intention of the legislature, therefore, was, as I understand it, to invest certain selected officers with magisterial powers, including among others the detention of offenders, but the object of such detention was in all cases "in order to their being brought before a Magistrate" and, in my judgment, the clear implication is that the Magistrate is intended to be an officer different from the police officer who arrested or detained the offender. Were it not so, the anomaly would arise of the officer who arrested an offender being also competent to try him judicially for the offence.

With regard to the second point, to use the words of Subhawardy, J., "there is

no period mentioned in the Calcutta Police Act within which this" (i.e., bringing an offender forthwith before a Magistrate) "must be done," I would say that herein the Act differs both from sec. 45 of the Suburban Police Act and sec. 61 of the Criminal Procedure Code, both of which provide for the production of the offender before the Magistrate within 24 hours from the time of his being taken into custody. Why then was the time limit laid down in one area and not in the other? The answer I would suggest is that in 1866 local conditions differed widely in the suburbs of Calcutta and the Mofussil Districts from the city of Calcutta, and that indifferent means of communication and a paucity of Magistrates made it necessary to allow a liberal margin of time within which the offender was to be brought before the Magistrate, while in the city of Calcutta no such considerations arose. The omission, therefore, to fix a time limit does not mean that there was no time limit, but that it was unnecessary to fix it. The words "until he can be brought before a Magistrate" seem to me to indicate that the offender is to be placed before a Magistrate as soon as it is convenient. That is in accordance with the general principle that a man arrested without a warrant shall be brought across the bar of the Magistrate's Court at the earliest possible opportunity. I cannot see how by any stretch of language the words can be construed as giving a Deputy Commissioner power to detain such a person in custody without placing him before a Magistrate until the investigation is completed. To accept that position would be to jeopardise the liberty of the subject very seriously.

For these reasons I agree with the order proposed.

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On the case coming on for hearing before the Full Bench.

Mr. A. N. Sen (Counsel) and *Babu Bibhuti Bhusan Lahiri* for the Petitioners.

Mr. B. L. Mitter (Advocate-General), *Mr. Paneridge (Standing Counsel)*, *Mr. Khundkar (Deputy Legal Remembrancer)* and *Babu Satindra Nath Mukherjee* for the Crown.

The JUDGMENT OF THE COURT was as follows :—

CHATTERJEA, A. C. J.—The questions referred to the Full Bench are :—

I. Whether upon a true construction of the Calcutta Police Act (Bengal Act IV of 1866) a Deputy Commissioner of Police, by virtue of his powers as a Justice of the Peace or otherwise, can lawfully order the detention in police custody of a person arrested without warrant, for any longer time than is necessary to enable such person to be brought before a Presidency Magistrate?

II. Whether a Deputy Commissioner of Police can lawfully order that the detention of any such person as aforesaid at a police-station or in police custody shall continue until the police investigation shall have been (a) further advanced, or (b) completed, notwithstanding that the time within which such person might have been brought before a Presidency Magistrate has elapsed?

The powers of the Commissioner or Deputy Commissioner of Police as a Justice of the Peace are defined in sec. 7 of the Act, which runs as follows :—

“The Commissioner of Police shall be appointed a Justice of the Peace, but unless he is vested with the jurisdiction of a Magistrate of Police, he shall act as a justice only so far as may be necessary for the preservation of the peace, the preven-

tion of crimes and the detection, apprehension and detention of offenders in order to their being brought before a Magistrate of Police, and so far as may be necessary for the performance of the duties assigned to the Commissioner by this Act.

The Deputies of the Commissioner of Police may be appointed Justices of the Peace, and, if so appointed, shall act in that capacity subject to the above restriction.”

The power of detention of offenders is only “in order to their being brought before a Magistrate of Police,” and the learned Advocate-General stated that he did not contend that the Deputy Commissioner as a Justice of the Peace has any power of detention except for that limited purpose. So the only question we have to consider is whether a Deputy Commissioner of Police as such has the power of detention for the purposes mentioned in the Reference to the Full Bench.

The provisions of the Criminal Procedure Code do not apply to the Commissioner of Police or the police in the town of Calcutta (see sec. 1). That being so, the questions referred to must be determined with reference to the provisions of the Calcutta Police Act (Bengal Act IV of 1866). Sec. 76 of that Act provides that “every person, taken into custody without a warrant by a police officer, shall be taken to the station house, in order that such person may be detained until he can be brought before a Magistrate or until he shall enter into recognizances with or without sureties for his appearance before a Magistrate.” There is no precise time fixed within which the person arrested is to be brought before the Magistrate. But he is to be detained *until he can be brought before a Magistrate*. The question is, whether these words mean, until he can be conveniently

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produced before the Magistrate, or until there is a case which can be laid before a Magistrate, in other words, whether the period of detention is co-extensive with the period of police investigation. It is contended by the learned Advocate-General that under sec. 7 of the Act, the detention by the Justice of the Peace is to be "in order to" the offenders being brought before a Magistrate, whereas under sec. 76 the detention in the (police) station house is to be until they can be brought before a Magistrate, which means that they can be detained for police investigation. I do not think, however, that there is any such difference as is contended for. The provision that every person taken into custody without a warrant by a police officer shall be taken to the station house in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognizances, means that the person arrested is not to be detained at any place other than the station house, but that he can be detained only so long as he cannot be produced before a Magistrate. The person arresting an offender may be, and often is, an ordinary constable. He must under the sections take the offender to the station house to be detained there until the proper police officer can bring him before a Magistrate.

Sec. 69 of the Metropolis Act (2 and 3 Vict., c. 47, upon which sec. 90 of the Calcutta Police Act, XIII of 1856, and sec. 76 of Act IV of 1866 appear to have been modelled) enacted that a person arrested without warrant shall be "forthwith delivered into the custody of the constable in charge of the nearest station house in order that such person may be secured until he can be brought before a Magistrate to be dealt with according to

law." It seems that "detained" in the Calcutta Act is the same as "secured" in the English Act—in either case until he can be brought before a Magistrate.

The person arrested has a right to be produced before a Magistrate without any unnecessary delay, that is, as soon as it can reasonably be done.

In sec. 74 which deals with apprehension of offenders by private individuals, in certain cases provides that such offender may be detained until he gives his name and address and satisfies such person that the name and address so given are correct (where his name and address are unknown) or *until he can be delivered into the custody* of a police officer. Sec. 76 says, "*Until he can be brought before a Magistrate.*" The detention, therefore, is to be only until he can be made over to a police officer in the one case, or until he can be brought before a Magistrate in the other. In either case the detention is to be only for such period as may reasonably be necessary. This may be illustrated by reference to two English cases—*Morris v. Wise* (4) and *Wright v. Court* (5). In the first—it was held that a person (a private individual) justified under the statute 7 and 8 Geo. 4, c. 30 in causing the arrest of another, must send him by the direct road to the lock-up; for if he sent *extra vias* he would be a trespasser against the person so arrested. In the second [*Wright v. Court* (5)], a case of a police officer, it was held that a constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can, and that a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and

(4) 2 F. & F. 51 (1860).

(5) 4 B. & C. 596 (1825)

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bringing them to prove the felony, was bad on demurrer. That is a statement of the common law, and sec. 76 of Act IV of 1866 cannot be used as an implied repeal of a general right affecting the liberty of the subject.

Under sec. 77 the officer in charge of a police-station may enlarge any person in the custody of any police officer without a warrant, on his own recognizance, and under sec. 78 every recognizance "shall be conditioned for the appearance of the person thereby bound before the Presidency Magistrate at his next sitting." If the accused enlarged on bail is to be brought before the Magistrate at his *next* sitting, whether or not the investigation is completed, it is difficult to see why the man who is not allowed bail or cannot find bail should not have that right. As pointed out in the order of reference, the right to be taken out of police custody by being brought before a Magistrate is a right given in the interest of the accused. "It prevents arrest and detention with a view to extract confession, or as a means of compelling people to give information. It prevents police-stations being used as though they were prisons—a purpose for which they are unsuitable. It affords an early recourse to a judicial officer independent of the police on all questions of bail or discharge."

The question before us is, no doubt, to be decided upon a construction of sec. 76 of the Calcutta Police Act. But we may refer to similar provisions in cognate Acts to show that the right of the person arrested to be produced as soon as it can reasonably be done before a Magistrate is recognised in such Acts. Sec. 61 of the Criminal Procedure Code provides that no police officer shall detain in custody a person arrested without warrant for a longer period than *under all the circum-*

stances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under sec. 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. Sec. 45 of Act II of 1866 (Suburban Police Act) also contains a similar provision. It seems to me that the period of detention indicated by the words "until he can be brought before a Magistrate" in sec. 76 of the Calcutta Police Act is the same as expressed by the provision "under all the circumstances of the case is reasonable" in sec. 61 of the Criminal Procedure Code, and does not justify detention, beyond such period, for police investigation.

It may be said that if that was the intention, why was the time-limit of 24 hours provided for in sec. 61 of the Criminal Procedure Code or in sec. 45 of the Suburban Police Act (II of 1866) omitted from sec. 76 of the Calcutta Police Act? The answer would be more or less a matter of speculation. It may, however, be suggested that the conditions in Calcutta in 1866, or at the present day, were, and are, not the same as in the mufassil. Having regard to the means of communication, there may be cases in which the police in Calcutta may be able to produce the accused within an hour of his arrest; on the other hand, there may be cases in which hundreds of persons are arrested and in which they cannot be conveniently produced before a Magistrate within 24 hours. So that the time-limit of 24 hours may be too long or too short in Calcutta.

Then, again, in 1866 at any rate, officers in charge of police-stations in Calcutta presumably belonged to a superior class of officers than darogas (Sub-Inspectors) in charge of police thanas in the mufassil, and in the case of the former who were

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expected not to detain for any longer time than was required for bringing the accused before a Magistrate the time-limit of 24 hours might not have been thought necessary or advisable. So far as the time required for producing the accused before a Magistrate is concerned, the Calcutta Act leaves it to the discretion of the police. But the whole question is—Does sec. 76 of the Act contemplate detention for the purpose of completing the police investigation beyond the time reasonably required for producing the accused before a Magistrate? Having regard to the common law right of the person arrested to be brought before the Magistrate as soon as is reasonably possible—a right recognised in the law relating to the whole of India outside Calcutta—it is impossible to hold that such right was impliedly repealed by the mere omission to state the hours of detention in sec. 76. There is nothing in that section to force us to that conclusion.

There is no indication in the Indian Acts (sec. 90 of Act XIII of 1856, sec. 45 of Act II of 1866, sec. 61 of the Criminal Procedure Code) or in the English Acts (sec. 69 of the Metropolis Act, 2 and 3 Vict., c. 47 : cl. 15 of the Police Clauses Act, 10 and 11 Vict., 1847; c. 89 or sec. 38 of the Summary Jurisdiction Act, 42 and 43 Vict., 1879) that the police can detain an accused, arrested without warrant, for a longer period than is necessary for bringing him before a Magistrate. I do not think that sec. 76 of the Calcutta Act alone was based on a different principle.

It appears that the practice in Calcutta for about 60 years is that the accused is detained for such period as may be necessary for completing the police investigation. The accused persons are "brought before the Deputy Commissioner every

morning who discharges them, or sends them for trial or sends them back to the lock-up, according to the state of the investigation reports." It is said that the detention is under some rules framed by the Commissioner of Police under the powers conferred on him by sec. 9 of Act IV of 1866. But that section empowers the Commissioner to make "such orders and regulations relative to the said police force as the said Commissioner shall, from time to time, deem expedient for preventing neglect or abuse, and for rendering such force efficient in the discharge of all its duties."

They seem to refer to "orders and regulations" for the guidance of police officers, and for internal management of the police force, and the words "for rendering such force efficient in the discharge of all its duties," cannot, I think, include the power of making rules for detaining a person arrested without warrant for a longer period than is necessary for producing him before a Magistrate. If the practice originated from these rules, it cannot be said to be based upon a solid foundation.

The power of detention by the Deputy Commissioner of Police has been considered; so far as I am aware, in three cases. In the case of *Emperor v. Panchhari Dutt* (2) a question was raised as to the legality of the detention of the accused in the Lal Bazar lock-up, and Mukerji, J., presiding at the Sessions observed: "On a consideration of the relevant provisions of the Calcutta Police Act (Bengal Act IV of 1866), I am disposed to take the view that there is no power of detention for an unlimited period, such as is claimed on behalf of the prosecution, in the Deputy Commissioner, by virtue of

(2) 1. L. R. 52 Cal. 67 (94) : S. C. 29 C. W. N. 300 (1924).

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his being a Justice of the Peace. It is said that it is understood generally that there is such a power, there being in fact no limitation prescribed anywhere, and sec. 61 of the Criminal Procedure Code not being applicable to the Calcutta Police. That no doubt is so, but I am aware that in the matter of *Mahommed Ramjan v. King-Emperor* (6) (application under sec. 491, Criminal Procedure Code) Walmsley, J., held a detention under similar circumstances as improper, presumably on the ground that no such unlimited power exists." The question was not actually decided in either of the two cases, but they indicate the views taken by the learned Judges. In the case of *Sri Lal Agarwalla v. The Emperor* (1), Suhrawardy and Duval, JJ., held that an order of detention pending police investigation is not illegal. The decision rested on two grounds—(i) that there is no period mentioned in the Calcutta Police Act within which the accused must be brought before a Magistrate, and (ii) that as a Justice of the Peace the Deputy Commissioner is entitled to take such steps as may be necessary to complete an investigation before placing the matter before a Magistrate. As for the first ground, it is true, that no period is fixed in the sense that the days or hours are not mentioned, but it cannot be said that there is no time-limit, the limit being "until he can be brought before a Magistrate" which, as I have already said, means within such time, as "under all the circumstances of the case is reasonable." With regard to the second ground sec. 7 of the Act shows that the Deputy Commissioner as a Justice of the Peace has the power of detention only

"in order to bring the offender before a Magistrate," and the learned Advocate-General expressly stated that he did not claim any power of detention for the purpose of investigation in a Deputy Commissioner as a Justice of the Peace.

If, as we hold, sec. 76 of the Act does not empower the police to detain an accused for the purposes of investigation, a question arises whether there is any provision in the Act for remand by the Magistrate to police custody for such purposes. Sec. 167 of the Criminal Procedure Code which lays down the procedure in cases where the investigation cannot be completed in 24 hours, and empowers the Magistrate to authorise detention of the accused in police custody, for such purposes for a term not exceeding 15 days, does not apply to the Calcutta Police.

There is sec. 344 under which a Magistrate may order a remand before commencing an enquiry or trial. It has been held, however, that the remand contemplated by this section is not a remand to police custody, but a remand to magisterial custody. See *Re Krishnaji P. Janglekar* (7) and *Queen-Empress v. Engadu* (8). In these circumstances, it is for the Legislature to consider whether provisions should be made authorising and regulating remands to police custody.

For the reasons stated above, I am of opinion that both the questions referred to the Full Bench should be answered in the negative.

GREAVES, J.—I agree.

RANKIN, J.—I agree.

PANTON, J.—I agree.

MUKERJI, J.—At no time did I have any real doubt in my mind as to what the answers to the two questions now before

(1) Cr. Mis. Case No. 51 of 1926, decided 1st April 1926. Unreported.

(6) Decided 18th September 1922. Unreported.

(7) I. L. R. 23 Bom. 32 (1897).

(8) I. L. R. 11 Mad. 98 (1887).

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us should be, and what I have heard in this Reference from the learned Advocate-General has not altered my view in any way. On several occasions these questions came up before this Court for decision, but every time before a stage was reached when the matter could be finally considered events happened which rendered such consideration unnecessary. If, therefore, to-day I say a few words after the judgment just now delivered and even at the risk of repeating only a part of what has already been said therein, my justification is a desire, not altogether unnatural, not to be understood as silently assenting to propositions which, while they are so vital on the question of the liberty of His Majesty's subjects in Presidency towns, condemn a procedure which has obtained in the town of Calcutta for a long series of years. This liberty, in my opinion, has been amply safe-guarded by the Legislature and yet, curiously enough, have, for years past, been frittered away by a process of mis-interpretation of the statute.

The right to detain a person in custody, being one in curtailment of the liberty of the subject, must necessarily have its origin in some statute or some provision laying the force of a statute. This is elementary and for this, I presume, no authority is needed. The statute that has to be looked to in this connection is the Calcutta Police Act (Bengal Act IV of 1866) which purported to amend and consolidate the provisions of Act III of 1856 (for regulating the police of the towns of Calcutta, Madras and Bombay) and of Act XI/VIII of 1860 (to amend Act XIII of 1856). Sec. 76 of Act IV of 1866 gives the police the right to detain a person taken into custody without a warrant and this right was also given by sec. 90 of Act XIII of 1856. The enactments

prior to 1856 need not be examined, as it is not suggested that any right of detention which the police may have had under any of the police laws which then existed was reserved to them by Act XIII of that year. The words of sec. 76 of that Act are very plain: "Every person taken into custody without a warrant by a police officer shall be taken to the police-station, in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognizance, with or without sureties, for his appearance before a Magistrate." The words of sec. 90 of Act XIII of 1859 are exactly the same, except that instead of the expression "police-station," we have there the expression "station house"—a variation which need not detain us. There is no power of detention conferred by the statute, apart from this provision. The exact extent of this power has to be construed, and I propose to do so immediately, but not until I have referred to two other sources which have either been relied upon or have at least been understood to be relied upon as being sources from which this power also emanates.

One of these sources is sec. 9 of Act IV of 1866, and certain rules or circular orders framed thereunder. These rules and circular orders were made and promulgated about the year 1880 by the then Commissioner of Police, and it is said that they were published in the *Police Gazette*—evidently for the guidance of the police officers whom they concerned. Sec. 9 runs in these words: "The police force shall be under the exclusive direction and control of the Commissioner of Police who may, from time to time, subject to the approbation of the said Lieutenant-Governor, frame such orders and regulations as he shall deem expedient, relative

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to the general government of the force, the places of residence, the classification, rank, distribution and particular service of the general numbers thereof; their inspection, the description of arms, accoutrements and other necessities to be furnished to them; and all such other orders and regulations relative to the said police force as the said Commissioner shall, from time to time, deem expedient for preventing neglect or abuse, and for rendering such force efficient in the discharge of all its duties." Those rules and circular orders relate mostly to police investigation and, in so far as they purport to lay down methods for carrying them on, were issued for the purpose of "rendering the police force efficient in the discharge of all its duties" within the meaning of sec. 9. If they affect the question of the powers of the police to detain a person arrested without warrant and mean to enlarge or curtail those powers, they are clearly *ultra vires* the section.

The other source is sec. 7 of Act IV of 1866, which provides for the appointment of the Deputies to the Commissioner of Police as Justices of the Peace and enables them to act in that capacity as Justices only so far as may be necessary for the preservation of the peace, the prevention of crimes, and detection, apprehension and detention of offenders in order to their being brought before a Magistrate of Police. This source, however, need not be examined, as the learned Advocate-General has expressly disowned it. His complaint, on the other hand, is that the arguments of the Crown on previous occasions were misunderstood, and he has said that the Crown does not seek to justify the power of unlimited detention on the part of the Deputy Commissioners as being founded on their capacity as Justices of the Peace. If this complaint

is directed against my observations in the case of *Emperor v. Panchkari Dutt* (2), I hasten to apologise. I should like to point out, however, that in this respect I am not alone but in company with the learned Judges who decided *Srilal Agarwalla's* case (1) and also the learned Judges who have made this Reference.

The whole controversy then centres round the expression "until he can be brought before a Magistrate, or until he shall enter into recognizances with or without sureties, for his appearance before a Magistrate" which is to be found in sec. 76 of the Calcutta Police Act. The expression connotes a period of time, the duration of which is prescribed by the words themselves. The argument on behalf of the Crown is that the expression means that the arrested person may be detained for the purpose of police investigation. This contention assumes that an arrested person *cannot* be brought before a Magistrate until the police investigation is complete, or, in other words, that it is not possible to do so; but is there any foundation for this assumption? In the mofussil to which the Code of Criminal Procedure applies and the suburbs of Calcutta to which the Calcutta Suburban Police Act (II of 1866) applies, the arrested person has to be produced before a Magistrate within 24 hours; so that there such production is not only possible but also obligatory, irrespective of the completion or otherwise of the police investigation. This assumption, therefore, has no foundation. The meaning of the word "can" used in sec. 76 of the Calcutta Police Act may also be gathered from sec. 74 of that Act where the same word is

(1) Cr. Mis. Case No. 51 of 1926, decided 1st April 1926. Unreported.

(2) I. L. R. 53 Cal. 67, s. c. 20 C. W. N. 800 (1924).

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used in connection with detention of offenders by private individuals. In that section the following expression occurs: "May be detained until he gives his name and address and satisfies such person that the name and address so given are correct or until he can be delivered into the custody of a police officer." Can it be argued that where it is possible for a private individual to deliver a person apprehended into the custody of a police officer he may detain the latter on the plea that he is not yet satisfied that the name and address given by the latter are correct? The analogy between the two sections, it is true, is not a complete one, but there is hardly any reason to suppose that the same word "can" has been used in the two sections in two different senses. The main argument on behalf of the Crown is that because the provision as to production within 24 hours which is to be found in the Code of Criminal Procedure, ever since 1861, and in the Calcutta Suburban Police Act of 1866, which is same year in which the Calcutta Police Act was enacted, is not in the Act last mentioned, and therefore it should be held that the detention may be for an unlimited period. In my opinion, this omission was deliberate and was made to secure higher rights, if at all, to the citizens of Presidency towns, the conditions of the Mofussil and the suburbs, where it may not be possible to get at a Magistrate so quickly as in Presidency towns, rendering it necessary to introduce a provision fixing a hard-and-fast limit of the detention. I am accordingly of opinion that the question whether a police investigation is complete or not, does not come in at all in this matter, and under the plain provisions of sec. 76 of the Act the person arrested may be detained by the police—in cases where he is not enlarged by the police on his recognizance

—only until it is possible for them to produce him before a Magistrate, subject, of course, to all just allowances.

It is then said that the system which obtains at present, namely, that of producing the arrested person before a Deputy Commissioner every morning, who hears a report as to the state of the investigation and considers whether bail should or should not be granted or discharges him or sends him up before a Magistrate, is a procedure which has worked very well. It may have, but with this we are not concerned on a question of construction of sec. 76 of the Calcutta Police Act.

It is next said that as sec. 167, Criminal Procedure Code, does not apply to Presidency towns, there is no provision which would enable the Magistrate to remand the arrested person to the custody of the police which may be necessary for the purposes of an investigation. Sec. 344 is the only other provision of this law under which an order for remand may be made by a Magistrate. It has been held by this Court in the case of *Narendra Lal Khan v. King-Emperor* (9) that this is the provision under which a remand may be made after the period of 15 days prescribed by sec. 167, Criminal Procedure Code, is over. There are authorities for the proposition that a remand contemplated by that section is a remand to magisterial and not police custody [*vide In re Krishnaji P. Janglekar* (7) and *Queen-Empress v. Engadu* (8)]. If, therefore, a remand to police custody cannot be made under that section, and such custody is necessary for the legitimate purposes of a police investigation, that must be a matter for the legislature.

(7) I. L. R. 23 Bom. 32 (1897).

(8) I. L. R. 11 Mad. 98 (1887).

(9) I. L. R. 26 Cal. 166; s. c. 13 C. W. N. 43 (1908).

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For the above reasons I agree in the answers which my Lord, the Acting Chief Justice, has given to the questions set out in this Reference.

ORDER.

The result is that the Rule is made absolute. The accused will be discharged from their recognizances. It will be open to the police to re-arrest them and proceed according to law.

S. C. M.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. (MIS.) No. 84 OF 1926.

BALI RAM KALWAR and

anr., Accused,

Petitioners,

v.

SITARAM KALWAR,

Complainant, Opposite
Party.

RANKIN, J.

MUKERJI, J.

1926,

23, July.

Criminal Procedure Code (Act V of 1898), sec. 526—Transfer of case—Conviction of accused by a Magistrate at previous trial, if ground under sec. 526 for transfer of case pending for re-trial by the same Magistrate—"Expedient for the ends of justice," as used in sec. 526, interpretation of—Re-trial, order of, by High Court, without stating, if re-trial to be held by the same Magistrate or some other Magistrate—Effect of such order.

The question as to whether a trial before a particular Magistrate is expedient for the ends of justice or not has got to be considered from the point of view of the accused person as well, and unless it is impossible to get a Magistrate other than the one who has already convicted the accused person on the same charge at a previous trial, or unless there be circumstances which would necessitate the trial of the same case before the same Magistrate over again, it is desirable that the re-trial should not be held before the same Magistrate.

If an order for re-trial is made by the

High Court and it is not stated in the order whether the re-trial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of the Court to direct that the re-trial should be held by the same Magistrate. The matter is left entirely in the discretion of the Magistrate who has got to appoint the Court by which the case is to be tried.

This was a Rule granted on 7th June 1926 against an order of the Additional Chief Presidency Magistrate, Calcutta (A. Z. Khan, Esq.), dated the 17th May 1926, rejecting an application of the accused Petitioners for transfer of their case pending in the Court of Rai G. N. Mukherjee Bahadur, Honorary Presidency Magistrate, Calcutta, to some other Magistrate for disposal.

The facts of the case appear from the judgment.

Babu Probodh Ch. Chatterjee for the Petitioners.

Babus Tarakeswar Pal Choudhury and Anil Chandra Dutt for the Opposite Party.

Babu Hemendra Chandra Sen for the Crown.

The JUDGMENT OF THE COURT was as follows :—

MUKERJI, J.—This Rule has been issued at the instance of two accused persons, the case against whom is now pending in the Court of Rai G. N. Mukherjee Bahadur, Honorary Presidency Magistrate. The Petitioners were originally tried on a charge under sec. 500, I. P. C., by the same learned Magistrate and were convicted and sentenced in respect of that charge. They moved this Court against the said conviction and sentence with the result that the same were set aside and a re-trial of the case was ordered. At the time when the order of this Court was

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pronounced the Petitioners undoubtedly should have raised the question as to who should be the Magistrate to try the case. Unfortunately, however, this was not done and the explanation that is offered as to why it could not be done does not seem to me to be altogether an unreasonable one. It appears, however, that when the records went down to the Court of the Presidency Magistrate the case was taken up by the Additional Chief Presidency Magistrate, Mr. A. Z. Khan, on the 26th April 1926. Mr. Khan on that date passed an order to the effect that Rai G. N. Mukherjee Bahadur, the trying Magistrate, was at Madhupur and was not expected back from that place before the last week of May 1926 and that the case was to be adjourned to the 1st May 1926, on which date he directed that the parties should be ready. On the 1st May 1926 the case came on again before Mr. Khan. On that date he recorded an order to the effect that the complainant was not ready as most of his witnesses had left Calcutta, and he thereupon adjourned the case to the 17th May 1926. By that date, however, it appears, Rai G. N. Mukherjee Bahadur had returned from Madhupur and an application under sec. 528, Cr. P. C., appears to have been filed before Mr. Khan praying in effect that the case might not be transferred to the file of Rai G. N. Mukherjee Bahadur. The learned Magistrate, however, rejected that application and upon that the Petitioners moved this Court and obtained the present Rule.

It seems to me that the learned Additional Chief Presidency Magistrate in rejecting the Petitioners' application aforesaid laboured under some sort of misconception as to the nature of the order that was passed by this Court under which the present trial is about to be held. He says

in his order that in ordinary course the case must be re-heard by the same Magistrate from the stage of the framing of the charge. The order of this Court, however, is plain enough and it directs the re-trial of the whole case. Under these circumstances the learned Magistrate should not have held that there was anything in the order of this Court to fetter the exercise of his discretion in the matter of the transfer that he had to make with regard to the case. He observes in his order that the re-trial is generally held by the same Magistrate and if the High Court desires that that Magistrate is not to re-try the case, then that fact would be distinctly mentioned in the order of the High Court. In my opinion it is just the other way about. If an order for re-trial is made by this Court and it is not stated in the order whether the re-trial is to be held by the same Magistrate or by some other Magistrate, then it should not be presumed that it was the intention of this Court to direct that the re-trial should be held by the same Magistrate. Under these circumstances the matter is left entirely in the discretion of the Magistrate who has got to appoint the Court by which the case is to be tried.

With regard to the merits of the application it seems to me that the learned Additional Chief Presidency Magistrate when he adjourned the case to the 1st May 1926 knowing full well, as he did, that Rai G. N. Mukherjee Bahadur would not be back from Madhupur before the end of May clearly intended either to take the case up himself or to transfer it to some other Magistrate on that date and therefore from the orders which the learned Magistrate passed either on the 26th April 1926 or on the 1st May 1926 it cannot be gathered that the learned Additional Chief Presidency Magistrate

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had made up his mind from the outset to transfer the case to the file of Rai G. N. Mukherjee Bahadur. It was also because on the 17th May 1926 that the learned Additional Chief Presidency Magistrate found that Rai G. N. Mukherjee Bahadur had come back from Madhupur and was available, and because of the misconception to which I have already referred that he thought fit to reject the Petitioners' application. I am clearly of opinion that having regard to the fact that the Petitioners were once convicted by the learned Honorary Magistrate Rai G. N. Mukherjee Bahadur it is desirable to have the case tried by some other Magistrate if one is available for that purpose.

The Rule has been opposed on behalf of the complainant as well as on behalf of the Crown. The learned vakil for the complainant has not been able to satisfy me that his client will in any way be prejudiced if the case is heard by some Magistrate other than Rai G. N. Mukherjee Bahadur. It is only on the footing of the misconception under which Mr. Khan laboured, namely, that the re-trial was to take place from the point when the charge would have to be framed that he can urge that there would be any prejudice to his client. As regards the arguments that have been advanced on behalf of the Crown the most important argument that has been advanced is with reference to the provisions of sec. 526, Cr. P. C. It has been urged that the mere fact that a particular Magistrate has once convicted the accused persons is no ground for holding that on a fresh trial before the same Magistrate with regard to the same offence the accused will not have a fair and impartial enquiry or trial, or that the case should not be tried by the same Magistrate on the ground that it would not be expedient to have it tried by

him. So far as this matter is concerned I venture to think that the question as to whether a trial before a particular Magistrate is expedient for the ends of justice or not is a question which has got to be considered from the point of view of the accused person as well, and unless it is impossible to get a Magistrate other than the one who has already convicted the accused person on the same charge at a previous trial, or unless there be circumstances which would necessitate the trial of the same case before the same Magistrate over again, it is desirable that the trial should not be held before the same Magistrate.

For these reasons I am of opinion that the Rule issued in this case must be made absolute and I order accordingly. The case will now go before the Chief Presidency Magistrate who will nominate such Magistrate other than Rai G. N. Mukherjee Bahadur as he thinks proper, for the purpose of trying this case.

RANKIN, J.—I agree.

H. C. S. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES

Nos. 196 AND 791 OF 1923.

CUMING, J.	}	SM. KUSUM KAMINI
CHAKRAVARTI, J.		DEBI and ors., Plaintiffs,
1925,		Appellants,
Heard, 7 and		v.
8, July.		HARA SUNDAR MAJUM-
Judgment,		DAR and ors., Defend-
21, July.		ants, Respondents.

Revenue Sale Law (Act XI of 1859), secs. 10, 11—Residuary share, sale of—Specification in notices, when sufficient—Largest co-sharer deliberately defaulting and buying up estate—Other co-sharers' equity to get reconveyance.

The specification in the notices of the property sold should contain sufficient details to enable the purchaser to know what he was buying.

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Where the largest co-sharer in a revenue-paying estate deliberately defaulted with the intention of getting rid of his co-sharers and purchasing the estate himself, the Court would in equity be justified in ordering him to reconvey to the other co-sharers their shares of the estate which he purchased at the sale on such co-sharers paying to him the amount of arrears due from them together with their shares of the costs incurred.

These were appeals preferred on the 28th of November 1922, against the decree of M. H. B. Lethbridge, Additional District Judge of Zillah Pabna and Bogra at Pabna, dated the 22nd July 1922, reversing the decree of Babu Pasupati Basu, Officiating Subordinate Judge, 1st Court of Pabna, dated the 30th September 1920.

The facts of the case will appear from the judgment.

Mr. Sarat Chandra Roy Choudhuri and Babu Debendra Narain Bhattacharji for the Appellants in S. A. No. 196.

Mr. Sasadhar Roy and Babu Jotindra Nath Sanyal for the Appellants in S. A. No. 791.

Dr. Jadu Nath Kanjilal and Babu Purna Chandra Chanda for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

CUMING, J.—These two appeals arise out of two suits which were tried along with two other suits. The suits were brought by some of the co-sharers of a certain residuary estate to set aside a certain revenue sale which was held in June 1918. The two suits in question out of which these appeals have arisen were heard along with two other suits of the same nature. The facts alleged were as follows :—The Plaintiffs were co-sharers

in the residuary estate Ja Sakhini which is No. 68 in the Pabna Collectorate. The *salar jama* of the parent estate was Rs. 647-7-0. Certain of the co-sharers opened separate accounts and the revenue of the residuary share that was left was Rs. 562-2. It is with this residuary share that we are now concerned. Two of the proprietors of this residuary estate mortgaged their entire share amounting to some 8½ annas to the Defendant No. 1, Hara Sundar Majumdar. He sued on his mortgage and having obtained a decree brought the property to sale and purchased it in the name of a certain private idol of which he was the *shebait*. This purchase was made on the 26th March and the price paid was Rs. 25,000. On the 28th of March the residuary share defaulted in payment of the revenue and it was sold for this arrear on the 26th June. On the 22nd of June the sale under the mortgage has been finally confirmed.

The Plaintiffs in the original four suits who were four of the co-sharers in the residuary estate sought to set aside the sale on the ground that the notices required by sec. 6 of the Act (Act XI of 1859) had not been complied with. The notices had not been duly served, they did not contain a sufficient description of the property and there were other irregularities, as a result of which the properties had been sold at a grossly inadequate price, the real value of the property being about Rs. 40,000. Further they contended that there had been fraud on behalf of the Defendant. On this point their case was that there was an agreement that the Defendant would purchase and then he would reconvey their shares of the estate to the Plaintiffs. This arrangement the Defendant failed to carry out. It was further their case that

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the Defendant was not really the *shebait* of the idol as he alleged but that he was really acting in his own interests and that he had been trying for some time to get possession of the whole property.

The case of the Defendant was a traverse of all the allegations of the Plaintiffs.

The Court of first instance decided in favour of the Plaintiffs. He found that the sale for various reasons which I need not set out here was liable to be set aside.

He found that there was not any agreement between the Plaintiffs and the Defendant by which the Defendant would purchase the estate and then reconvey it to the Plaintiffs, but he also found that the Defendant deliberately defaulted with the intention of buying the estate for himself and getting rid of the co-sharers and this he held that the Defendant could not be allowed to do. He therefore made the following order:—That on the Plaintiffs rateably contributing to the costs of the Defendants in these suits and paying their share of the purchase money, their shares should be reconveyed to them. If on the Plaintiffs depositing the money within a certain time the Defendant did not execute these reconveyances and register them, then the sale would be set aside. If the Plaintiffs failed to deposit the money required in the time allowed, the suits of the Plaintiffs who defaulted would be dismissed.

The Defendant appealed to the District Court.

The learned Judge held that the sale was not liable to be set aside for any irregularity, that the description of the property in the sale notification was sufficient.

Further there was nothing in the circumstances of the case which would

justify the Court in ordering the Defendant to reconvey their shares to the Plaintiffs on the payment of the share of the purchase money. He therefore decreed the appeals and ordered that the suits of the Plaintiffs would be dismissed. Each party was to bear his own costs.

Two of the Plaintiffs have appealed to this Court.

They are the Plaintiffs in suits Nos. 207 and 639.

In appeal two points have been urged.

First, that the notices were not legally sufficient. They did not contain the shares that were to be sold and as the result of this omission the property was sold at a very inadequate price as the purchasers could not know what was really being sold. Now admittedly the shares that were to be sold were not specified in the sale notification. In dealing with this point the learned Judge for certain reasons held that it was impossible to specify the shares. He held that a number of separate accounts had been opened in the estate which did not comprise definite fractions of the estate but the whole or certain shares of certain mouzahs. It was not therefore possible to calculate the fraction which the residuary share constituted. As, however, the sale notification contained a list of the mouzahs comprised in it and the share in each was stated and also the revenue was stated that was due from the residuary share, it could be ascertained from these facts what was being sold.

Now the sections of the Act that deal with the question of opening of separate accounts are sec. 10 and sec. 11:

Sec. 10 provides that when a recorded co-sharer of a joint estate held in common tenancy wishes to pay his share of the revenue separately he may apply to the Collector to open a separate account. In

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that case he has to specify the share held by him in the estate. By this I presume is meant that he will state the amount of the share, *viz.*, one anna or two annas as the case may be. There is a second case to be considered, *viz.*, when his share consists of a specified portion of the lands of the estate. In this case the applicant merely gives a specification of the land comprised in his share with the boundaries together with the *sudar jama* to be paid on it. There would be no difficulty in this because the quinquennial registers in the collectorate contain the revenue on each estate, mouzah by mouzah.

In this case apparently it is not necessary to state the share held in the estate and this is the case the learned Judge is thinking of when he states that the separate accounts comprised not definite fractions of the estate such as one anna or two annas but the whole or part of mouzahs. In such a case it would not be possible for the collectorate to state exactly what was the fractional share of the estate. What therefore was stated in the notice was the actual mouzahs and the share in each that was to be sold. Further it was stated what was the revenue of the share to be sold and the revenue of the parent estate. This it seems to me would be sufficient and I do not see how any more information could be given. A number of decisions have been cited to me on this point. None of them really lay down that there are certain specifications to be given and that if by any chance one of these details is not given the notification is not sufficient. Reference may be made to the decision in the case of *Maharaja Sir Ravanswar Prasad Singh Bahadur v. Baijnath Rami Goenka* (1), in which it is pointed out

(1) I. L. R. 42 Cal. 897; a. c. 19 C. W. N. 481 (P. C.) (1914).

that "the object of the law as well as the rules of the Board requiring specification of the properties to be sold is clearly to enable the purchasers among the public to know exactly what is going to be sold and thereby to ensure reasonable competition. When an estate is going to be sold it is not difficult to specify it. In the case of shares of an estate the work of specification requires care and attention. No hard and fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case." So far as I can see in the present case the notices did contain sufficient details to enable the purchasers to know what they were buying. It contained the names of each of the mouzahs and the share in each to be sold, also the *jamas* of the parent estate and the *jama* of the share to be sold. I must therefore agree with the learned Judge that the description was sufficient for the purpose and in fact it was the only one possible. This is clear on a consideration of the two sections that I referred to. I therefore hold that the sale is not liable to be set aside for any irregularity. The next point urged by the Appellant is that in all the circumstances of the case the Respondent is bound in justice, equity and good conscience to reconvey to the co-sharers, who are willing to purchase, their share of the property.

Their case would seem to be that the Respondent took advantage of his position as the largest co-sharer to allow the property to be sold in order that he might squeeze out his co-sharers. The Respondent has for a long time been trying to get hold of the whole property and with this in view he allowed the property to be sold for default of paying the revenue. The amount of the revenue was small compared with the price that the Respondent

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paid for the property. Now, what are the facts? The amount of revenue for which the property was sold was Rs. 141-1-6. No doubt the Respondent could have paid this without any difficulty seeing that he paid some Rs. 4,500 for the property at the revenue sale. The property had defaulted some four times before. The last time the Appellant whose share in the revenue amounted to some ten rupees had paid some Rs. 250 to save the property from sale and she could not be expected to repeatedly pay this amount to save her small share with all the attendant difficulties of recovering the amount from her co-sharers. The default for which the property was sold was for the period ending with the 31st March. The Respondent had purchased at the execution sale on the 26th March when he purchased in the name of the *thakur* of which he alleged he was the *shebait*. This *thakur* it is admitted is his own private idol. He was thus a co-sharer, or rather his *thakur* was, for the *kist* for which the property was sold. If he had been acting *bonâ fide* he would not have allowed the property of the idol for which he was the trustee to be sold for the small amount of revenue due and the idol lose a valuable property. For it is significant, the purchase at the revenue sale was made not in the name of the *thakur* whose interests he was supposed to look after but in his own name. He was not an outsider, for he or rather the *thakur* whose interests he was supposed to be taking care of had a mortgage on the property. He was obviously a rich man, for he had paid Rs. 25,000 for the property when he purchased it in the name of the *thakur* and Rs. 4,500 for it at the revenue sale. It may be argued that he purchased at the revenue sale in his private capacity and that it was the *thakur* who was a co-sharer. I am not

impressed by this supposed dual capacity of the Respondent. Now no doubt the mere fact that the purchase at the revenue sale was by one of the co-sharers would not of itself give the other co-sharers an equity to obtain a reconveyance of their shares from the purchaser on their paying to him the proper proportion of the expenses which he had incurred. See *Khurshed Ali v. Dina Nath Sarma* (2). To support the claim there must be something unfair in his dealings with his co-sharers. In the case of *Deonandan Prosad v. Janki Singh* (3), the Judicial Committee of the Privy Council advert to the need of demanding from each co-sharer such measure of candid dealing as would ensure that the co-sharer would not be tempted to make a deliberate default with a view of ousting his co-sharers and appropriating to himself the common property. In the present case we find that the Respondent was the largest co-sharer being the owner of 8½ annas. He had never paid up the revenue before to save the estate. He was admittedly a rich man and could have easily paid the necessary money to save the estate. The only conclusion to be drawn in the circumstances is that he deliberately defaulted with the intention of getting rid of his co-sharers and purchasing the estate himself. If he had been acting *bonâ fide* it seems to me that he would not have allowed the estate of the *thakur* for which he was the trustee and which he was bound to protect to be sold for the small sum that was owing as arrears of revenue. I think that this is a case where in equity the Respondent may be asked to reconvey to the co-sharers who desire to repurchase, on the payment of their share of

(2) 29 C. L. J. 492 (1918).

(3) I. L. R. 44 Cal. 573: s. c. 21 C. W. N. 473 (P. C.) (1916).

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the dues, their share of the property, The order, therefore, I make is as follows :— The order of the learned District Judge dismissing the case of the Plaintiff is set aside and on the Appellants in these two appeals paying to the Respondent the amount due by them together with any costs that the Respondent may have incurred as the result of their default, which amount will be ascertained by the Subordinate Judge, within two months from the date of such ascertainment, the Respondent will reconvey to the Appellants by a properly registered deed their share of the property. In default of the Respondent executing these deeds and registering them after the money has been paid within such time as the Court below may think reasonable, the Court will execute the conveyances on his behalf. If the Appellant* or Appellants fail within the time to pay the above-mentioned sum into Court, his or their appeal will be dismissed.

In the circumstances of the case I think both parties must bear their own costs in this litigation in all Courts.

CHAKRAVARTI, J.—I agree with my learned brother in the order he proposes to make.

The residuary estate consisted not only of 8½ annas share of the Touzi belonging to the Defendant No. 1 but also of some other shares. Only a share of some of the villages also formed part of it. In these circumstances it appears to me that the description given in the notice under sec. 6 might have specified those shares in addition to the shares of the villages. This would have conveyed a more definite information to purchasers. Be that as it may, I agree that the appeal should be allowed on the other ground mentioned in the judgment of my learned brother.

N. G.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

VICOUNT DUNEDIN.] LAKSHMAN CHANDRA
LORD ATKINSON. MANDAL, Appellant,
MR. AMEER ALI. v.
1926, TAKIM DHALI and
Heard, 11, May. ors., Respondents.
Judgment, 11, May.

Possessory title—Onus of proof of superior title—Concurrent findings of fact.

The Plaintiff-Appellant claimed to have purchased two-thirds share in a leasehold property from the heirs of two brothers and brought this suit for recovery of the said share against the Defendant-Respondent who purchased the whole of the leasehold property from the third brother who was in possession thereof:

Held—That since the Courts below found that the Plaintiff could not establish, by the evidence adduced, his allegation that the leasehold property had been acquired by the father of the three said brothers and dismissed the suit, the Judicial Committee would not interfere with this concurrent finding of fact.

This was an appeal (No. 14 of 1925) from a decree of the High Court at Calcutta, dated the 31st December 1923, which affirmed a decree, dated the 31st May 1921, of the Court of the Subordinate Judge of Khulna.

The Appellant instituted his suit against the Respondents prayin for a declaration of his title to a two-thirds share in a leasehold mahal known as Chak Ula Kalijaga in the Collectorate of Khulna. The first Respondent was in possession of the property and based his title on a purchase of the leasehold from Budhai Sana on the 14th November 1906.

The Appellant claims to be the purchaser of a two-thirds share in the leasehold from the heirs and legal representatives of two brothers of Budhai Sana,

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resting his title on the allegation that Budhai Sana had only an one-third share in the property by inheritance from his father Idu Sana who is alleged to have been the original lessee.

He contended that upon the death of Idu Sana his three sons Chand, Neamat and Budhai inherited the property in equal shares under Mahomedan law and that he purchased the two-thirds share belonging to Chand and Neamat from their heirs on the 28th January 1917.

It is not disputed that a grant of the leasehold was made by the superior landlord on the 25th February 1881 and that an *amalnama* or order for possession was issued on the same day.

The question at issue was whether the grant was made to Idu Sana or to Budhai, his son. If it was made to Idu Sana, then Budhai Sana's title was by inheritance and not by purchase and that only to the extent of an one-third share, the remaining two-thirds going to his two brothers from whom the Appellant purports to trace his title.

Both Courts in India were of opinion that the original settlement was made with Budhai and they dismissed the suit. The Plaintiff appealed to His Majesty in Council.

Messrs. DeGruyther, K. C. and H. N. Sen for the Appellant.

Messrs. Dunne, K. C. and Hyam for the Respondent No. 1.

Their LORDSHIPS' JUDGMENT was delivered by

VISCOUNT DUNEDIN.—The Appellant-Plaintiff in the case is the purchaser of two-thirds of a certain leasehold property which he says originally belonged to Idu Sana from whom his vendors are descended, in right of two sons of Idu Sana, and he sues the Defendant-Respondent who

is in possession, he having acquired the whole property from Budhai, the other and remaining son of Idu Sana.

The whole point in the appeal therefore depends upon whether the leasehold in question was originally settled with Idu Sana who was the head of the whole family here represented, or whether it was originally settled with one of his sons Budhai. Budhai was undoubtedly in possession, and it was necessary for the Plaintiff to prove his case. He attempted to do so by bringing forward certain statements that were made in various litigations that had happened, but upon looking into those litigations the learned Judge of first instance and the High Court both came to the conclusion that the statements made were absolutely contradictory and therefore no affirmative proof for what the Plaintiff wished to deduce from them. The oral evidence suffered the same fate; it was contradictory and was not believed and accordingly, there again, we have concurrent findings that the Plaintiff has not made out his case. That really disposes of the merits of the case.

There is a second branch of the case as launched in which the disappointed purchaser, owing to the result of what has been narrated, asks for re-payment of the price which he has paid. It is quite clear that that point was never really investigated in the Courts below. It has never been gone into as to whether it was a truly speculative purchase or a purchase under such circumstances as would warrant a good title, and accordingly the learned Subordinate Judge said he could not decide the matter, but gave leave to the Plaintiff to raise the question in a separate suit. That also was confirmed by the High Court.

Their Lordships will therefore humbly

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advise His Majesty to dismiss the appeal with costs.

Solicitors: *Messrs. Ranken, Ford & Chester* for the Appellant.

Solicitors: *Messrs. Barrow, Rogers & Nevill* for the Respondent No. 1.

G. D. M.

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 1 OF 1925.

CHATTERJEA, C. J.

RANKIN, J.

CHAKRAVARTI, J.

1926,

24, February.

WALMSLEY, J.

PAGE, J.

1926,

8, July.

SM. PRAFULLA

KAMINI ROY

v.

BHABANI NATH ROY.

Hindu law—Gift by Hindu widow followed by surrender to next reversioner—Latter, if may recover before widow's death—Valid surrender, what is—Difference of opinion in Division Bench hearing appeal from mofussil Court—Civil Procedure Code (Act V of 1908), sec. 98, or Letters Patent, 1865, cl. 36, if applicable.

A Hindu widow purported to make a gift of a portion of her husband's immoveable properties to one T. Later on she executed a deed of relinquishment in favour of the next reversioner B, but it appeared that she did this in consideration of a sum of money paid in cash and an annuity to be paid to her during her life. In a suit by B to recover from T, the properties gifted to him:

Held (by CHATTERJEA, C. J., RANKIN and CHAKRAVARTI, JJ.)—*That the fact that some maintenance has been agreed to be paid by the reversioner to the widow does not affect a surrender, but whether there was a surrender or relinquishment such as would accelerate the succession of*

the reversioner or whether the transaction was a transfer for valuable consideration depended on the facts of each case and in this case the circumstances showed that the transaction was a transfer for valuable consideration.

That the Plaintiff's suit must therefore fail and the question whether upon a valid relinquishment by a Hindu widow, the reversioner becomes entitled to recover from a previous alienee without legal necessity, immediately or upon the death of the widow, did not arise.

Per WALMSLEY, J.—In the event of a valid surrender by the widow, the right of the reversioner to recover from the previous alienee is postponed to the widow's death.

Per PAGE, J.—The right to recover arises immediately upon such surrender.

The authorities discussed.

Per WALMSLEY AND PAGE, JJ.—Sec. 98 of the Civil Procedure Code and not cl. 36 of the Letters Patent applies where there is a difference of opinion between two Judges sitting as a Division Bench in appeal from a subordinate Court.

PERNA CHANDRA v. NARENDRA NATH (18) and BHAIIDAS v. GULAB (19) considered.

This matter came up originally as Appeal from Original Decree No. 131 of 1922 against the decree of Babu Sarodaprosad Banerjee, Subordinate Judge of Pabna, dated the 22nd December 1921. It was heard by Walmsley and Page, JJ., who delivered the following dissentient judgments:—

WALMSLEY, J.—The appeal preferred by the Plaintiff was dismissed for reasons which need not be stated, and we are now concerned only with the Defendants' cross-objection.

(18) 29 O. W. N. 755 (1925).

(19) L. R. 48 L. A. 184; s. o. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

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The necessary facts are as follows :— There were two brothers, Prasanna Nath Roy and Bhabani Nath Roy. The former died in 1871, leaving a widow named Shyamrangini, who is still alive. She succeeded to a Hindu widow's estate in respect of the property left by her husband.

On 26th April 1915, she executed a deed of gift in favour of the Defendant Taranath Roy by which she transferred to him one of the items of property described in Sch. "Ga" to the plaint. In July 1917 she executed a second document, in favour of her husband's brother, Bhabani, by which she relinquished all her rights to him as reversioner. On his side he paid her a considerable sum in cash and undertook to make a monthly payment for the rest of her natural life. On the strength of this document Bhabani as Plaintiff wants to eject Taranath from the property comprised in the deed of gift.

Taranath defended the suit on several grounds; he impugned the deed of relinquishment; in any case, he said, it did not specify the property described in the deed of gift; he alleged that the property given to him was bought by the widow from her *stridhan*, and that her conduct showed an intention to treat it as *stridhan*.

The learned Judge found that Shyamrangini executed the deed of relinquishment voluntarily and with full understanding of its effect, and that she intended it to operate in regard to all the property including that given to Taranath Roy. With regard to that gift he held that it was not *bonâ fide*, and he also held that, as it was not an alienation for valuable consideration; while the Plaintiff has paid a substantial sum and is going to pay a monthly allowance, it was equitable that the property should go to the Plaintiff and not to the Defendant. He rejected the

evidence about the *stridhan* character of the property as meagre and unsatisfactory.

On these findings he gave the Plaintiff a decree for the property covered by the deed of gift.

For the Defendant Taranath it is urged that the learned Judge's decision is wrong.

The first question is as to the reality of the gift. The learned Judge, relying mainly on a letter written by the Defendant, held that the gift was not a *bonâ fide* gift. That is a finding with which I cannot agree. The lady says that she made the gift, and the donee is in possession. The letter to which reference is made is very inconclusive, and cannot outweigh the donor's positive statement. In my opinion, the deed of gift to the Defendant was intended to be effective.

In regard to the deed of relinquishment the learned Judge has shown abundant reason for believing that the lady understood what she was doing and intended it to be operative. It is true that it does not mention specifically the property covered by the deed of gift, but its terms are so comprehensive as to include it. The suggestion that the latter property was *stridhan* is not supported by any evidence worthy of acceptance.

There remains, therefore, the question whether the reversioner on the strength of the deed of relinquishment can obtain possession of the property given to the Defendant immediately, or whether he can do so only on the natural death of the widow.

I think it is clear on the authorities that the widow could make a deed of gift valid for her own life. Mr. Mayne says :—

"She cannot in the absence of legal necessity bind the inheritance for her own personal debts or private purposes as against reversioners, but she can do so for

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her own life. Any alienations in excess of her powers are not void but voidable."

The deed of gift in favour of Taranath used words of inheritance, but that makes no difference; for the term of the widow's life it is a valid alienation, but the reversioner will be able to attack it as voidable as soon as she dies. For the Plaintiff, however, it is urged that he need not wait until the widow dies, but that the deed of relinquishment entitles him to immediate possession. In other words, it is argued that by the doctrine of acceleration of the reversion, the reversioner at once succeeds to the whole estate as completely as he would on the natural death of the widow. There are, of course, several authoritative pronouncements to the effect that a widow can operate her own death, but, so far as I have been able to find out, none of the decisions go to the length of saying that she can do so where prior dispositions have created interests in third persons. The effect of adoption has been considered on several occasions in Madras and Bombay, but I do not think it is of any use to refer to the decisions, partly because the two Courts have taken different views, partly because the results of adoption on the widow's interest are very definite. A decision of more reliance is to be found in the case of *Subbamma v. Subramanyam* (1). In that case the widow had created a mortgage before she executed a deed of relinquishment in favour of the reversioner. The learned Judges upheld the trial Court's view that the relinquishment could not defeat the mortgagee's right to get a decree for sale of the widow's life-interest. It is true that in that case the alienation was for value, whereas in the present case the alienation was by gift, but I do not think that the presence of valuable consideration

affects the question. The point is that the widow has made an alienation which she was competent to make, and she cannot re-call it by a voluntary act, which only by fiction has the same effect as her actual death would have.

There are two other points to be noticed in this case. The first is that the learned Judge has held that the sale and the leases of parts of the property must stand good for the term of the widow's life, and that part of his judgment has become final. The second is that the widow has covenanted for a monthly payment in addition to a cash payment. Those two facts make it difficult to regard the relinquishment as of the whole estate, and as effecting the widow's death from the legal point of view.

I regret to differ from my learned brother, but in my opinion, the Defendant's cross-objection should be allowed, and the suit dismissed as premature so far as it relates to the land covered by the deed of gift.

PAGE, J.—This cross-appeal raises an interesting and important question in connection with a Hindu widow's power of alienation while possessing a widow's estate in property inherited from her deceased husband.

About the year 1880 one Prasanna Nath Roy died intestate leaving as his heiress Shyamrangini, his widow, and as his heir presumptive his brother, the Respondent Bhabani Nath Roy. At the time of Prasanna Nath Roy's death, Shyamrangini was eight or nine years old, and for about 10 years thereafter she lived under the guardianship of Bhabani. After reaching her majority Shyamrangini obtained possession of her husband's property, and on the 26th April 1915 she executed an absolute deed of gift by which she transferred to her cousin, Taranath

(1) I. L. R. 39 Mad. 1035 (1915).

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Roy, her right and interest in certain lands and premises, the particulars of which were set out in the schedule to the deed. This deed of gift was duly executed and registered by Shyamrangini. On the 24th July 1917 Shyamrangini executed a deed of conveyance by which she surrendered and relinquished in favour of Bhabani, the next heir of Prasanna Nath Roy, the entirety of the widow's estate which she had inherited. In the deed of relinquishment it was *inter alia* provided :—

" You are the brother of my husband and the only presumptive heir of the properties left by him on my death. My husband had peculiar affection for you and I too have genuine love for you. Under these circumstances, having made up my mind to attend to the performance of religious duties, and giving up in your favour my entire life-interest I received by inheritance from my husband, by this deed of release of life-interest I agree and declare that I completely relinquish the entire Hindu widow's life-interest that I had in all the properties described in the under-mentioned schedule which I received by inheritance from my husband or acquired with the usufruct of properties so inherited which know as the entire estate inherited from my husband and over and above that in any other property unknown to me which might have belonged to my husband. I further relinquish in your favour all arrear-dues receivable from my tenants in those properties. From to-day I cease to have any interest or connection with those properties or the arrears realizable therefrom. On the strength of this deed of release you will from this day own and possess an absolute right of my husband's share in the properties described in the under-mentioned schedule, and will continue to hold

and enjoy the same with great pleasure down to your son, son's son, etc., heirs and representatives in succession, with right to make alienation of every description, such as, gift, sale, etc., and to grant subordinate settlements."

It is to be observed that in the schedule to this deed of relinquishment no mention is made of the *jote* and occupancy rights in the land and premises which were the subject-matter of the deed of gift of the 16th April 1915. On the 25th July 1917 Bhabani executed a deed of *mushihara* under which he agreed to pay an allowance of Rs. 150 a month to Shyamrangini, and declared that he had paid Rs. 3,000 to her. After the execution of these two deeds Bhabani was given possession of the properties then in the possession of Shyamrangini, and since July 1917 Shyamrangini has been receiving the monthly sum of Rs. 150; indeed, she has accepted an instalment of the allowance even after the present suit was filed. On the 21st June 1920 Bhabani launched the suit out of which this appeal arises against Taranath Roy and his daughter in which he claimed *inter alia* :—

(1) " That on declaration of Plaintiff's right of inheritance to the properties of Schs. Kha and Ga together with the house, etc., standing thereon as described in the schedule, and on declaration that no right has accrued to the Defendant in respect thereof a decree for *khas* possession may be made in favour of the Plaintiff and eviction of the Defendants therefrom ;

(2) " That a decree may be passed in Plaintiff's favour for recovery of Rs. 925 in the shape of *wasilat* from the Defendant, or should any larger amount be found due in course of trial a decree for that amount on payment of the deficit court-fees."

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The properties described in Sch. Ga to the plaint were the properties which were the subject-matter of the deed of gift of the 26th April 1915. On the 22nd December 1921 a decree was passed in the said suit by which the Court *inter alia* ordered that—

“the Plaintiff's title be declared to the land and houses, etc., described in Sch. Ga and the Plaintiff do get possession thereof,” and “the Plaintiff do get Rs. 50 in respect of mesne profits of the land in Sch. Ga.”

Bhabani and Taranath have died in the course of these proceedings. Against this decree the representatives of Bhabani appealed, and the representatives of Taranath filed a cross-appeal against so much of the said decree as related to the properties in Sch. Ga which had been transferred to Taranath under the deed of gift. The appeal has not been prosecuted, and the cross-appeal alone has been contested before us.

The validity of the deed of gift and of the deed of relinquishment were challenged at the trial of the suit, and the learned trial Judge held that, inasmuch as Taranath had written a post card to the manager of Shyamrangini's properties after the execution of the deed of gift asking for instructions about the management of the estate, the deed of gift was not a *bond fide* gift. I am unable to regard this post card as evidence from which such a conclusion might reasonably have been drawn, and, indeed, the argument on appeal proceeded upon the footing that the deed of gift was a genuine and duly executed document. On the other hand, it was contended that the property covered by the deed of gift had been purchased out of the *stridhan* of Shyamrangini. The learned Judge found that that was not the

fact, and upon the evidence, in my opinion, his decision was correct.

As regards the deed of relinquishment it was urged that Shyamrangini did not understand the nature or effect of the document which she was signing, and that the Court ought not to allow this document to stand. It was further contended that the deed of relinquishment did not amount to a *bond fide* surrender of the entirety of Shyamrangini's interest in her late husband's property, but was merely a device by which she attempted to divide the inheritance with Bhabani Nath. *Rangasami Gounden v. Nachiappa Gounden* (2). The learned Judge decided against both of these contentions, and, in my opinion, the conclusion at which he arrived was right. Shyamrangini was an educated and intelligent woman; she had experienced considerable trouble over the property; she was getting old, and was anxious to pass the rest of her days in meditation free from worldly cares. The joint income which Bhabani and Shyamrangini's husband had received from the ancestral estate was about Rs. 4,000, although at the date of the trial the estate had increased in value. It can well be imagined that Shyamrangini would be only too glad to receive Rs. 3,000 for the expenses of a pilgrimage, and a monthly income of Rs. 150, and to be relieved from further anxiety in respect of the family property. Not only did she act upon the above arrangement with Bhabani in respect of the monthly allowance, but in a letter to Bhabani's son Shamapado she wrote that—

“Bhabani has amply repaid me for the trust I reposed in him in giving up the property.”

Further, with respect to the contention

(2) I. L. R. 43 Mad. 523 : s. c. 23 C. W. N. 777 (P. C.) (1918).

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that Shyamrangini did not understand the nature and effect of what she was doing when she executed the deed of relinquishment, it is to be remembered that she was an educated woman; that the draft of the deed was considered by several pleaders; that before she executed the deed it was read over and explained to her; that she herself had taken the draft to a pleader, Radha Ballav, who was her relative, in order to obtain his advice thereon; that she herself had affixed the seal to the deed and had handed it to Bhabani; that subsequently she acted upon the deed, and has never taken any steps to have it set aside or declared to be invalid. In my opinion, there is no substance in the contention that the deed of relinquishment was not duly and validly executed, or that the deed of relinquishment was a mere device by which the inheritance was divided between Shyamrangini and Bhabani. I should add that I am not satisfied upon the evidence that Shyamrangini was possessed of any moveable properties which she had inherited from her husband, and for the purposes of this appeal it must be taken that no such moveables were in existence, at any rate at the time when the deed of relinquishment was executed.

In these circumstances an important question falls for determination, namely, whether Bhabani, the heir presumptive of Shyamrangini's husband, is entitled to have the deed of gift to Taranath set aside during the life-time of Shyamrangini.

Now, the nature of a Hindu widow's estate is not always understood. It is an anomalous estate which obstructs the normal course of succession as laid down by Hindu sages. For that reason, therefore, it is regarded among the Hindu community as a praiseworthy act that a widow should contrive to put an end to

the unnatural situation created by the existence of the widow's estate of inheritance. In the case of *Moniram Kolita v. Keri Kolitani* (3), Mr. Justice Dwarkanath Mitter observed :—

“ We think it scarcely necessary to remark that the estate of a widow under the Hindu law is one of a very peculiar character. To compare it with a life estate, or with any other estate known to the English law, would be to misunderstand its nature completely; and if authority is needed to support this proposition, we have only to refer to the remarks made by the Privy Council in the case of *The Collector of Masulipatam v. Cavalry Venkata Narainapah* (4). It is true that the widow is allowed to succeed to the estate of her deceased husband as heiress-at-law; and it is also true that she is allowed to represent that estate fully, so long as her right to hold it continues to exist. But her dominion over it is rigorously confined within certain defined limits, beyond which she has no power to go; nor is it allowed to descend to her heirs after her death. As ‘ half the body ’ of her deceased husband she takes his property in default of male issue, but being not more than half her power to deal with it is anything but that of an owner in the true sense of the term.”

The Judicial Committee did not affect to impugn the accuracy of the above exposition of the general position of Hindu widows according to Hindu law and usage, although Sir Barnes Peacock in delivering the judgment of the Privy Council in that case differed from Mitter, J., in thinking that a Hindu widow held the property which she had inherited from

(3) L. R. 7 I. A. 115, 119; s. c. I. L. R. 5 Cal. 778 (1880).

(4) 2 W. R. (P. C.) 59; 8 Moo. I. A. 500 (1860).

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her husband as a trustee. The correct view, as Lord Dunedin observed in *Rangasami's* case (2), is that—

“The rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English law applicable to what might seem analogous circumstances. Phrased in English law terms her estate is neither a fee, nor an estate for life, nor an estate tail. Accordingly, one must not, in judging the question, become entangled in western notions of what a holder of one or other of these estates might do.”

The sage Vrihaspati laid down that—

“In scripture and in the code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives. How then should another take his property while half his person is alive? Let the wife of a deceased man who left no male issue take his share, notwithstanding kinsmen, a father, a mother, or uterine brother, be present. Dying before her husband a virtuous wife partakes of his consecrated fire: or if her husband die before her she shares his wealth: this is a primeval law. Having taken his moveable and immoveable property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half-yearly and other funeral repasts.”

So Vishnu ordains:—

“The wealth of him who leaves no male issue goes to his wife.”

Jimuta Vahana upon this passage made the comment that—

“It must not be alleged that the mention of the widow is intended merely for

the assertion of her right to wealth sufficient for her subsistence. For it would be irrational to assume different meanings of the same term used only once, by interpreting the word wealth as signifying the whole estate in respect of brothers and the rest, and not the whole estate in respect of the wife. Therefore, the widow's right must be affirmed to extend to the whole estate.”

Thus Vrihat Menu says:—

“The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share.”

Again, in the Dayabhaga Jimuta Vahana ordains that—

“On failure of heirs down to the son's grandson, the wife, being inferior in pretensions to sons and the rest, because she performs acts spiritually beneficial to her husband from the date of her widowhood (and not, like them, from the moment of their birth), succeeds to the estate in their default.”

Thus Vyasa says:—

“After the death of her husband let a virtuous woman observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband. Let her day by day perform with devotion the worship of the gods, and especially the adoration of Vishnu, practising constant abstemiousness. She should give alms to the chief of the venerable for the increase of holiness, and keep the various fasts which are commanded by sacred ordinances. A woman who is assiduous in the performance of duties conveys her husband, though abiding in another world, and herself to a region of bliss.”

(3, I. L. R. 43 Mad. 585, 591; A. C. 28 C. W. N. 777 (P. C.) (1915).

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Again, Jimuta Vahana expounds the law as follows :—

“ But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it.”

Thus Catyayana says :—

“ Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.

“ Abiding with her venerable protector, that is, with her father-in-law or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage or sale of it at her pleasure.

“ Nor shall the heirs of the woman's separate property (as her brothers, etc.) take the succession (on failure of daughters and daughter's sons), to the exclusion of her husband's heirs, for the right of those persons, whose succession is declared under that head is relative to the property of a woman (other than that which is inherited by her).

“ Therefore those persons who are exhibited in a passage above cited as the next heirs on failure of prior claimants, shall, in like manner as they would have succeeded if the widow's right had never taken effect equally succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested.”

Dwarkanath Mitter, J., passed the following comment upon the law as laid down by these sages :—

“ It should not be supposed that the above provisions were intended by their framers to serve as mere moral precepts which the widow is at liberty to obey or disobey at her pleasure; on the contrary,

the utmost precaution appears to have been taken by them to secure their strict enforcement. We have already shown that according to the Hindu law women are deemed to be never fit for independence, and the widow in possession of her husband's estate is no exception to the general rule. When the husband is dead (says Narada) his kin are the guardians of his childless widow. In the disposal of property and care of her person, as well as in her maintenance, they have full power.”

The authority of these passages is distinctly recognised in the *Dayabhaga*, which lays down that—

“ In the disposal of property by gift or otherwise she is subject to the control of her husband's family after his decease and in default of sons.”

(*Dayabhaga*, c. xi, s. lv. 64.)

A Hindu widow does not possess a life-estate in the property which she has inherited from her husband, for during her life-time she may, and often does, lose the estate which passed to her on her husband's death. On the other hand, by effecting an alienation within the limited ambit of her power of disposal a Hindu widow is able to transfer to the assignee a proprietary title to the property alienated. But the restrictions upon her power of alienation are various and formidable. No doubt for certain religious, charitable, or customary purposes, or those which conduce to the spiritual welfare of her deceased husband, or are founded on legal necessity, her capacity to dispose of the *corpus* of the estate is wide, if not unfettered. With respect to alienations for legal necessity it is to be remembered that—

“ When the alienation of the whole or part of the estate is to be supported on the ground of necessity then, if such necessity

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is not proved *aliunde*, and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

[*Per* Lord Dunedin in *Rangasami's* case (2); see also *Debi Prosad Chowdhury v. Golap Bhagat* (5).]

I confess that I should have expected to find that all other alienations by a Hindu widow were utterly void and inoperative. But it is now settled beyond doubt or controversy that for purposes not authorised under the Hindu law a Hindu widow is entitled to give, sell, mortgage, or otherwise alienate property which she has inherited from her husband, or any part thereof, for a term which does not exceed the period during which she remains in the enjoyment of her widow's estate: see *Moniram's* case (3). Further, as between the widow and the assignee such alienations by the widow are regarded as valid and binding, and the widow herself is not entitled to impugn the validity of the transaction, for she does not hold the property merely as a trustee for the reversioners, but, subject to certain restrictions, as the owner thereof, and when she purports to act in the capacity of owner she is not permitted to derogate from her grant. On the other hand, unauthorised alienations by a Hindu widow are voidable at the instance of the reversioners.

"A Hindu widow is not a tenant for life, but is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *primâ facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is in fact nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the Appellants prayed by their plaint a declaration that the *ijara* was inoperative as against them as leading up to their prayer for delivery to them of *khas* possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the Defendants to plead and (if they could) prove the circumstances which they relied on for showing that the *ijara* or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."

[*Per* Lord Davey in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (6).]

During the continuance of the widow's estate the person or persons entitled to the reversionary interest in the husband's estate upon the determination of the widow's interest therein are also entitled to restrain the widow from alienating the *corpus* of the property for purposes which are unauthorised; to prevent her from committing waste; and to claim a declara-

(2) I. L. R. 42 Mad. 523 s. c. 28 C. W. N. 777 (P. C.) (1918).

(3) L. R. 7 I. A. 115, 119 s. c. I. L. R. 5 Cal. 776 (1880).

(5) I. L. R. 40 Cal. 721: s. c. 17 C. W. N. 701 (F. B.) (1 13).

(6) I. L. R. 34 Cal. 329: s. c. 11 C. W. N. 424 (P. C.) (1907).

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tory decree that any such alienation is voidable as against them.

"A reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognised by Courts of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.

"But a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity so that the *corpus* of the estate may pass unimpaired to those entitled to the reversion. The law on this subject was recently expounded in the judgment of this Board delivered by Mr. Ameer Ali in *Venkatanarayana Pillai v. Subbammal* (7).

"This representation is in law founded upon a different set of considerations from those which would seek to stamp the character of reversionary heir upon one individual. The latter operation attempted during the enjoyment of the life-estate would necessarily be premature and might, as stated, be futile. The former is justified by the considerations of keeping the estate intact for the persons to whom as reversioners it shall ultimately and at the proper time be determined that the estate shall go."

[*Per* Lord Shaw in *Janaki Ammal v. Narayanasami Aiyar* (8); see also *Balbhadra v. Bhowant* (9), *Isri Dut Koer v. Hansbutti Kocrain* (10), *Ram Pershad Chowdry v. Jokhoo Roy* (11) and *Munnal Chaudri v. Gajraj Singh* (12).]

(7) I. L. R. 38 Mad. 406 (1915).

(8) I. L. R. 39 Mad. 634, 635 (1916).

(9) I. L. R. 34 Cal. 853 : s. c. 11 C. W. N. 956 (1907).

(10) I. L. R. 10 Cal. 324 (1883).

(11) I. L. R. 10 Cal. 1003 (1884).

(12) I. L. R. 17 Cal. 246 (1889).

It follows, therefore, according to the principles of Hindu law, that a widow is impotent *suo motu* to affect the reversionary interests in her husband's estate by her unauthorised alienations. The learned vakil for the Appellants, however, upon the assumption (contrary to his contention) that the deed of relinquishment put an end to Shyamrangini's estate as a Hindu widow, urged that Bhabani was not entitled to impugn the deed of gift to Taranath during the life-time of Shyamrangini. In support of his contention he relied upon the judgment of the Madras High Court in *Kottapalli Subbamma v. Jatavallabhula Subramanyam* (1). In that case the Plaintiff sued to recover the amount due on a mortgage bond executed by a Hindu widow. It appears that during the pendency of the suit the widow had executed a deed of relinquishment in favour of the next heir. The Court held that the Plaintiff was entitled to enforce his mortgage on the widow's life-estate in the property notwithstanding the surrender of her entire interest therein to the heir presumptive of her deceased husband. It may be that that decision can be supported either on the ground that the deed of surrender was executed *pendente lite*, or on the ground that the execution of the surrender was a fraudulent transaction to which both the widow and the next reversioner were parties. Sadasiva Ayyar, J., however, based his decision on the ground that—

"the artificial mediæval doctrine of a widow having no full power of alienation, and the consequent doctrine superimposed by the Bengalee lawyers on this doctrine, namely, the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (this second doctrine having been adopted

(1) I. L. R. 39 Mad. 1035 (1915).

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for South India also by the Madras High Court) cannot, in my opinion, be pushed to the extent to which Mr. Narasinha Rao wishes that they should be extended, namely, so as to defeat the claims of alienees for value who, as Sir Bhashyam Ayyangar said in *Sreeramulu v. Kristamma* (13), were entitled to be protected in their reasonable expectation that they obtained a transfer valid for the widow's life except in the rare case of re-marriage."

Napier, J., added that—

"the theory that the change of status of an assignor or a surrender by such assignor can invalidate legal rights obtained by an assignee is, in my opinion, so contrary to equity and good conscience that it should not be accepted by Courts of this country, whatever the ancient Hindu law on the subject was."

The observations of Bhashyam Ayyangar, J., to which Ayyar, J., referred were passed in a suit in which it was contended that the estate of the widow was determined, not by a deed of surrender in favour of the next reversioner, but by the widow's adoption of a son. His Lordship said:—

"The proposition that a son adopted by the widow cannot, before the termination of her widowhood by death or re-marriage, recover possession of any portion of his adoptive father's estate which she might have alienated prior to the adoption, is not only sound in principle, but is in consonance with justice and equity. A widow, having authority from her husband,—however imperative such authority may be—is not bound to exercise the same, and it is entirely optional with her to adopt or not as she may choose. . . . A person dealing with a widow reasonably calculates that the

alienation will hold good at any rate during her life-time, and except, of course, in the rare case of a re-marriage this will be ensured by the conclusion herein arrived at even when an adoption takes place subsequent to the alienation. When the widow has made an alienation prior to the adoption, the parties concerned will, before giving the boy in adoption, be fully aware of the same, and of the extent of the property remaining with the widow which will immediately come into the possession of the adopted son, and the extent of the property which will come into his possession only after the life-time of the adopting widow—provided such property had not been alienated for a necessary purpose."

In my opinion, the *ratio decidendi* of these two cases in substance was the same, namely, that during the life-time or widowhood of the widow unauthorised alienations by the widow made while she was in the enjoyment of her widow's estate are valid and unimpeachable. With great respect to the learned Judges who decided those cases the reasoning upon which the decisions rest, in my opinion, is vitiated by two fallacious assumptions: (1) that a Hindu widow inherits from her husband an estate for a term which is conterminous with her life-time, or, at any rate, with her widowhood; (2) that while she is in the enjoyment of the estate a Hindu widow possesses absolute power to alienate the property, or any part thereof, for a term which does not exceed the period of her life-time or of her widowhood. No doubt, an estate inherited by a Hindu widow from her husband in some cases has been loosely described as her "life-estate" or an "estate for her widowhood," but such expressions must be read with reference to the context in which they appear, and for the reasons

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which I have stated, in my opinion, the estate which passes to a Hindu widow by way of inheritance from her husband subsists until it is determined by the happening of some event which, according to the principles of Hindu law, puts an end to it. It is settled law that one of the events which effect the determination of a widow's estate is the surrender of her entire interest in the inherited property to the next reversioner.

"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate."

[*Per Lord Morris in Behari Lal v. Madho Lal Ahir Gayawal* (14).]

"To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death."

[*Per Lord Dunedin in Rangasami Gounden v. Nachiappa Gounden* (2).]

With respect to the second of the above assumptions I am of opinion that the power of alienation which a Hindu widow possesses, so far from being absolute or unfettered, is rigidly limited and restricted in the manner which I have stated, and that every unauthorized alienation by the widow is voidable at the instance of the

reversioners. The learned Judges then proceed to comment upon the hardship which would result to alienees from the Hindu widow if the principles of Hindu law were to be enforced. But where the law is clear there is no room for an *argumentum ab inconvenienti*, although, for my part, I am unable to discern any harshness in the application of the Hindu law on the subject. Why should the Court extend special protection to an alienee from a Hindu widow, and none to an alienee from a minor? Upon what principle of fairness or equity ought the Court to favour the interests of an alienee to the detriment of the rights of the reversioners? I can see none. In my opinion, a person who is minded to enter into a business transaction with a Hindu widow must be taken to know the law, and to be aware of the restricted power of alienation which a Hindu widow possesses. In this controversy an *argumentum ab inconvenienti* appears to me to be out of place. Moreover, the learned Judges who were parties to these decisions seem to have been influenced unduly by the view which is widely entertained amongst western communities that it is desirable, whenever possible, to remove the clogs which fetter the free transfer of property, and not to have borne in mind the danger of regarding the principles of Hindu law from the standpoint of western idealism of which Lord Dunedin gave the warning to which I have alluded. [See also *per Lord Giffard in Cossinaut Bysack's case* (15) and *Khub Lal Singh's case* (16)]. I desire to add (although I express my opinion with diffidence and reserve, for the sources from which an European can draw information on this subject are necessarily restricted), that I am

(2) I. L. R. 42 Mad. 523; s. c. 23 C. W. N.

777 (P. C.) (1918).

(15) I. L. R. 10 Cal. 226, 241 (1891).

(15) 2 Morley's Digest 198 (1819).

(16) I. L. R. 43 Cal. 574 (1915).

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not aware of the existence of any desire on the part of the Hindu community generally to enlarge the powers of alienation possessed by a Hindu widow. Of course, it may further be urged that, whereas the alienations in the above cases were for valuable consideration, the transfer in question is by way of gift and—

“being a deed of gift it cannot possibly be held to be evidence of alienation for value for purposes of necessity. It follows, therefore, that the deed taken by itself cannot stand.”

[*Per Lord Dunedin in Rangasami's case (2).*]

But for the purpose in hand it matters not, in my opinion, whether the alienation was for valuable consideration or not. The important feature of the transaction is not that it is voluntary, but that it is unauthorized, and, in my opinion, all alienations for purposes not permitted by the Hindu law are to be treated as *in parâ materia*. The reasoning upon which the decisions in those cases was based has been rejected by the Bombay High Court [*Rama Krishna's case (17)*]. In my opinion, it is not in consonance with the principles of Hindu law, or consistent with the course of judicial pronouncements, and with all due respect I am unable to acquiesce in it.

Applying the principles which I have enunciated to the facts of the present case, in my opinion, having regard to the oral evidence which was adduced at the trial and the evidence inherent in the deed of relinquishment, Shyamrangini by executing the said deed intended to relinquish in favour of Bhabani, the next reversioner, and thereby in fact surrendered to him,

her entire interest in the estate which she had inherited as the widow of her deceased husband. It is true that *co nomine* the property which she had given to Taranath was not included in the schedule to the deed of relinquishment; (it may be because she did not regard that property as still forming part of the estate); but it is clear, to my mind, that she intended to surrender to Bhabani her entire interest in her husband's estate.

In these circumstances the conclusion at which I have arrived is that in so far as the decree declared that Bhabani was entitled to possession of the property described in Sch. (Ga), and ordered that possession and mesne profits in respect thereof be given to him the decision of the learned trial Judge ought to be affirmed. Further, even if it were to be held that Shyamrangini by executing the deed of surrender did not thereby relinquish in favour of Bhabani the entirety of her widow's estate, inasmuch as under the deed of gift to Taranath Shyamrangini did not merely transfer her own interest in the property for the period during which her interest therein endured, in my opinion, the Court ought to interfere at the instance of the reversioners to prevent the wrongful dissipation of the estate by Shyamrangini. By the deed of gift Shyamrangini admittedly purported to transfer her interest in the property, but in the deed it is further provided that—

“You will own and hold possession down to your sons, grandsons and other heirs and representatives, and remain in enjoyment and possession thereof with great pleasure, with power to alienate the same by gift or sale, and by causing mutation of your name in place of mine in the Sherista of the Zemindar. To that neither myself nor my heirs or legal representatives shall be competent to raise any ob-

(2) I. L. R. 42 Mad. 523; s. c. 28 C. W. N. 777 (P. C.) (1918).

(17) I. L. R. 33 Bom. 88 (1908).

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jection; even if raised the same will not be fit to be heard."

In my opinion, the effect of the deed of gift was not only that Shyamrangini thereby alienated her own interest in the property, but that under its provisions she set up a title adverse to that of the reversioners, and attempted thereby to change the course of succession to the property alienated. In my opinion, having regard to the principles and authorities to which I have referred, the reversioners would be entitled to impugn this transaction even during the subsistence of Shyamrangini's interest in the estate. I regret that my learned brother's view on this subject differs from that which I have expressed, but for the above reasons I am of opinion that the cross-appeal fails, and ought to be dismissed.

[In view of the above difference of opinion the question arose whether the decision of Walmsley, J., should prevail (*vide* cl. 38, Letters Patent) or whether the judgment of Page, J., which affirmed the decision of the trial Court would be the judgment of the Court. Upon this point after hearing arguments, the following judgments were delivered on 8th July 1925.]

WALMSLEY, J.—As my learned brother and I differed in regard to the order to be passed on the appeal, we have now to deal with the result of that difference, in other words, to decide whether we are to follow the rule of seniority prescribed by cl. 36 of the Letters Patent or the rule of affirmation contained in sec. 98 of the Civil Procedure Code.

This is the second time that I have had to consider the question and my learned brother on this occasion takes the view, expressed by Suhrawardy, J. [see *Purna Chandra v. Narendra Nath* (18)] on the (18) 39 C. W. N. 755 (1925).

former occasion, that we ought to follow the rule of affirmation. We have heard the learned pleaders on the subject and I have had the advantage of considering my learned brother's judgment. In the circumstances it is clearly my duty to examine the matter anew.

In the first place I wish to repeat that I based my decision in the former case solely on what I deemed to be a correct reading of the judgment of their Lordships of the Privy Council in the case of *Bhaidas v. Gulab* (19). But for that judgment, I should without hesitation have followed the directions of sec. 98, C. P. C. : for I am satisfied that since 1884 when the Full Bench delivered judgment in the case of *Sri Sri Gridhariji v. Purushotum* (20), it has been the practice of this Court to adopt the principle of affirmation when there has been a difference of opinion between two Judges hearing an appeal on the Appellate Side : and in my view that practice is just as correct under the present Code as it was under the Code of 1882.

The question therefore as it presents itself to me is whether or not the judgment of their Lordships is expressed in such terms as to embrace all differences of opinion, both those arising in appeals from Judges exercising the Original Jurisdiction and those arising in appeals from subordinate Courts.

It is true that their Lordships were dealing with an appeal in a suit tried by a Judge exercising the High Court's Original Jurisdiction. That fact of itself would be enough to warrant me in holding that the decision was meant to relate only to appeals of that particular class if it were not for the very peculiar features

(19) L. R. 49 I. A. 184; s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).
(20) I. L. R. 10 Cal. 514 (1884).

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of the case. The appeal to His Majesty in Council was limited to one ground, and that that the Judges of the Bombay Court had erred in following the procedure laid down in sec. 98, Civil Procedure Code. When the controversy was of such a nature, that is to say, when the Appellant's contention was that the Judges had applied to that appeal the procedure that was applicable to appeals of a different class, whether reference was made in argument to the existence of such a class or not, I found it very difficult to distinguish the case merely on the principle of not extending a judgment to a different set of facts, or by laying emphasis on the words "in this instance." Again, their Lordships' choice of *Nundeeput's* case (21) as an illustration seemed to me a source of grave difficulty, for that was an appeal from the mofussil, and the judgment contains a passage of considerable importance. My learned brother Suhrawardy, J., may be right in his interpretation of the law as it stood in 1870, but the reasons given by Norman, C. J., are different.

Those are the two difficulties which lay in my way. I have now had the advantage of being able to study Suhrawardy, J.'s judgment in print, and also of hearing further arguments, and of perusing the judgment which my learned brother is about to deliver, and I have come to the conclusion that I ought to defer to the opinion expressed by my learned brothers and these are my reasons.

In the first place *Nundeeput's* case (21) was quoted only as an illustration of a fact, and I ought not to regard the reference to it by way of illustration as endorsing by implication the reasoning on which the judgment was founded.

Secondly, my learned brother in his (21) 13 W. R. 209 (1870)

judgment has explored the history of the matter, and shown how it is that the principle of cl. 36 of the Letters Patent has been preserved for appeals within the Court, and that the legislature has consistently sought to enforce the principle of affirmance, at any rate for Appellate Side appeals. It is abundantly clear that the legislature had no intention of going back on the method established by the Codes of 1877 and 1882 when the present Code was introduced, and if the terms of sec. 4 have that effect, it is an accident.

Next, I am more impressed than I was by the distinction between the two classes of appeal, that is, by the fact that the appeals of one class are within the Court while those of the other class are from subordinate Courts. The distinction is important, because the Civil Procedure Code makes no mention of the one while it contains elaborate rules for the other. Coupled with this is the necessity of attaching some meaning to the words of sec. 98, Civil Procedure Code, for in this Province, at any rate, they are superfluous unless they refer to Divisional Benches of this Court.

I have also studied the decision of the Bombay High Court in the case of *Bhuta v. Lakadu Dhansing* (22). The judgment was delivered before the decision in *Bhaidas's* case (19), but it is of value because the possible effect of sec. 4 was present to the minds of the learned Judges.

For these reasons I think that I am not justified in differing from my two learned brothers in holding that in appeals from subordinate Courts a difference of opinion between two Judges forming a Division Bench must continue to be regulated by the provisions of sec. 98 of the Civil Pro-

(19) L. R. 48 I. A. 184: s. c. I. L. R. 45 Bom. 718; 25 O. W. N. 605 (1921).

(22) I. L. R. 43 Bom. 423 (1916).

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cedure Code, and that the decision in *Bhaidas's* case (19) must be taken to refer only to that class of appeals to which it expressly relates.

A decree will now be drawn up in accordance with the judgment of my learned brother Mr. Justice Page. The hear-in-fee in this Court is assessed at six gold mohurs.

PAGE, J.—Owing to the difference of opinion which has arisen between my brother Walmsley and myself, it is incumbent upon the Court to determine whether this appeal is governed by cl. 36 of the Letters Patent of 1865 or by sec. 98 of the Civil Procedure Code of 1908. The controversy which has raged over this question is one that has vexed the Courts for 60 years, and can only satisfactorily be set at rest by the action of the legislature now long overdue. The solution of the problem, however, as I apprehend the matter, will be found to depend upon the answer which is given to two questions :—(1) What was the law in force at the time of the enactment of the Civil Procedure Code (Act V of 1908)? (2) Was the law then in force repealed by sec. 4 of the said Act?

Upon the creation of the High Court at Fort William in Bengal, pursuant to 24 and 25 Vict., Ch. 104, 28 Vict., Ch. 15 and the Letters Patent of 1862 and 1865, the said High Court became vested *inter alia* with the Original Jurisdiction administered by the Supreme Court, and with the Appellate Jurisdiction of Mofussil Courts which formerly had been exercised by the Suddar Dewani Adalat. Now, in the case of an appeal to the Suddar Dewani Adalat, it was provided by sec. 23 of Act XIII of 1861 that—“ if an appeal lies to the Suddar Court, it

(19) L. R. 48 I. A. 184; a. c. I. L. R. 45 Bom. 718; 25 O. W. N. 605 (1921).

shall be heard and determined by a Court consisting of two or more Judges of that Court; if, when the Court consists of only two Judges, there is difference of opinion upon the evidence in a case in which it is competent to the Court to go into the evidence, and one Judge agrees in the opinion of the lower Court as to the facts, the case shall be determined accordingly. If in a Court so constituted there is a difference of opinion upon a point of law the Judges shall state the point upon which they differ and the case shall be re-argued upon that question before one or more of the several Judges, and shall be determined according to the opinion of the majority of the Judges of the Suddar Court by whom the appeal is heard.” By the preamble to this Act as also by that to Act VIII of 1869 the provisions of the said Act were not to extend to Courts established by Royal Charter. On the other hand, by cl. 4 of the Letters Patent of the 26th March 1774, under which the Supreme Court of Judicature at Fort William was established, it was provided—“ that all judgments, rules, orders and acts of authority, or power whatsoever, to be made or done by the said Supreme Court of Judicature at Fort William in Bengal, shall be made or done, by and with the concurrence of the said four Judges, or so many, or such one of them, as shall be on such occasions respectively assembled or sitting as a Court, or of the major part of them so assembled and sitting; provided always, that in case they shall be equally divided, the Chief Justice, or in his absence the senior Judge present, shall have a double or casting vote.” In the Letters Patent of 1862 no provision was made for the course to be pursued in the event of the Court being equally divided in opinion, but under cl. 36 of the Letters Patent of 1865 it was

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provided: "And we do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its Original or Appellate Jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of sec. 108 of the Government of India Act of 1915; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail." In prescribing the mode of procedure laid down in cl. 36, the Crown appears to have had in mind the rule which had governed the Supreme Court in such cases; but, whatever the source of the rule may have been, from 1865 until 1877, when the Civil Procedure Code (Act X of 1877) was enacted, the procedure in cl. 36 was followed uniformly in all appeals, whether they were preferred from the decision of a Judge in the exercise of the Original Civil Jurisdiction of the High Court or from Courts subordinate to the High Court. [*Shahazadi Hajra Begum v. Khaja Hossein Ali* (23) and *Nundecput Mahta v. Urguhart* (21)]. It is to be observed that by cl. 44 of the Letters Patent of 1865 it was provided that the Letters Patent were to be subject to the legislative powers of the Governor-General in Council, and on the 20th March 1877 the Code of Civil Procedure (Act X of 1877) was passed by the Governor-General in

Council. By sec. it is provided that:—

"When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges, or of the majority (if any) of such Judges. If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed; provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it. Where there is no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed. The High Court may from time to time make rules consistent with this Code to regulate references under this section."

The provisions of Act X of 1877 relating to appeals are reproduced in the Civil Procedure Code of 1882 (Act XIV of 1882) and the terms of sec. 575 are similar to those of sec. 98 of the Civil Procedure Code of 1908 except that, whereas in sec. 575 the reference to one or more other Judges of the Court is on law and fact, in sec. 98 it is restricted to the point of law in respect of which the Appeal Bench has differed. I find it difficult to express my view of the rule laid down in cl. 36 of the Letters Patent with becoming moderation, for I cannot see in it a scintilla either of equity or of merit. It will suffice, however, for the purposes of this appeal, that I should refer to the ob-

(21) 13 W. R. 209 (1870).

(23) 4 Bong. L. R. 86 (1869).

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servations of Mr. Arthur Hobhouse, Q. C., as he then was, in presenting the report on the proposed Code of Civil Procedure to the Governor-General in Council on 21st September 1876 :—

“ The last point I think it necessary to trouble the Council with—and they will be very glad to hear that it is the last—is the subject of appeals, not the vexed question of second appeals upon which we have had so much discussion, because the proposals of the Bengal Government to alter the structure of the Appellate Courts have not yet been determined upon. The law with respect to appeals where the Appellate Court consists of a plurality of Judges is not in a satisfactory state. According to sec. 332 of the Code which applied to the Sudder Court, when an Appellate Court of two Judges differs upon a question of fact, and one of the Judges agrees with the Court below, the judgment of the Court below is to stand. When they differ upon a point of law, the point is to be re-argued before another Judge or other Judges, and is to be decided according to the opinion of the majority of the whole of the Judges who have heard the point argued. By the Charters of the High Courts if a Division Court of two or more Judges is equally divided in opinion, the opinion of the senior Judge is to prevail. Now, in that clause of the Charter, Original business and Appellate business were lumped together, and though the rule is a very good rule in respect to Original business, it is not satisfactory as applied to Appellate business. The result of it is that the Plaintiff may have a great preponderance of judicial opinion in his favour and yet a decree be given for the Defendant. It may happen that a man has obtained a decree in the Court below or in two Courts below, and that half the

Appellate Court is in favour of his retaining that decree, but because a single Judge, being the other half of the Appellate Court, thinks otherwise, then the decree goes for the Defendant. We had to consider this question very carefully last year in connection with the Burma Courts Act, because the principal Court of Appeal in Burma consists of not more than two Judges, and the principle we applied there was that which prevails in England, and which seems to me to be the most reasonable of all principles; that if there is no majority of the Appellate Court, which can agree to alter, and how to alter, the decree of the Court below, that decree shall remain unaltered. I must confess that in our Bill No. 3 we left that matter in a rather unsatisfactory position, for we copied too faithfully both the Code and the Charters, and the result was that we had introduced two conflicting principles. However, we found out our error and we have now adopted the principle which will be found embodied in sec. 575 of Bill No. IV.”

“ It is, I think, clear beyond all doubt or controversy that in passing sec. 575 of the Civil Procedure Code of 1877 the legislature intended to substitute in all appeals to which the provisions of sec. 575 can reasonably apply the rule laid down in sec. 575 for the rule in cl. 36 which was then in force.” [*Per Lord Buckmaster in Bhaidas Shindas v. Bai Gulab* (19)].

It is quite plain that these provisions create a totally distinct method of procedure in the event of difference between two Judges from that which was laid down by sec. 36. Under sec. 36 of the Letters Patent the judgment of the Judge who was the senior Judge would be the

(19) L. R. 48 I. A. 184; s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

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judgment which the parties before the Court would have a right to obtain. Under sec. 98, the judgment to which they are entitled is the judgment of the majority of all the Judges who have heard the appeal: and this case shows that those two provisions might produce a totally different result.

It follows, therefore, that if and in so far as cl. 36 and sec. 575 are extended to the same subject-matter and the two enactments are inconsistent, they cannot stand together, and the earlier enactment *pro tanto* must be deemed to have been repealed by the later one [*Conservators of the River Thames v. Hall* (24) and *Emperor v. Prokhat Chandra Barua* (25)]. That the two rules are incompatible, I apprehend, will be conceded, but are they also applicable to the same subject-matter? Can it reasonably be suggested that the two enactments are able to stand together because sec. 575 is applicable to some Courts other than the High Court and, therefore, in relation to appeals to the High Court, that the provisions of cl. 36 are still in force. By secs. 5 and 8 of the Civil Procedure Codes of 1877 and 1882, the Small Cause Courts are excluded expressly from the ambit of the appeal sections of Codes: (see also secs. 7 and 8 and Ors. 50 and 51 of the Code of 1908). To what Courts other than the High Courts therefore were the provisions of sec. 575 intended to, or can they, apply? I know of none. In my opinion, it is an irresistible inference from the provisions of the Code of 1877 that it was intended that sec. 575 should be applied to all appeals which up till the time of its enactment were within the ambit of sec. 36 of the Letters Patent. It is to be remembered that the Code of 1877 con-

tains no saving clause similar to sec. 4 of the Code of 1908. On the contrary, by secs. 631 and 632 the Codes of 1877 and 1882 in express terms are made applicable to the Chartered High Courts except as provided by sec. 638, which contains no reference to sec. 575. Moreover, some doubt having arisen as to whether the Appellate Jurisdiction of the High Courts included the exercise of its powers of revision, by sec. 628 a rule was applied to applications for review similar to that which governed appeals. [See Or. 47, Or. 49 (3) of the Code of 1908 and *Chappan v. Moidin Kutti* (26).] In my opinion it is clear and certain that the legislature intended to substitute sec. 575 of the Code for cl. 36 of the Charter, and to the extent to which the provisions of sec. 575 apply to appeals to which cl. 36 also extend the provisions of cl. 36 must be regarded as no longer in force after the Code of 1877 was enacted. The same view of the meaning and effect of sec. 575 was taken by Edge, C. J., in *Husaini Begam v. The Collector of Muzaffarnagar* (27), where his Lordship observed:—

“I am of opinion that sec. 27 of our Letters Patent is superseded in those cases only to which sec. 575 of the Code of Civil Procedure properly, and without straining language, applies.”

No distinction in this behalf, I think, can be drawn between first and second appeals from Subordinate Courts to the High Court, and, in my opinion, sec. 575 applied alike to both. This view has consistently been held by the High Courts in India since 1879, in which year the case of *Appaji Bhoirav v. Shivalal Khubchand* (28) was decided by Westropp, C.

(24) L. R. 3 C. P. 415 (1868).

(25) I. L. R. 51 Cal. 504 (1924).

(26) I. L. R. 23 Mad. 68 (1898).

(27) I. L. R. 11 All. 182 (1889).

(28) I. L. R. 3 Bom. 204 (1879).

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J. and Melville and West, JJ., in the Bombay High Court. [*Shahatzadi Begum's* case (23), *Narayanasami Reddi v. Osuru Reddi* (29) and the cases cited in the judgment of Suhrawardy, J., in *Beacharam v. Purna* (30).] Indeed, in *Gossami Sri 108 Sri Gridhariji Maharaj Tekait v. Purushotum Gossami* (20) in which a difference of opinion arose in an appeal from the decision of a Judge in the exercise of the Original Civil Jurisdiction of the High Court, the Full Bench of the Calcutta High Court consisting of Garth, C. J., Mitter, McDonnell, Prinsep and Wilson, JJ., went so far as to lay down in general terms that—

"We agree in the view taken by the Bombay High Court in the case of *Appaji Bhirrao v. Shital Khubchand* (28) that the effect of sec. 575 of the Code is to supersede the provisions in cl. 36 of the Letters Patent; that in the event of any disagreement between two Judges of a Division Bench the judgment of the senior Judge should prevail; but and still that, notwithstanding that section, cl. 15 of the Letters Patent remains in full force."

I confess that I should have thought that the law as laid down in that case was correct. But after the decision of the Judicial Committee in *Hurrish Chunder Chowdhury v. Kalisunderi Debi* (31), in which case their Lordships observed that "they do not think that sec. 588 of the Act X of 1877 applies to such a case as this, where the appeal is from one Judge of the Court to the Full Court," doubts were entertained, founded partly (a) upon the language of sec. 540 and the

kindred sections of the Code, and partly (b) upon the fact that the Original Civil Jurisdiction of the High Court was derived not from the Code but from the Letters Patent, as to whether the sections of the Code relating to appeals were applicable to appeals from one Judge of the High Court to a Divisional Bench of the same Court. Now there is no Court of Appeal within the High Court to which appeals can be preferred from the decision of a Judge or Judges of the High Court exercising the Original Civil Jurisdiction with which the Court is endowed under the Letters Patent of 1865. The High Court was constituted after the model of the old Court of King's Bench in England in which no one Judge was subordinate to another, and in which an appeal from one Judge of the Court was preferred to the Court on appeal and not to a Court of Appeal. I have often heard senior men, who remembered the system as it obtained in England before the Judicature Act of 1873, lament that the Judges suffered a serious diminution of prestige after the creation of the Court of Appeal in England, but fortunately in this country the constitution of the High Court has remained unchanged. Having regard to the constitution of the High Court in its Ordinary Original Jurisdiction, therefore, it was held that inasmuch as the provisions of the Code relating to appeals were mainly, if not wholly, applicable to appeals from subordinate Courts to a superior Court, the appeal sections did not apply to appeals from one or more Judges of the Court to the High Court on appeal. In *Sabhpathi Chetty v. Narayanasami Chetty* (32) the Madras High Court held that—

"Both sec. 540 of the Code of Civil Procedure relating to appeals from origi-

(20) I. L. R. 10 Cal. 814 (1884).

(23) 4 Bng. L. R. 86 (1869).

(28) I. L. R. 3 Bom. 204 (1879).

(29) I. L. R. 25 Mad. 547 (1901).

(30) 41 C. L. J. 456 (1925).

(31) F. L. R. 9 Cal. 482 (P. O.) (1882).

(32) I. L. R. 25 Mad. 555 (1901).

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nal decrees and secs. 588 and 591 relating to appeals from orders provide for appeals from one Court to another of higher grade. The provision made by sec. 15 of the Letters Patent for appeals from one or more Judges of the High Court to other Judges of the same Court is entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another."

[See also *Chappan's case* (26), *Sesha Ayyar v. Nagarathan Lala* (33), *Deben-dra Nath Das v. Bibudhendra Mansingh* (34) and *Kamcshwar Prosad v. Amanu-tulla* (35)].

The language used in the appeal sections of the Code does not appear to me however to warrant the drastic inference which was drawn from it, and since the case of *Sabitri Thakurain v. Savi* (36) it must be taken, as Lord Sumner observed, that the decision in the Madras cases "laid down their effect much more widely than was necessary, and overlooked the distinction between rules which took away existing rights of appeal and rules which recognise those rights but regulate the procedure of the Court in which such appeals are pending."

"There is no reason why there should be any general difference between the procedure of the High Court in matters coming under the Letters Patent and its procedure in other matters. . . . The Code is framed on the scheme of providing generally for the mode in which the High Court is to exercise its jurisdiction, whatever it may be, while specifically excepting the powers relating to the exercise

of Ordinary Original Civil Jurisdiction to which the Code is not to apply."

The question to be determined is whether the particular provisions of the Code under consideration in each case extend to the Ordinary Civil Jurisdiction of the High Court. For example, in *Mathura Sundari Dasi v. Haran Chandra Saha* (37), Sanderson, C. J., held in the circumstances obtaining in the case, namely, where the suit was dismissed under Or. 9, r. 8 of the Civil Procedure Code, that the Code of 1908 gives a right of appeal from a Judge exercising Ordinary Civil Jurisdiction of the High Court to the Court on appeal, and that the provisions of the Code applied to such an appeal.

"By the terms of sec. 117, the Code is made applicable to the High Court, and Or. 43, r. 1 gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the Defendant's case that Or. 10, r. 9 applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the Plaintiff should be subjected to Or. 9, r. 8 and be liable to have his suit for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules, which—when his application for re-instatement had been refused—gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the

(26) I. L. R. 22 Mad. 68 (1898).

(33) I. L. R. 27 Mad. 121 (1903).

(34) I. L. R. 43 Cal. 90 (1915).

(35) I. L. R. 28 Cal. 53 (1898).

(36) L. R. 48 I. A. 76; s. c. I. L. R. 48 Cal. 481; 25 C. W. N. 557 (1921).

(37) I. L. R. 43 Cal. 886; s. c. 20 C. W. N. 594 (1915).

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rules made under it. In my judgment, the Code and the rules do apply and the Plaintiff has a right of appeal."

I respectfully agree with the decision in that case, and I do not think that it is open to the criticism passed upon it by Hayward, J., in *Bhuta Jayatsing v. Lakadu Dhansing* (22). On the other hand, in *Tulsimoni Dassi v. Sudevi Dassi* (38), Ameer Ali, J., observed :—

"In my opinion sec. 588 of the Code of Civil Procedure applies only to orders made by Subordinate Courts, which derive their powers from the Code. The Civil Procedure Code is applicable to the Original Side of the High Court in so far as the procedure is concerned, and some of its provisions have no doubt had the effect of curtailing the rights of appeal by giving finality to certain orders of a Judge exercising singly the Ordinary Original Civil Jurisdiction of the High Court. In other words, it lays down an uniform procedure for all Courts of Original Civil Jurisdiction including the High Court on its Original Side. But the powers of the High Court are not derived from the Code and consequently an order of a Judge of the High Court exercising its Original Civil Jurisdiction, though made in accordance with the procedure laid down in the Code, can hardly be said to be made 'under the Code.' Besides, sec. 589 of the Code indicates to my mind that the preceding section was applicable only to the orders of Subordinate Courts."

Again, in *Debendra Nath Das v. Bibudhendra Mansingh* (34), Jenkins, C. J., stated :—

"The Code makes no provision for an appeal within the High Court, that is to

say, from a single Judge of the High Court. This right of appeal depends on cl. 15 of the Charter.

"And here I may point out that a Judge sitting alone is not a Court subordinate to the High Court but performs a function directed to be performed by the High Court (cl. 15, Letters Patent)."

Accordingly, it was held in *Chappan's* case (26), *Sabhapathi Chetty's* case (32), *Sesha Ayyar's* case (33), *Lachman Singh's* case (39), *Rooplal's* case (40), *Surajmal's* case (41) and *Bhuta Jayatsing's* case (22) [in the Madras cases much reliance being placed on the third part of sec. 652 of the Codes of 1877 and 1882, which was added by sec. 2 of the Civil Procedure Code Amendment Act (XII of 1895), and which was re-enacted in sec. 129 of the Code of 1908] that the procedure of sec. 36 remained unrepealed and in force in relation to appeals to the High Court from a Judge or Judges of the Court exercising Original Civil Jurisdiction. In 1908, therefore, at the time when the Civil Procedure Code of that year was passed the law in force relating to differences of opinion in appeals to the High Court from a Judge or Judges of the High Court exercising Ordinary Civil Jurisdiction was cl. 36 of the Letters Patent of 1865, while a difference of opinion arising in an appeal from a Subordinate Court to the High Court was governed by sec. 575 of the Code of 1882. I apprehend that no doubt can arise that in like manner the effect of secs. 117 and 120 of the Code of 1908 was to extend *inter alia* Part VII of the Code (in which sec. 98 appears) to the

(22) I. L. R. 43 Bom. 433 (1918).

(26) I. L. R. 22 Mad. 78 (1898).

(32) I. L. R. 25 Mad. 555 (1901).

(33) I. L. R. 27 Mad. 121 (1903).

(39) I. L. R. 26 All. 10 (1908).

(40) I. L. R. 29 Mad. 1 (1905).

(41) 20 Bom. L. B. 185 (1917).

(22) I. L. R. 43 Bom. 433 (1918).

(34) I. L. R. 43 Cal. 90 (1915).

(38) I. L. R. 26 Cal. 361 : s. c. 3 C. W. N. 347 (1899).

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Chartered High Courts of India. But by sec. 4 of the Code it is provided that—

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form prescribed by or under any other law for the time being in force."

Now, assuming the law in force relating to differences of opinion in appeals to the High Court was that which I have stated, it follows that if cl. 36 now extends to appeals from Subordinate Courts to the High Court, sec. 4 must be taken to have effected *pro tanto* a repeal of the law in force at the time when the Code of 1908 was enacted. Indeed this must be so unless in construing sec. 4 the provisions of the Code of 1908 are deemed to be a fresh start in litigation, and no regard is to be paid to the law in force at the date when the Code of 1908 was enacted. What a strange anomaly that a clause which was designed and purported to save laws and forms of procedure then in force should operate to repeal them. That it was neither intended nor contemplated by the legislature that such a construction should be put on sec. 4 is plain, for Mr. Erle Richards, K. C., as he then was, in presenting the report of 1908 to the Governor-General in Council on 6th September 1907, observed:—"The next subject dealt with in the bill is the important one of appeals, and in regard to that I have little to say, because, in fact, the provisions remain much as they are in the present Code."

Moreover, since the Code of 1908 was passed, the Courts in India consistently have held that the law then in force was not repealed by sec. 4 of 1908, and remained unaffected by the provisions there-

of. It is urged, however, that the Judicial Committee of the Privy Council, notwithstanding the matters to which I have adverted, in *Bhaidas Shiodas's* case (19) have held that cl. 36 of the Letters Patent of 1865 extends to all appeals to the High Court and that cl. 36 is not affected by sec. 98 of the Code by reason of sec. 4 of the Code. I cannot persuade myself that their Lordships intended to decide, or, in fact, determined, so broad and general a question. In *Bhaidas's* case (19) the appeal was preferred from a decision of MacLeod, J., exercising Original Civil Jurisdiction to the High Court at Bombay, and the appeal was heard before Scott, C. J., and Heaton, J. They differed in opinion, Scott, C. J., held that the appeal ought to succeed, Heaton, J., on the other hand, agreeing with the Judge who tried the suit.

"The course then taken was to refer the matter to two other Judges, Batchelor and Shah, JJ., who also decided adversely to the Plaintiff's contention.

"The Plaintiff has now brought an appeal before His Majesty in Council, and the first point he has raised is this; that the order made referring the case to the decision of Batchelor and Shah, JJ., was *ultra vires* and void; that there was no jurisdiction in these two Judges to entertain the dispute; and that he is entitled as of right to a decree in accordance with the opinion of Scott, C. J., the senior of the two Judges before whom the appeal was first heard."

[*Bhaidas's* case (19).]

It is to be observed that Scott, C. J. and Heaton, J., in *Bhuta Jayatsing's* case (22), while the proceedings in *Bhaidas's* case (19) were pending, took the contrary

(19) L. R. 48 I. A. 184; s. c. I, L. R. 45 Bom. 718, 25 C. W. N. 605 (1931).

(22) I. L. R. 49 Bom. 483 (1918).

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view, and expressed the opinion that cl. 36 of the Letters Patent applied to an appeal from a Judge exercising Ordinary Civil Jurisdiction. Lord Buckmaster, in *Bhaidas's* case (19), after citing sec. 4 of the Code, stated :—

“ There is no specific provision in sec. 98, and there is a special form of procedure which was already prescribed. That form of procedure sec. 98 does not, in their Lordships' opinion, affect. The consequence is that, in this instance, a wrong course was taken when this case was referred to other Judges for decision, and he is technically entitled to a decree in accordance with the judgment of the Chief Justice. This view of the section is not novel, for it has been supported by judgments in Madras, in Allahabad and in Calcutta; see *Rooplal v. Lakshmi Doss* (40), *Lachman v. Ramlogan* (39) and *Nundeeput v. Urquhart* (21).”

Upon this observation is founded the contention that the Judicial Committee intended to decide that all appeals to the High Court are governed by cl. 36 of the Letters Patent. I do not think that the language used supports any such contention. Sec. 4 does not preserve every special law or form of procedure physically retained on the Statute Book, and not expressly repealed (which the learned pleader for Taranath suggested was the position of cl. 36 when sec. 4 was passed), but those only which were then in force. The provisions of sec. 36 of the Letters Patent, undoubtedly, were in force on that date in respect of appeals from the Original Side of the High Court; but it is equally plain, as I apprehend the

matter, that the provisions of the Code of 1882 had been substituted for those of cl. 36 in respect of appeals from Subordinate Courts to the High Court, and that to that extent sec. 36, though not expressly repealed, was no longer in force. The appeal in *Bhaidas's* case (19) was from a Judge of the High Court exercising Ordinary Civil Jurisdiction and it could not be doubted that cl. 36 extended to such an appeal. It is plain, I think, that the Judicial Committee were applying their minds to the case which was before them and it is for that reason that Lord Buckmaster was careful to state :—

“ The consequence is that the Appellant is right in saying that in this instance a wrong course was taken when the case was referred to other Judges for consideration.”

The words which their Lordships employed were apt in the circumstances of the case under appeal, but it was not the language which I venture to think that the Judicial Committee would have used if their Lordships had intended to lay down a general rule that would govern all appeals to the High Court. Their Lordships did not state that cl. 36 was to have this general application. Why should it be assumed that such was their intention? Moreover, the three cases to which Lord Buckmaster referred do not warrant such a supposition; *Rooplal's* case (40) being an appeal from a Judge of the High Court, *Lachman's* case (39) an appeal from a single Judge of the High Court sitting as a Divisional Bench; while in *Nundeeput's* case (21) the appeal was decided at a time when no form of proce-

(19) L. R. 48 I. A. 184; s. c. I. L. R. 45 Bom. 718; 25 O. W. N. 605 (1921).

(21) 13 W. R. 209 (1870).

(39) I. L. R. 26 All. 10 (1903).

(40) I. L. R. 29 Mad. 1 (1903).

(19) L. R. 48 I. A. 184; s. c. I. L. R. 45 Bom. 718; 25 O. W. N. 605 (1921).

(21) 13 W. R. 209 (1870).

(39) I. L. R. 26 All. 10 (1903).

(40) I. L. R. 29 Mad. 1 (1903).

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duration regulating appeals to the High Court other than that contained in cl. 36 was in existence. No cases were cited, and no argument was addressed to their Lordships relating to the law in force in 1908 governing appeals from Subordinate Courts to the High Court. If the Judicial Committee had been minded to reverse the settled procedure laid down by the Courts of India in a long stream of Judicial pronouncements during a period of nearly 60 years, I am persuaded that they would not have done so out of hand, and without argument or reference to the statutes, the case-law and the history on the subject; much less would they have couched their decision in terms such as those which they employed. For these reasons I hold that the judgment in *Bhaidas's* case (19) is limited to appeals from Judges of the High Court exercising Ordinary Civil Jurisdiction to the Court on appeal (such as the appeal which they were called upon to determine), and is not to be taken as deciding that the law relating to appeals from Subordinate Courts to the High Court which for so long a period had been in force in India had been repealed by sec. 4 of the Code of 1908. Since *Bhaidas's* case (19) the Calcutta High Court in at least three cases has acted upon the view which I entertain of the meaning and effect of the judgment of the Privy Council in that case, although my brother Walmsley felt himself constrained by the language used, to take different view of the meaning to be attributed to the judgment of the Judicial Committee. [See *Becharam v. Purna* (30)]. In *Suresh Chandra v. Shiti Kanta* (42), Mr. Justice Newbould

and Mr. Justice B. B. Ghose and I expressed the view that sec. 36 extended to differences of opinion in first appeals from a mofussil Court to the High Court; but in that case, the opinion of the Court was merely *obiter*. No argument was addressed to the Court on the point, and inasmuch as the senior Judge was in favour of dismissing the appeal, it was a matter of indifference whether sec. 98 or cl. 36 was applied, for in either case the same result would have followed. After the exhaustive manner in which the subject has been argued before us on this appeal, I have come to the conclusion that the untutored opinion which I then expressed I was wrong, and I resile from it. In my opinion, sec. 98 applies to the difference of opinion which has arisen between my brother Walmsley and myself in this appeal, and I agree that the appeal should be dismissed.

[The decision being as stated above, the Appellant preferred a further appeal under cl. 15 of the Letters Patent which came on for hearing before their Lordships N. R. Chatterjea, C. J., Rankin and Chakravarti, JJ.]

Babu Bansori Lal Sarkar for the Appellant.

Dr. Radha Binode Pal and *Babu Bhupendra Kishore Basu* for the Respondent.

The following JUDGMENT was delivered by

CHATTERJEA, C. J. (RANKIN AND CHAKRAVARTI, JJ., agreeing).—This is an appeal under sec. 15 of the Letters Patent against a decision of Mr. Justice Page.

The suit out of which the appeal arises was instituted by the Plaintiff-Respondent for a declaration of title to, and recovery of possession of, certain properties which originally belonged to one Guru Charan Roy (*sic*). Guru Charan (*sic*)

(19) L. R. 43 I. A. 184; s. c. I. L. R. 45 Bom. 718; 25 C. W. N. 605 (1921).

(30) 41 C. L. J. 456 (1925).

(42) I. L. R. 51 Cal. 669; s. c. 28 C. W. N. 637 (1924).

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died in 1871 leaving a childless widow Shyamrangini, and she came into possession of the zemindary, *putni* and other properties left by her husband in her right as a Hindu widow. She acquired certain *jotes* out of the income of the estate in her hands and built a house upon the *jote* land acquired by her. In 1915, she granted an *ijara* of the zemindary and the *putni* properties to her husband's agnatic cousin Taranath Roy, now represented by his widow Profulla Kamini Roy, the present Appellant. About the same time she executed a deed of gift by which she conveyed to him the dwelling-house which she had erected on the *jote* land. In the deed it was asserted that the property was her *stridhan* and she purported to give it absolutely to the donee. In 1917 she gave notice to Taranath for terminating the *ijara* and, as a matter of fact, the *ijara* was terminated. On the 25th of July 1917 she executed a deed of release in favour of her husband's brother Bhabani Nath Roy, and, on the 21st of June 1920 the latter instituted the present suit against Taranath and another Defendant (Defendant No. 2) for recovery of possession of the properties in suit.

It appears that the Plaintiff claimed in Sch. Ka the moveable properties which belonged to the lady. This was a claim against both the Defendant No. 1 and the Defendant No. 2. In Sch. Kha the Plaintiff claimed certain lands which had been sold by the lady to, and certain lands which had been partly settled with, the Defendant No. 2. Sch. Ga comprised the land containing the house; and this was the property which was conveyed by the deed of gift to the Defendant No. 1.

The learned Subordinate Judge held that the moveable properties were not in-

cluded in the deed of release, that the lands of Sch. Kha which had been alienated by the lady were alienated for valuable consideration and that the settlement of the *khamar* lands mentioned in Sch. Kha was valid on the ground of prudential management. He accordingly dismissed the claim with regard to the properties of Schs. Ka and Kha. With regard to the property in Sch. Ga he was of opinion that the deed of gift set up by the Defendant was not a *bonâ fide* one and he accordingly gave a decree to the Plaintiff in respect of that property.

The Plaintiff appealed to the High Court in respect of the properties mentioned in Schs. Ka and Kha, regarding which his claim had been disallowed by the trial Court, and the Defendant appealed with respect to the property of Sch. Ga.

The Plaintiff did not prosecute his appeal and it was accordingly dismissed.

The cross-objection preferred by the Defendant with respect to the property in Sch. Ga only was heard by Mr. Justice Walmsley and Mr. Justice Page and the question was raised whether under the deed of surrender the Plaintiff was entitled to get possession of the property conveyed to the Defendant by the lady during her life-time. The learned Judges differed upon that point, and the judgment of Mr. Justice Page which was an affirmation of the judgment of the trial Court prevailed; the judgment of the trial Court was upheld, and the cross-objection was dismissed. Hence this appeal was preferred by the Defendant, under the Letters Patent.

Before considering the question which of the views taken by the learned Judges is correct, the first thing to be considered is what is the nature of the deed of sur-

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render executed by the lady in favour of the reversioner.

There is no doubt that a Hindu widow is entitled to surrender her estate in favour of the reversioner at any time. But it may be either by way of a transfer of her interest in the estate for valuable consideration or it may be an absolute surrender which has the effect of accelerating the succession of the reversioner, and we have to see whether the transaction in the present case falls within the one class or the other.

The case was not decided upon the footing of acceleration of inheritance by surrender in the trial Court which was the point taken up and discussed by the learned Judges in this Court.

One of the learned Judges, Mr. Justice Walmsley, referred to the finding of the Subordinate Judge that the sale and the leases of parts of the property must stand good for the term of the widow's life, and that that part of his judgment had become final, and observed: "That the widow has covenanted for a monthly payment in addition to a cash payment. These two facts make it difficult to regard the relinquishment as of the whole estate, and as effecting the widow's death from the legal point of view." Mr. Justice Page noticed the contention that "the deed of relinquishment did not amount to a *bonâ fide* surrender of the entirety of Shyamrangini's interest in her late husband's property but was merely a device by which she attempted to divide the inheritance with Bhabani Nath," but he appears to have dealt more with the question whether the widow understood the nature and effect of what she was doing when she executed the deed than the matters referred to above. With regard to the moveables Mr. Justice Page observes that the moveables were not in

existence; but it appears that the Plaintiff himself claimed 151 items of moveable properties in the first schedule to the plaint, and that some of these which had belonged to the family *thakur* were decreed in favour of the Plaintiff.

The main question which we have to consider is whether the surrender was of such a nature as to accelerate the succession of the reversioner.

It appears that the income of the properties is Rs. 3,000 a year and the property was let out in *ijara* at Rs. 2,700 a year to the Defendant No. 1 originally. At the time the deed of release was executed by her in favour of the Plaintiff it was arranged that the Plaintiff would pay her Rs. 3,000 in cash and Rs. 1,800 a year

It is contended by the learned vakil for the Plaintiff that the fact that some maintenance was agreed upon to be paid by the reversioner to the widow does not affect the surrender. That is so. But the question has to be decided, upon the circumstances of each case, whether the surrender was not a mere device for dividing the property or for transferring it for valuable consideration.

In the present case the fact that the reversioner had paid to the widow Rs. 3,000 and agreed to pay Rs. 150 a month is not even mentioned in the deed of surrender. Evidently, that fact which appears to have been the consideration for the surrender was concealed, and was mentioned only in the deed of *masahara* executed the next day by the Plaintiff in favour of the lady. But there is no doubt that the two documents must be taken as parts of the same transaction, and the effect of the two deeds is that the lady, the widow, in consideration of Rs. 3,000 in cash and Rs. 1,800 a year (which, it may be pointed out, was to be realised

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from the Plaintiff by the lady, in case of default of payment, with interest at 12 per cent. per annum from all the properties), agreed to give up all the properties which she had, in favour of the reversioner. In these circumstances it seems to me that it was not a deed of surrender such as is contemplated under the Hindu law to operate as an acceleration of the inheritance of the reversioner. There must be an effacement of the widow—an effacement which in other circumstances is effected by actual death or civil death—which opens the estate of the deceased husband to his next heirs at that date. Having regard to the facts and circumstances mentioned above, the deed appears to me to be really a transfer of the interest of the widow for valuable consideration and, that being so, there can be no doubt that only the properties covered by the deed would pass to the Plaintiff.

It may be pointed out that the operative part of the deed of surrender expressly states that the reversioner would be entitled to get possession of the properties mentioned in the schedule to the deed, and the schedule does not mention the property, the subject-matter of the cross-objection.

The Plaintiff accordingly is not entitled to get possession of the property covered by the deed of gift in favour of Defendant No. 1.

In this view it is unnecessary to consider the question whether in the case of an absolute surrender by a Hindu widow in favour of the reversioner, the latter can during the life-time of the widow, recover possession of properties previously alienated by her.

It has been pointed out by the learned vakil for the Defendant-Appellant that the property covered by the deed of gift

was either *stridhan* property of the lady, or that at any rate it was acquired out of the income of the husband's estate which was treated as separate from the estate, and that therefore it was unaffected by the question whether there was a real surrender or not. It is pointed out on the other hand that the learned Judges were agreed that it was not *stridhan*. In the view we have taken of this case, it is unnecessary to go into that question.

The cross-objection is, therefore, allowed and the judgment and decree of the Subordinate Judge so far as the property of Sch. Ga is concerned are set aside and the Plaintiff's claim to the property of that schedule is dismissed.

The Defendant No. 1 is entitled to the whole costs of the paper-book incurred by her in this Court, and the hearing-fee in the first appeal and the Letters Patent appeal which is assessed at Rs. 100 for each hearing.

As regards the costs of the trial Court the Defendants Nos. 1 and 2 would get 2/3rd and the Plaintiff 1/3rd.

N. G.

[CIVIL APPELLATE JURISDICTION.]
APPEALS FROM APPELLATE DECREES
Nos. 305 to 310 of 1924.

CUMING, J.	}	JITENDRA NATH ROY,
B. B. GHOSE, J.		Plaintiff, Appellant,
1926,		v.
Heard, 7 and		ABEJANNESHA BIBI and
8, March.		ors., Defendants,
Judgment,		Respondents.
8, March		

Bengal Tenancy Act (VIII of 1885), sec. 50 (), presumption under, if can be rebutted by confirmatory kabulyats containing agreement to pay rent at an enhanced rate at a future time.

An agreement to pay rent at an enhanced rate at some future time does not constitute a change in the rate of rent

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under sec. 50 of the Bengal Tenancy Act. Such an agreement by itself does not rebut the presumption under cl. (2) of the section. The Court refused to grant relief on the basis of the agreement in a suit for enhancement instituted under sec. 30 of the Bengal Tenancy Act on the ground of rise in the prices of staple food crops.

These were five appeals against the decrees of M. C. Ghosh, Esq., Special Judge of Zillah Jessore, dated the 21st September 1923, confirming the decrees of Maulvi Kazi Sadrul Ola, Assistant Settlement Officer of Lakshmipasa, dated the 21st October 1922.

The material facts will appear from the judgment.

Babu Hemchandra Sen for the Appellant. •

Babu Prafulla Kamal Das for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

CUMING, J.—These five appeals arise out of five suits for enhancement of rent under sec. 50 of the Bengal Tenancy Act on the ground of rise in the prices of the staple food crops and also for increase of rent for increase in area under sec. 52 of the Bengal Tenancy Act.

With regard to increased rent for increased area both the Courts below have found that there has been no increase in area. Therefore the Plaintiff is not entitled to any increase of rent under this section.

With regard to enhancement of rent under sec. 30 of the Bengal Tenancy Act on the ground of rise in the prices of the staple food crops both the Courts below have held that the tenants hold at a fixed rate of rent and therefore their rents are not liable to enhancement under sec. 30.

In the Court below the tenants relied upon the presumption under sec. 50, cl. (2) of the Bengal Tenancy Act and the case of the Plaintiff who is now the Appellant was that this presumption had been rebutted by certain *kabuliyats*. Both the Courts have found that these *kabuliyats* do not rebut the presumption under sec. 50, cl. (2) of the Bengal Tenancy Act and the Plaintiff's suits have been dismissed.

The Plaintiff has appealed to this Court and he argued that these *kabuliyats* have rebutted the presumption under sec. 50, cl. (2), because they show a change in the rate of rent. The learned vakil for the Appellant has put before us one of these *kabuliyats* which presumably is in the same terms as the other four. At any rate he has not asked us to go through the other *kabuliyats*. In this *kabuliyat* the rent was given as Rs. 4 and there is the following clause :—“ You will be entitled to measure the land at any time and we shall be present with the *amin* at the time of measurement and shall cause the same to be measured without any concealment according to different classes of lands after which we shall take settlement of the lands found according to the following rates, namely, each *pakhi* homestead land (*bastu*) at Rs. 4-8, straw land, Rs. 3-8, paddy land, Rs. 2.”

The learned vakil argues first of all that by agreeing to these terms the tenant has agreed to an enhancement to rent and that the enhancement must be held to take effect at the time of the execution of the *kabuliyat*.

There are two flaws in this argument. The first flaw is that there is nothing to show that these rates are enhancements at all, because it is not stated in the *kabuliyat* at what rate the tenant was then paying rent. No details have been given

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in the *kabuliyat* as to the classes of rent he is holding, whether it is all cultivable lands or straw lands or *bastu* lands. All that is given is the figure of Rs. 4 as rent for some two *pakhis* odd land. Therefore it is impossible to say that the rates set forth here for the different classes of land are enhancements of what is being paid at present. The learned vakil argues that the area of the present holding is some $2\frac{3}{4}$ *pakhis* and that if it is taken for the sake of argument that it is all paddy land, then he is paying rent at the rate of less than 2 per *pakhi* and that therefore it must be an enhancement of rent. This argument leaves out the possibility that besides *bastu* and straw lands there may be other lands on which no rent would be assessed. Therefore this argument fails.

Even if these rates were an enhancement on the rates that he was then paying it would not constitute such an enhancement as would rebut the presump-

tion under sec. 50, cl. (2) of the Bengal Tenancy Act because it would not show a change in the rate of rent. It would only show agreement to pay rent at an enhanced rate of rent at some future time. An agreement to pay enhanced rent at some future time does not constitute a change in the rate of rent under sec. 50. Therefore we cannot say that the rate of rent was changed at the time of the execution of *kabuliyat*.

The learned vakil has argued that at any rate he is entitled to the rates as mentioned in the *kabuliyat*; possibly he may be but not in the present suit which he has based not on his contract in the *kabuliyat* but on the rise in the prices of the staple food crops under sec. 30 of the Bengal Tenancy Act.

The appeals therefore fail and are dismissed with costs. Hearing-fee, one gold mohur in each appeal.

B. B. GHOSE, J.—I agree,

P. K. D.

[END OF VOL. XXX]

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The new legal year.

We accord our hearty welcome to all members of the judiciary and of the legal profession on the resumption of work by the Bench and the Bar on the re-opening of the High Court to-day after the long autumn vacation which gives them a well-deserved recess after ten months of arduous work. It is no doubt true that every one connected with the law Courts cannot avail himself of full two months' holiday, except the Hon'ble Judges and some leading members of the legal profession, but undoubtedly it is a period of relaxation with all and this together with a period of rest and change of environment enables us all to resume our work with fresh vigour and a healthier tone of the body and the mind. The long vacation in Bengal is associated with the celebration of autumn festivities, the most pleasing feature of which is that at their conclusion all differences are forgotten and greetings of good-will and amity are exchanged amongst all. It is in the same spirit that we offer our greetings of good-will to all our readers and convey our best wishes for them for the coming year and the years to come.

The new Law Member Mr. S. R. Das.

The appointment of Mr. S. R. Das, the Advocate-General of Bengal and the leader of the Calcutta Bar, as the law member of the Executive Council of the Governor-General of India is a matter of congratulation to us and him alike. He was associated with us in conducting this journal for some years from its very start. He has enjoyed the reputation of being a sound lawyer all through his career at the Calcutta Bar. His father was an eminent vakil of the Calcutta High Court and enjoyed a leading practice on the Criminal Appellate

Side of the Court. He was a prominent member of the Brahmo community and was greatly respected for his broad and liberal views and his active co-operation in the promotion of the social and religious reform movement of his time. Mr. Das has inherited the admirable qualities of character and intellect of his father. He received his school education in England and also a thorough good grounding in law in the course of his legal studies there. Since he joined the Calcutta Bar he confined his practice to the Original Civil Side of the High Court. His rise at the Bar has been steady and his ability as a lawyer and fairness as an advocate have won for him the respect and good opinion of the Bench and the legal profession alike. Throughout his professional career he has maintained the best traditions of the English Bar. For his honesty, personal courtesy and readiness to help people in distress or difficulties, he has always been held in high regard even by those who have differed from him in political views. He is a thorough constitutionalist and believes in the progressive realization of responsible government in this country by constitutional means. As a member of the Executive Council and in the Indian Legislature he will be in sympathy with the legitimate aspirations of the people, but, cautious as he is by nature, he will be no supporter of any sudden or drastic changes. As a lawyer he will be found a great help to the legislative department of Government of India. He may not be a brilliant speaker but he will be found quite clear and lucid in presenting his own or the Government point of view before the legislature and also courteous and dignified in replying to his opponents. One may not always agree with his political views but even his opponents will have to concede that they are based on his honest convictions. The acceptance of the office of the Law Member means great pecuniary loss to him and surely he would not have accepted it but from a desire to serve his country. He could ill afford to accept office after he had sacrificed all his life's earnings in discharging the liabilities of a school-mate of his for whom he had

stood surety when he met with misfortune in business. Reserved as he is by nature, he has never made any parade of his generosity or hankered after popularity, wealth, honour or even official favour. The one ideal of his life is to do duty in the light of his own conscience. We have always entertained great respect for him as a man of character and principle and are sure that he will make a very capable Law Member.

International situation and world-peace.

Every year since the outbreak of the Great War, we have been longing to see the world settle down in the path of orderly progress to which we had been accustomed. But the prospects of world-peace seem to be as far off as during the mighty conflict that seemed to turn the world topsy-turvy. The Locarno Pact is the only silver lining to the war-cloud that hangs over the fair face of the old world. The Mahomedan world is still in a great state of ferment. The war that has been raged against the Rifis, the inhuman outrages that have been perpetrated in Syria by a so-called liberty-loving, progressive and civilized republican state of Europe make us despair; the mere profession of abstract principles of political "liberty, equality and fraternity" does not afford any guarantee to life and limb to the weak and their right to live in a world dominated by the powerful. The Mahomedans may not be a peace-loving people but having regard to recent events there cannot be any question that they have been greatly wronged. The Arab countries are engaged in internecine conflicts, but the administrative genius of the British people has enabled the mandatory power to maintain peace in Palestine and Iraq. Egypt seems to be still in a state of ferment but we believe that British statesmanship will allay the unrest by recourse to conciliation. While Britain as a mandatory power is always ready to resort to a policy of conciliation, France, on the other hand, is more autocratic in her administration and has more faith in putting down unrest by force of arms.

Turkey is undoubtedly the most progressive and powerful state amongst the Mahomedan countries. Young Turkey is now pursuing a policy of thoroughly Europeanising the country, politically, socially and even sartorially. The evident object of this is to demonstrate to

their western brethren that they are in no way inferior to them. They are a brave people and they are now seeking intellectual and social equality with the other people of the world. The Mosul boundary question forms a bone of contention between Turkey and Iraq and the latter's British mandatory. The League of Nations seemed to be in favour of Turkish claim but it did not arrive at any definite decision and the final settlement has been deferred till the International Tribunal has interpreted a certain clause of the Lausanne Treaty, to which it has been referred for interpretation. Turkey has assumed a bellicose attitude over the question and we are sure that British diplomacy will rise equal to the occasion and effect a satisfactory settlement in the interest of the world-peace.

The League of Nations has just prevented a fresh outbreak of war in the Balkans which might have been fraught with serious consequences. The unrest amongst the Czech-Slavs is in no small measure due to communist propaganda amongst this impressionable and turbulent people. Soviet Russia is now a standing menace to the peace of the world. According to the new régime in Russia, the social system and the form of Government that have evolved out of the past are fundamentally wrong and both must be wiped out and rewritten on a new slate. Individuality, personal liberty, toleration, independent scope of action, sentiments and affection, which have been the heritage of mankind for ages untold count for little. Man is to be reduced to an automaton and merely to form a limb of a huge state machinery, which will be at perfect liberty to crush him, if he falls out of gear. The whole world, old and new, is reluctant to subject itself to such a drastic revolution and reverse the course of evolution through which it has passed from time immemorial.

These forces of unrest are knocking at the very gates of our ancient land all round. Persia has only recently declared herself a republic. True, however, to her ancient culture she is not likely to fall an easy prey to the new forces of social disruption. China in the far East which also adopted a republican constitution some years ago is still engaged in internal strife. She may be taking full advantage of such help as her Soviet neighbours are able to render, but with her time-honoured philosophy,

traditions and religious ideals she is not likely to be an out and out convert to the rather dubious faith of her western neighbour. Turkistan has fallen an easy prey to Russia, and Afganistan, with all her autocratic instincts, has to court the good graces of her powerful neighbour, but she cannot afford to pick a quarrel with the British in India with all the resources of men, money and armaments at their beck and call. The serious unrest that prevails over the Mahomedan countries from the strongholds of the Riffs to those of Afganistan is not without its effect amongst their co-religionists in India, where there have been more communal disturbances of late than ever before. Still we must congratulate ourselves that we are in the enjoyment of peace in India. The so-called unrest in India is essentially a movement for the attainment of Dominion status within the British Empire. The great strength, cohesion and stability of the British Empire rest on its policy of conciliation and we believe that by an honest effort based on mutual good-will many of the outstanding differences between the governing and the governed may be satisfactorily settled.

From this bird's-eye view of the international situation it is evident that after the Great War it is the British Empire alone which has settled down in the path of peaceful and orderly economic, social and political progress. Britain also has recently played the part of a great peace-maker in the framing of the Locarno Pact and agreed to act as a guarantor for the preservation of European peace. When this Peace Pact is concluded amongst the great powers of Europe, it will be greatly instrumental in the preservation of the world-peace and the desire of Turkey that all the world powers, great and small, should be included in the Pact, when reciprocated, will result in allaying the Mahomedan unrest which is based on very just and legitimate grievances. The international conference now meeting in China may be expected to exert its influence to meet her just demands and to restore and preserve peace in the far East. America occupies a position of enviable isolation and necessarily is a very potent factor in the preservation of peace both in the East and West. War now-a-days is the most costly, cruel and inhuman enterprise which in its result brings on ruin and untold sufferings to mankind.

PROCEDURE IN CASES OF OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

Under Chap. XXXV of the present Code of Criminal Procedure a civil, revenue or criminal Court is to make a complaint when it thinks that it is expedient in the interests of justice that an enquiry should be made into an offence affecting the administration of justice which appears to have been committed in or in relation to a proceeding in that Court and such Court is to forward the complaint to a Magistrate of the first class having jurisdiction in the matter. Under sec. 476B an appeal lies to the Court to which the civil, revenue or criminal Court, which may have occasion to act under sec. 476, is subordinate in the sense that appeals ordinarily lie to that Court from the appealable decrees or sentences of the former Court. Such Appellate Court may direct the withdrawal of the complaint or as the case may be itself make the complaint which the subordinate Court might have made. Now the question arises, how far the High Court is competent in revision to pass an order of the nature mentioned above, jurisdiction to make which is specifically given by the statute to the Appellate Court mentioned in sec. 476B.

A Full Bench of the Rangoon High Court in *King-Emperor v. Syed Khan*, 3 Rangoon 303, has held that there is no question that sec. 476 gives the High Court as a superior Court full powers to lay a complaint in any and every case in which it appears expedient in the ends of justice to do so and there is nothing in the Code to justify the proposition that that power and jurisdiction is taken away because in cases of a complaint or for its refusal to lay a complaint by some subordinate Court an appeal from that order is allowed under sec. 476B.

The law on the subject is not so simple as it seems to be. In cases of orders under sec. 476 of the Code by Criminal Courts, the High Court is to exercise its powers of revision under sec. 439 of the Code under which it can exercise any of the powers conferred on a Court of Appeal by secs. 423, 426, 427 and 428 or on a Court by sec. 328. Formerly in cases of offences against public justice the sanction of the Court concerned was necessary under sec. 195 for which purpose the interested party was to move the Court. Besides this under sec. 476, the Court concerned could of its own motion make an order for prosecution. In cases coming under sec. 195 there was a provi-

sion in that section for an Appellate Court revoking or granting a sanction granted or refused by the Court of first instance. Now the procedure has been unaltered and all cases must now be started on the complaint of the Court concerned and the provision for appeals in all cases is now to be found in sec. 476B of the present Code. Before the amendment sec. 476 empowered the High Court to exercise among others the powers of an Appellate Court under sec. 195, but the law as it now stands makes no mention in sec. 439 of the appellate powers exercisable under sec. 476B. In these circumstances, is it competent to the High Court to make a complaint under sec. 476 when the subordinate Courts have refused to make it, in other words, can it exercise the powers which have been conferred on a Court of Appeal by sec. 476B although those powers are not given to it. The answer is not far to seek and must be in the negative. We think it is an oversight on the part of the legislature.

So far as cases *hoc re* civil and revenue Courts are concerned, orders in such cases can only be revised under the Code of Civil Procedure and the difficulty in these cases is greater.

The best solution is for the legislature to lay down in sec. 476B that it shall be competent to the High Court in revision to make an order of the nature contemplated in the section.

Correspondence.

A FEW OBSERVATIONS ON SUMMARY TRIALS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR, The decision of the Calcutta High Court in the case, *Natabar Khan v. Emperor*, (Criminal Revision No. 576 of 1923), is an extremely important one so far as the procedure for summary trials is concerned.

It says that sec. 263, Criminal Procedure Code, applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases only. But there is no such exemption in a case tried summarily, in which the sentence passed is appealable.

Under the old Code (sec. 414) there was no appeal from summary convictions in which the sentence was one of imprisonment not exceeding three months. So for all practical purposes it mattered very little what the proce-

cedure in appealable cases might be. The great majority of sentences in summary convictions was non-appealable.

Under the new Code, however, even a day's simple imprisonment is appealable. Convictions for offences under secs. 380, 381, 411, 414, 456, 457, etc., of the Indian Penal Code (which are triable summarily under sec. 260, Criminal Procedure Code) usually call for a sentence of imprisonment and the result is that the sentences in the majority of summary convictions are at present appealable.

The ruling lays down emphatically that a formal charge must be framed in such cases. Let us see what this decision involves. In the first place sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. The defence need not cross-examine till charge has been framed. Even when the charge has been framed cross-examination would be deferred under sec. 250 of the Code of Criminal Procedure to some other date to be fixed by the Court and the trial would be "summary" in name alone.

The decision, therefore, does not seem to fit in very well with the general scheme of summary trials if such trials are meant to be expeditious ones. It does not also seem to be in strict consonance with the law as it stands. Sec. 263 of the Code of Criminal Procedure lays down the particulars (a) to (j) which the Magistrate shall enter in cases where no appeal lies. Sec. 264 which follows says that in every case tried summarily in which an appeal lies the Magistrate shall, before passing sentence, record a judgment embodying the substance of the evidence and also "the particulars mentioned in sec. 263." It will be noted that these particulars, (a) to (j), sec. 263, do not comprise "a formal charge" though something akin to it is mentioned in item (f). Therefore in recording these particulars and the substance of the evidence, the Magistrate does not record a formal charge. Sec. 264, subsec. (2) says distinctly that these *shall* be the *only* record in cases coming within this section.

Where then is there room for a "formal charge" in the record of cases, tried summarily, in which an appealable sentence is passed?

I have the honour to be,
etc., etc.,

SUSIL KUMAR MUKHERJI,
Sadar Sub-Divisional Officer, Noakhali.

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Charge in summary trials.

We do not at all agree with the view expressed in the correspondence which we published in our last issue on the subject of summary trials under the Code of Criminal Procedure. The ruling referred to therein holds that the exemption from framing a charge allowed by sec. 263 of the Code has no application to cases tried summarily in which an appeal lies. The point is perfectly clear and the law laid down in the decision aforesaid is quite consistent with the provisions of the Code which have a bearing on the matter. The general policy followed in the Code of Criminal Procedure is that a charge is to be framed in warrant cases (sec. 254) but it shall not be necessary to frame it in summons cases (sec. 242). A large number of warrant cases are triable summarily under Chap. XXII and in sec. 262, it is distinctly laid down that in trials under this chapter the procedure prescribed for summons cases shall be followed in summons cases and the procedure prescribed for warrant cases shall be followed in warrant cases except as provided in the said chapter.

The exception is to be found in sec. 263 which says that in cases where no appeal lies the Magistrate need not record a formal charge. It follows therefore conclusively that in a case in which an appeal lies and which is a warrant case, a charge must be framed. In Chap. XXXI of the Code, which deals with appeals, sec. 414 has been amended by Act XVIII of 1923 so as to make a decided improvement in the Code as it stood. Formerly there was no

appeal in cases of summary convictions in which the sentence inflicted did not exceed imprisonment for three months or a fine of two hundred rupees, but now the only sentence that is non-appealable is a fine not exceeding two hundred rupees, in other words, every sentence of imprisonment is now appealable in cases tried under the summary procedure. Thus in every warrant case tried summarily in which a sentence of imprisonment is passed a charge must be framed. There cannot be any doubt that the change effected by the recent amendment is decidedly one for the better and the grievance made by our correspondent has no legs to stand upon. Sub-sec. (2) of sec. 264 cannot be made the basis for holding that in summary trials no charge need be framed.

Transfer of Sylhet to Bengal and Territorial Re-distribution.

We have received a copy of the Memorandum of the Government of Bengal embodying the letter of the Government of India and the letters of the Government of Bengal and the Government of Assam regarding the transfer of Sylhet from the Province of Assam to the Presidency of Bengal. Sylhet originally formed a District of Bengal. About 50 years ago it was transferred to Assam. The Bengalee-speaking people who form the majority of the population in the District from the very start protested against the transfer but to no effect. During the Partition of Bengal when the Bengalee-speaking people demanded that Lord Curzon's partition should be annulled and that the whole of the Bengalee-speaking people should be brought under one administration, the movement found a very sympathetic response from the people of Sylhet and other Bengalee-speaking areas of Assam. But when the Partition was annulled in 1912, the scheme of raising Behar to a Province by tacking on to it Orissa and some Bengalee-speaking Districts from Bengal was settled by the Government of India at its meetings of the

Executive Council without any reference to the people of the areas concerned. But Lord Hardinge in his previous despatch in recommending the annulment of Partition, had suggested the re-adjustment of the provinces on linguistic basis and considered it as a necessary step for the establishment of provincial autonomy.

Bengal was for the time satisfied with what she got and having regard to Lord Hardinge's assurance the leaders of public opinion in Bengal did not consider it desirable to agitate for giving immediate effect to it. From this it cannot be inferred that public opinion in Bengal and, particularly, in Bengalee-speaking areas, was satisfied or reconciled to the transitional arrangement made at the annulment of the Partition. In the unsettled condition of the Great European War, that soon followed, and the momentous questions raised towards its close by the enquiry with regard to constitutional reforms in India, all provincial questions assumed a secondary importance. But all the same it must be noted that the Montague-Chelmsford Reform Report distinctly recommended that territorial re-distribution should be given effect to by the Government of India according to the wishes of the people of the area concerned. Since the members of the Assam Legislative Council on the 29th of July last adopted a resolution by a majority of votes that Sylhet should be transferred to Bengal and the Bengal Legislative Council on the 19th of August last passed a resolution approving of such transfer, the Government of India seem disposed to give effect to the transfer. But before any final decision is arrived at by the Government of India, the Bengal Legislative Council must pronounce its opinion whether it is willing to accept the financial burden that would be cast on Bengal as a result of such transfer. The question will be brought before the Bengal Council during the December session for discussion.

Sylhet is a deficit district under the Assam administration. Within the Sylhet district is included Jantia Parganas, which are a temporarily settled area. The population in this area is mostly non-Bengalee. The surplus of revenue raised from this area reduces the deficit of the Sylhet district to 4½ lakhs. If Jantia Parganas are kept with Assam the defi-

cit of the Sylhet district, which is a permanently settled one, would amount to 7 lakhs a year. If the Bengalee-speaking people of Sylhet, who form the majority, are anxious to revert to Bengal, it would be ungracious on our part to object to the transfer on such paltry financial grounds. If we turn our attention seriously to practical politics in the Bengal Legislative Council, it would be possible to effect retrenchments to make good the loss of 7 lakhs that is likely to result from such transfer. As for the transfer of the Cachar, if the people of that area, who are largely Mahomedans, prefer to remain with Assam, there is no reason why we should insist on its transfer as well. The Lushai Hills are largely inhabited by aboriginal tribes and as the Assam Government has to deal with many such backward people all along its eastern frontier, it is desirable that all of them should be left under the same administration. The Assam Government is not unwilling to cede the Sylhet district to Bengal, provided its status as a Governor's Province is not taken away. The Government of India are not prepared to give any assurance to that effect for any indefinite future but say that no immediate change would be made in its status by reason of the transfer of Sylhet. We are not sure that it would not be to the advantage of the Assam administration if a frontier province of the backward areas were carved out of it. But with this we are not at present concerned.

Before we conclude we must say that mere transfer of Sylhet will not be the last word regarding territorial re-distribution between Bengal, Behar and Assam. At the annulment of the Partition a claim was put forward by the people of Bengal for the transfer of Goalpara, now included in Assam, which also is a permanently settled and Bengalee-speaking area. On the western frontier of Bengal, the Pakur Sub-Division is a Bengalee-speaking area. So are the Manbhum and the Singbhum districts. These are all now included in Behar and Orissa. It is well-known that the people of Orissa have gained nothing and suffered much inconvenience by being tacked on to the province of Behar. Orissa has now for many years been demanding that the Oriya-speaking people should be brought under one administration, even if that be that of a sub-governorship. The people of

Singbhum, Manbhum and Pakur also suffer no less inconvenience by being included in a province where the script and language are quite different from those of their own mother tongue. It will be seen from the letter of the Government of Bengal which we publish elsewhere that the Government apprehends that the proposal of the transfer of Sylhet might set up an agitation in Bengal for the restoration of Goalpara from Assam and Manbhum and Singbhum from Behar to Bengal. Had not the attention of Bengal been diverted since the Reform Constitution came into operation, to many side-issues connected therewith, we are sure, the Bengalee-speaking people as a whole and those living in the adjoining areas above-mentioned would never have relaxed their claims for union with Bengal.

It may not be desirable to raise any agitation over the legitimate demand of Bengal but that is all the more the reason why the justice of the claims of the Bengalee-speaking people to be brought under one administration should not be indefinitely disregarded. We would suggest to the Bengalee-speaking people at large that they should press their claims in this behalf before the Parliamentary Commission that would come out to India in 1929 or earlier. If Goalpara, Singbhum, Manbhum and Pakur are restored to Bengal, the administration would be more homogenous and the burden that would be cast on Bengal by the transfer of Sylhet alone would be relieved. We do not wish the Province of Behar to be curtailed in area. But its boundaries will surely require re-adjustment. If Orissa is severed from it, we fail to see with what justification Singbhum and Manbhum can continue to form a part of Behar. If the permanently settled areas of the United Provinces of Oudh and Agra, viz., the Districts of Mirzapur and Gorukhpur are transferred to Behar, she will be amply compensated for the transfer of Manbhum and Singbhum to Bengal. The United Province is now the largest of Indian provinces and the districts which neither belong to Agra nor Oudh may very legitimately be transferred to Behar. A united province of Benares and Behar adjoining that of Agra and Oudh would make an ideal Province. But in making such re-adjustment of territories, the opinion of the people of the area will have to be consulted. In any case, we are

in favour of the transfer of Sylhet to Bengal and have all along pressed for the restoration of the Bengalee-speaking areas to Bengal and will continue to do so.

PROPOSED TRANSFER OF SYLHET AND CACHAR TO BENGAL.

No. F. 81/23-Home, dated Shun, the 24th October 1923.

From—H. FOXKINSON, Esq., C.I.E., Joint Secretary to the Government of India, Home Department,

To—The Chief Secretary to the Government of Bengal.

I am directed to refer to the correspondence closing with your telegram No. 1161 P.C., dated the 26th August 1923, on the subject noted above. As the Government of Bengal are aware, the further discussion, which was to have taken place during the September session of the Assembly, of the resolution moved on this subject in January 1923 by Mr. Aney did not mature, and the resolution was withdrawn on the understanding that a fresh resolution would be moved during the session beginning in January next. The Hon'ble the Home Member explained that the examination of the proposal had not reached a stage at which discussion in the Assembly would lead to practical results. The Government of India have now completed their preliminary examination of the question, and are of opinion that it is very desirable to come as soon as possible, to a decision one way or another on the proposal and with a view to facilitate the reaching of a final decision they have arrived at conclusions on certain preliminary issues which I am to state for the information of the Governments of Bengal and Assam.

2. In the first place the Government of India consider that the question of the transfer of the district of Cachar from Assam to Bengal need not continue to complicate the main issue of whether the district of Sylhet should be transferred or not. They observe that the original motion in the Assam Council merely recommended the transfer of Sylhet, and that at a late stage an amendment was moved adding Cachar. In the Bengal Council an amendment urging the transfer of Cachar was lost. The Government of India are of opinion that Cachar is an essentially Assam district, and that moreover its transfer to Bengal would mean the isolation of the Lushai Hills districts. They consider that no case has been made out for investigating further the proposal regarding Cachar, and suggest that this part of the discussion may now be regarded as closed.

3. In connection with the district of Sylhet itself the Government of India have examined the question whether it is possible to come to a decision regarding the Jaintia Parganas with a view to limiting further the range of inquiry. They observe that there are some reasons for

suggesting that the people in this area do not perhaps wish to be incorporated with the Presidency of Bengal, and that the Parganas historically belong to Assam. In addition, they form a temporarily-settled area, whereas the greater part of the remainder of Sylhet is permanently settled. On the other hand, these Parganas are now a part of the Sylhet district and if they remain with Assam, they, being a surplus area in the district, which as a whole is a deficit district, would increase the average annual deficiency of the revenues as compared with the expenditure of the district from some 4½ lakhs to 7 lakhs of rupees. The Government of India consider, therefore, that the question needs further examination, and that it should be decided according to the most convenient geographical boundary between the two provinces, if it is decided to transfer the Sylhet district to Bengal. In this connection the question of how communications between Cachar and Shillong will be affected, if at all, if Sylhet is transferred to Bengal, should also be reported. The Government of Assam are being addressed on the question and their final views will be communicated to the Government of Bengal in due course.

4. In paragraph 11 of their letter of the 11th August 1925 the Government of Assam raise the question of the future status of Assam if Sylhet is transferred, and suggest that it should be laid down now that if Sylhet is transferred Assam should retain its status as a Governor's province. The Government of Assam apparently conclude that it is only if Assam without Sylhet is to retain its present political status that they would not oppose the transfer of the district. The Government of India regret that they are unable to accept the view that this may be imposed as a condition of transfer. They consider that the future status of Assam is a separate question which must be left an open matter to be decided on the merits after any transfer is made. The Government of India observe, however, that any change in the status of Assam would probably involve an amendment of the Government of India Act, and therefore for some time at any rate Assam would remain a Governor's province. They are unable to state now whether they would be able to support the continuance of Assam as a Governor's province after its population has been reduced by some 33 per centum.

5. Lastly, the Government of Bengal in their telegram, dated the 25th August 1920, have raised the question of the financial effect of the proposed transfer. They state they would claim a contribution from the Government of Assam as a set off against the deficit of the Sylhet district. The Government of India are of opinion that, although the Government of Assam will be better off financially after the transfer of the district of Sylhet, after that transfer the district will form part of the Bengal Presidency and there will be no reason why the Government of Assam should pay any contribution on

account of it to the Government of Bengal. The Government of India recognise that this possible territorial readjustment has a bearing on the question of the Meston Settlement. If at the time when that Settlement was made Sylhet had formed a part of the Bengal Presidency the contribution payable by Bengal would presumably have been fixed lower and that payable by Assam higher than was actually done. As, however, the Government of Bengal, as a temporary measure, make no contribution to the Central Government the Government of India do not consider that this affords any ground for a contribution by the Government of Assam to them. This follows also because sec. 45A of the Government of India Act contemplates contributions from provincial Governments to the Central Government but not from one provincial Government to another, and any increase of the Assam contribution, which the Government of India do not suggest will take place, could not therefore be accompanied by a corresponding reduction of any contribution received from Bengal.

6. The Government of India trust that these conclusions will clear the ground for a final discussion of the question in the Bengal Legislative Council. I am to request that this letter may be published with the papers which were distributed to the members of the Indian Legislature (copy enclosed) and that arrangements may be made for the subject to be discussed again in the Bengal Legislative Council as early as possible after the people concerned have had a sufficient opportunity of studying the papers. The subject will come up for discussion in the Assembly in the session beginning in January next, and I am to request that the final views of the Government of Bengal may be submitted to the Government of India as early as possible after the discussion in the Bengal Legislative Council which should be arranged to take place on an early date.

LETTER FROM THE GOVERNMENT OF BENGAL,
No 635-P., DATED THE 15TH JANUARY
1925.

I am directed to refer to the Home Department letter No. F-682-2 24-Pub., dated the 6th December 1924, in which the Government of India ask for the views of the Government of Bengal on the proposal to transfer the districts of Sylhet and Cachar from Assam to Bengal.

2. In reply, I am to say that upon the material before him the Governor-in-Council is unable to form any final opinion. The Government of Assam is most concerned in the scheme. If Sylhet is included in Bengal, however, it is certain that there will be an agitation to include Manbhum also, and the Government of Bihar and Orissa is therefore also concerned. The basis of the demand is sentiment and the proposal is likely to appeal to educated Hindu opinion in Bengal. It appears from the Assam Government's letter

that, if this movement began, it would not stop with Sylhet Cachar would also desire to be included and a further demand is to be anticipated for the re-union of all Bengali-speaking districts which would also include Goalpara as well as Manbhum. Moreover, if Sylhet and Cachar were included in Bengal the Lushai Hills would have Bengal as a boundary on three sides, and their inclusion would have to be considered. There is not at the present moment, however, any live demand in Bengal for the transfer of these districts. The Governor-in-Council, therefore, would prefer not to raise the question. If it is raised at all it would be primarily essential to examine the financial effect of the scheme, and until this is done the Governor-in-Council cannot commit himself to any final opinion.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

Oct. 20th.—The Judicial Committee of the Privy Council have entered on their Michaelmas sittings and a number of petitions for special leave to appeal were disposed of this morning. The Board was composed of LORD SHAW, LORD CARSON and SIR JOHN EDGE.

Their Lordships refused leave to appeal from a decision of the High Court in Bengal in *Chotanagpur Banking Association, Ltd. v. Gangasahai*. Messrs. DeGruyther, K. C. and Parikh for the Petitioner contended that certain hundies were shahjogi and that notice of dishonour was unnecessary. Amendments to that effect had been refused. Sir G. Lowndes, K. C. and Mr. Douglas McNair opposed.

Leave was refused in *Sudhir Ch. Das v. Sm. Indumati Chowdhurani*. Messrs. DeGruyther, K. C. and Parikh appeared for Appellant.

Also in *Mohini M. Misra v. Sm. Sarat Sundari Debi*, where the dispute concerned a mortgage made in 1830, any relief upon which was held by the lower Courts to be barred by limitation. Messrs. DeGruyther, K. C. and Parikh appeared for Appellant; Sir G. Lowndes, K. C. and Mr. Douglas McNair for Respondent.

Messrs. A. M. Dunne, K. C. and Wallace applied and obtained special leave in *Guran Ditta v. I. R. Ditta*. Leave was refused in *Bibi Najimunnissa v. Madan Mohan Lal*. Messrs. DeGruyther, K. C. and A. Majid appeared for Appellant; Mr. B. Dubé for Opposite Party. Leave was also refused in *Jameshar*

Prasad v. Durga Sahu. Mr. A. Majid appeared for Applicant.

Leave to appeal was granted in *Shiam Sunder Singh v. Jagannath Singh*. Messrs. Clouston, K. C. and Dubé appeared for the Applicant.

Judgments were delivered in (1) *Bansilal Abirchand v. Ghulam Mahbub Khan* (Hyderabad): appeal dismissed.

(2) *Ram Protap Chamarla v. Durga Prasad Chamarla* (Bengal): appeal dismissed.

The new list contains 16 appeals from India and 11 from Canada, Australia and the Crown Colonies. Among the Indian appeals is the appeal by the Secretary of State and the New Birbhum Coal Co., against a decision of the Bengal High Court which held *inter alia* that Government parted with the mineral rights at the time of the Permanent Settlement. The appeal was heard *ex parte* by the Privy Council, the Respondent being unrepresented through no fault of his own. Before judgment was delivered leave was granted for the appeal to be re-argued before a fresh Board. Another important appeal concerns a question which has been fruitful of litigation for many years, *viz.*, the discussion between the Sitambari and Digambari Jains as to the right of worship on Poresh Nath Hill.

G. D. M.

Correspondence.

SEC. 162, CR. P. C. AND SEC. 27 OF THE EVIDENCE ACT.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

It is an extremely gratifying thing to find an executive officer taking an active interest in points of law and discussing the same through the medium of law journals. I mean Mr. Susil Kumar Mukharji, Sub-Divisional Officer, Noakhali, and his learned and interesting article on the interpretation of sec. 162, Cr. P. C., which appeared in Part 43 of *Calcutta Weekly Notes*, Vol. 29. In his article Mr. Mukharji raises the point whether the words "any person" occurring in sec. 162, Cr. P. C., include an accused person who makes a statement to the police in the course of an investiga-

tion, and if so, whether sec. 162, Cr. P. C., has repealed sec. 27 of the Indian Evidence Act. With a view to fully appreciate the point raised by Mr. Mukharji, it is necessary to quote here sec. 162, Cr. P. C., both old and new, and also sec. 27 of the Indian Evidence Act. Sec. 162, Cr. P. C., as it stood before the amendment, is as follows:—(1) No statement made by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence: Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing, and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of sec. 32, cl. (1) of the Indian Evidence Act, 1872. The same section after the amendment is in these words:—(1) No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by sec. 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for purpose only of explaining any matter referred to in his cross-examination. Provided further that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry^{*} trial or that its dis-

closure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused. (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of sec. 32, cl. (1) of the Indian Evidence Act, 1872. Sec. 27 of the Indian Evidence Act runs thus:—Provided that, when any fact is deposited to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

I take up now the first part of Mr. Mukharji's query, *viz.*, whether the words "any person" used in sec. 162, Cr. P. C., include an accused person. Mr. Mukharji seems to be of opinion that the words "any person" as used in sec. 162 include the statement of a witness and not that of an accused person, as otherwise, he thinks, sec. 27 of the Indian Evidence Act would be rendered nugatory or meaningless. He therefore points out that this difficulty or "anomaly," as he calls it, may be removed by holding that the words "any person" occurring in sec. 162 are used in the same sense as in sec. 161, namely, as meaning a witness and not an accused person. He also refers to a ruling of the Sind Judicial Commissioner's Court reported in 86 I. C. at p. 410, in support of that view. In the first place, following the principle of construction that words are to be construed in their plainest sense, the words "any person" would appear to admit of one and one meaning only, namely, any person, whoever he may be. In the absence therefore of any indication to the contrary, either in the body of the section itself or in the marginal note affixed thereto, it must be presumed that the legislature has used the words "any person" in their natural and obvious sense, *viz.*, in the sense of any person, whoever he may be—whether a witness or an accused person. Had the legislature intended to use the words in any restricted or peculiar sense, it would have certainly given an indication of its intention somewhere in the Code itself; but the legislature has done nothing of the kind. In the next place, whatever may be the meaning of the words "any person" in sec. 161, there is nothing in sec. 162 which would warrant

the inference that the words bear the same meaning also in sec. 162. The learned Sub-Divisional Officer also, in his article, has not shown any analogy between secs. 161 and 162 from which the said inference could be drawn. The marginal note to sec. 161 is in these words, *viz.*, "examination of witnesses by police," whereas the marginal note to sec. 162 (old) is—"statements to police not to be signed or admitted in evidence," and that to sec. 162 (new) is—"statements to police not to be signed; use of such statements in evidence." It would therefore appear, regard being had to the marginal notes, that so far as the construction of the two words "any person" is concerned, the intention of the legislature is as distinguishable in the two sections (161 and 162) as the letter A is distinguishable from the letter B. In the ruling also cited by Mr. Mukharji, *viz.*, 86 I. C. 410 (I say with the greatest respect to the Court concerned) it is not stated or suggested that there is anything in sec. 162 from which it could be said that the words "any person" as used in that section have the same meaning as they have in sec. 161.

I would therefore answer the first part of Mr. Mukharji's query by saying that the words "any person" as used in sec. 162, Cr. P. C., do include an accused person also.

Next, with regard to the second part of Mr. Mukharji's query, *viz.*, whether sec. 162, Cr. P. C., as amended, has repealed sec. 27 of the Indian Evidence Act. Of course read cursorily, the wording of sec. 162, Cr. P. C., as amended, appears to lend some support to the idea that sec. 27 of the Indian Evidence Act has been repealed by the amended sec. 162 of the Criminal Procedure Code. In fact, one of our High Courts has actually held that sec. 162 of the Criminal Procedure Code, in its present form, overrides sec. 27 of the Evidence Act [*vide* 84 I. C. 545 (Rangoon)]. I would however submit with the greatest respect to the said High Court that the view taken by it of sec. 162 does not seem to be correct. My reasons are as follows:—

(1) Sec. 27 of the Indian Evidence Act refers to the statement of an accused person while he is in the custody of a police officer, whereas sec. 162, Cr. P. C., refers to the statement of an accused person to a police officer. If, therefore, an accused person, while in the custody of a police officer, makes a statement to a non-police man, that statement of the

accused person won't be barred under sec. 162, Cr. P. C. To this extent at least, therefore, if not in its entirety, sec. 27 of the Indian Evidence Act stands absolutely unaffected by sec. 162, Cr. P. C.

(2) The legislature has not expressly repealed any portion of sec. 27 of the Indian Evidence Act. While amending one Code or Act, the legislature is presumed to have in its view all the other existing Codes or Acts also, and that being so, if the legislature intended to annul or modify sec. 27 of the Indian Evidence Act, it would certainly have done so in clear and express terms. As the legislature has not done that, it must be presumed that its intention is not to modify or repeal any portion of sec. 27 of the Indian Evidence Act. The Indian Evidence Act is a splendid work, and is about the only Act which has stood the test of time and has required very little amendment since it came into being, *i.e.*, since 1872. In such circumstances, it is but natural to suppose that if the legislature had any mind to repeal or alter any section of that Act, it would have done so openly and expressly, and not stealthily and by implication.

(3) If the position be this that sec. 27 of the Indian Evidence Act stands unrepealed by sec. 162, Cr. P. C., and that the words "any person" used in sec. 162 do include an accused person, then the question arises, how to reconcile the apparent conflict, or "anomaly," as Mr. Mukharji calls it, between these two sections, in other words, how to keep these two sections intact, and yet not permit any one of them to commit trespass upon the dominion of the other. The solution lies in the interpretation of the words "such statement" used in sec. 162, Cr. P. C. Of course, the words "such statement," taken alone, would seem to be wide enough to include both oral as well as written statements, but there are indications in the section itself, as also other considerations, from which it would clearly appear that the legislature has used those words in sec. 162 in the sense of written statements only. And if the words "such statement" be construed in that way, no conflict would arise between sec. 162, Cr. P. C. and sec. 27 of the Indian Evidence Act. My reasons for holding that the words "such statement" used in sec. 162 include only written statements, are these:—

(a) The marginal notes to sec. 162, both old and new, are practically the same. If the

legislature intended that the words "such statement" as used in the new section should have a wider meaning than the words "such writing" as used in the old section, then we should have expected some material change in the wording of the marginal note to the new section from which it might be gathered what the intention of the legislature is.

(b) The allocation of the words "such statement" immediately after the clause "No statement made, etc., shall, if reduced into writing, be signed by the person making it," also seems to indicate that the words "such statement" are meant to refer to statements which have been "reduced into writing," and not to oral statements.

(c) Sec. 162, as it stood before the amendment, had nothing to do with oral statements, and if the legislature intended to widen the scope of the amended section so as to include oral statements as well, brushing aside the whole volume of case-law regarding the interpretation of the old section, then the legislature would have certainly stated that unequivocally.

(d) Both the provisions to the new section apply only to written statements.

(e) The new section is intended to give a new right to the accused person, namely, the right of having a copy of the written statements for the purpose of contradicting the witness or witnesses, a right which the accused person did not possess under the old section. The new section is therefore intended to enlarge the rights of the accused person, and not to curtail them. If, however, the words "such statement" as used in the new section be held to include oral statements also, then an accused person would be debarred from using in his favour any statements favourable to himself, made in the course of the police investigation, that is, an accused person loses a valuable right which he had under the old law. It is unthinkable that the legislature, while creating a new right in favour of the accused person by the new section, should, by that very section, take away a right which the accused person was enjoying under the old section.

(4) There is also case-law to the effect that the provisions of the Indian Evidence Act are quite independent of the sections in the Criminal Procedure Code and cannot be treated as having been impliedly repealed in consequence of the amendment of the Criminal Procedure

Code (*vide* 86 I. C. p. 664—*In re Semulil Goundan*). There is also case-law to the effect that the application of the new sec. 162 is confined, as that of the old one was, to the written record, and that as regards proof and use of oral statements, the law is unaltered and is as it was before (*vide* 86 I. C. 209—*In re Grandhe Venkatasubbiah*).

In the circumstances stated above I would answer the second part of Mr. Mukharji's query by saying that no portion of sec. 27 of the Indian Evidence Act has been repealed by sec. 162 of the amended Criminal Procedure Code.

I would now request that you will please publish the above in your much-esteemed journal.

Yours, etc.,

ROMES CHANDRA BHATTACHARYA,
Pleader, Mymensingh.

Review.

THE INDIAN COMPANIES ACT (VII OF 1913) with notes and amendments. By S. K. Rangachariar, B.A., B.L., Vakil. Law Printing House, Madras. 1925.

This is the second edition of the work with which the profession is already familiar. The plan of the work is excellent. It begins with giving the text of the English Companies (Consolidation) Act and then the bare text of the Indian Companies Act. The amendments under Acts of 1914 and 1918 follow. Two tables are given, one showing the sections of the Indian Companies Act which correspond to those of the English Act and the other, the sections of the Indian Companies Act of 1882 which correspond to the new Act. Then follows the text of the new Act with annotations. The English and Indian cases bearing on them are briefly summarized and set out in such a manner that one can find out the case-law on the subject at a glance. There are several Appendices at the end in which the Rules relating to the Company law in India framed by the Government of India, the local Governments and the High Courts are given. One of them gives the texts of other Acts relating to corporate bodies which are analogous to companies. The work is an exhaustive one and is a store-house of information with regard to Company law which will be found to be of very valuable help to lawyers and business-men alike.

THE Calcutta Weekly Notes.

Vol. XXX.]

MONDAY, NOVEMBER 23, 1925

[No 8.

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REPORTS (See Index.)

Is Sylhet a deficit district?

It has been pointed out to us by a correspondent from Sylhet that we are not correct in stating that the Jaintia Parganas are inhabited by aboriginal tribes. In fact we are assured that the population of these parganas are mostly Bengali-speaking. We, therefore, see no reason why these parganas should not be transferred to Bengal along with the Sylhet district. This will reduce the deficit as estimated by the Government of India to 4 lakhs. We have also received a copy of a memorial to the Government from some representative men of the Sylhet district in which they question the statement that Sylhet is at all a deficit district. They have attempted to show by facts and figures that it is not. We invite special attention of the Government to this memorial. The local officials who are at present under the influence of the Assam Government are not likely to present a roseate account of the financial side of the question and we are disposed to agree with the memorialists that when the district is transferred to Bengal along with the Jaintia Parganas, it will not impose any additional burden on Bengal. As the Jaintia Parganas are separated from Assam by a range of hills, it will be a mutual advantage to Bengal and Assam to have such a well-defined natural boundary.

The Executive and the Judiciary.

The Lord Chief Justice of England speaking at the centenary of the Law Society made the following observations regarding the separation of the executive and the judicial functions. He maintained that because the judiciary are to be independent of the executive, it does not follow that the executive should be independent of the judiciary. The present day politics takes little interest in the constitutional safeguard on which the liberty of the British sub-

jects rests. But what value is attached to them in England will appear from the following pronouncement of the Lord Chief Justice of England:—

There never was a time when the faithful exercise of judicial duties was more profoundly important in this country. As the fruit of the labours of wise men in the past we enjoyed the equal and impartial rule of law. Never let us be tempted to sacrifice that heritage, or to entertain, or connive at, or even to coquette with alien notions of what was called administrative law, which, while they recognised that the judges were, as indeed they must be, independent of the executive, cherished the fallacy that the executive was somehow to be independent of the judges. If and when and wherever that heresy appeared in our midst, whether it took the form of ingeniously drafted clauses, or whether it took some other and much more amusing form, whatever form it took, those who loved British justice could feel that the Law Society would deal faithfully with it.

Uncorroborated testimony of an accomplice.

The Court of Criminal Appeal in England has in the recent case of *Rex v. Beebe* (41 T. L. R. 635) given a ruling regarding the directions to be given to the jury by the Judge as regards the uncorroborated testimony of an accomplice, which will be found helpful by the profession and judiciary in India. The law in this respect is in England practically the same as in India. We are indebted to the *English Law Journal* for the following statement of the English law on the subject:—

It has long been a settled rule of law that it is open to a jury to convict a prisoner on the uncorroborated evidence of an accomplice alone, *Rex v. Atwood* (1 Leach, 464); but, on the other hand, it has been the invariable practice of the Court to warn the jury of the danger of acting on such evidence alone: *Reg v. Stubbs* (Deane, C. C. 555); *Re Meunier* (1894, 3 Q. B. 415); *The King v. Baskerville* (1916, 2 K. B. 658). The Court of Criminal Appeal has recently given an important ruling as to the points on which the judge must direct the jury in such cases: *Rex v. Beebe* (41 T. L. R. 635). In that case, objection was taken to the direction given by the trial judge to the jury for two reasons. In the first place, the learned judge, in warning the jury, had at the same time added that it was generally dangerous to act on such evidence alone; and secondly, he had directed them to the effect that, if in fact they were satisfied with the evidence and believed the same to be true, they ought to commit, notwithstanding the absence of corroboration. The Court of Criminal Appeal sustained the objection, and quashed the conviction. The judgment of the Lord Chief Justice is of importance, because it clearly and admirably summarises the main points on which the jury must be directed by the trial judge in cases where the only evidence is the uncorroborated testimony of an accomplice or accomplices. "There is a distinction drawn," the Lord Chief Justice says

(41 T. L. R., at p. 636), "between the three different things which the jury are to be told - that it is within their legal province to convict; that in *all* cases it is dangerous to convict; and they may be advised not to convict. It is quite clear, when one looks at the enumeration of the various courses, that nowhere is there to be found, directly or indirectly, any reference to a case in which it may be the duty of the learned judge to advise the jury in such a case that they ought to convict."

An error in the forms given in Sch. I, C. P. C.

In a correspondence which we publish elsewhere our attention has been drawn to what appears to be a curious oversight both on the part of the legislature and the High Court. Or. 21, r. 22 of the Code of Civil Procedure provides that where an application for execution is made (a) more than one year after the date of the decree or (b) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause why the decree should not be executed. In Appendix E of the First Schedule, Form No. 7, is the form prescribed to be used for notice under Or. 21, r. 22 and it proceeds to state that an application for execution has been made on the allegation that the decree in question has been transferred to the applicant by assignment and the person on whom the notice is issued is called upon to show cause why execution should not be granted. Application for execution of decree by the transferee thereof is dealt with in Or. 21, r. 16 and Form No. 7 can only be appropriate for the purpose of that rule, and it is an obvious mistake which has so long remained unnoticed that this Form No. 7 should be used under Or. 21, r. 22. It appears that no form at all is prescribed under Or. 21, r. 16. Our High Court also has made the same mistake. Its civil process No. 36 (Appendix C, Vol. II, General Rules and Circular Orders, Appellate Side, Civil) is simply a copy of the aforesaid Form No. 7 in the Code of Civil Procedure. This is regrettable indeed and the mistake should at once be rectified. The rule-making power of the High Court is wide enough to rectify an error of this kind. Sec. 122 of the Code gives the High Courts power to make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence and by such rules to annul, alter or add to all or any of the rules in the First Schedule. It is competent to the High Court to alter the rules themselves in the First Schedule and certainly it can alter the forms. It is not necessary therefore to wait for the in-

tervention of the legislature in a matter of this kind. We draw the attention of the High Court to this matter and we hope that necessary action will be taken.

LOST OWNERS' ESTATES.

Sec. 107 of the Indian Evidence Act provides that when the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it, and sec. 108 lays down further, "Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it." In *Lala Govind Prosad v. Lala Jugdip Sahay*, [1925 Pat.] p. 57, the decree-holder who got a decision in his favour finally on 15th May 1922 disappeared from the 27th May 1922 without leaving a trace. After some futile proceedings in execution at the instance of his son, an application for execution signed by the pleader who appeared for him in the suit and verified by the son was put in, on 1st September 1923. The previous application was made on behalf of the son on the theory that the decree-holder was dead, but no evidence was given to prove that he was in fact dead and the Court in the circumstances had no alternative left to it except to hold that the decree-holder being in law alive, his son's application as heir was incompetent. The second application was held to be competent in the view that the authority of the pleader in the suit still subsisted for the purpose of the application for execution. Suppose, however, that what was required to be done had called for a fresh authority to initiate it. In such an event, if the son and heir had to wait for seven years to avail himself of the presumption under sec. 108 of the Evidence Act, the proceeding sought to be started might in all probability have been time-barred. The fact that the pleader who represented the Plaintiff in the suit was alive and willing to take up the execution though without specific instructions in that behalf from the client and did in fact file the application as on behalf of the Plaintiff was really accidental, and accordingly, in the High Court, the question of substance as to what should be done for instituting or keeping alive proceedings in the interest of a person in the event of his unexplained disappearance was very properly

raised in argument. Bucknill, J., in answer suggested two alternative courses, viz., (i) that the Court may be applied for, upon affidavit stating the circumstances, to presume his death, and (ii) in the event of the Court not finding the circumstances sufficient to justify such a presumption, the Court can and should appoint some person to look after the affairs of the person who has disappeared until his return or until his death can be properly presumed.

Although the case-law on this point in India is as good as non-existent (Bucknill, J.'s observations quoted above being merely *obiter*), it must not be supposed that such cases are very rare. A leading article contributed to the *Minnesota Law Review* for January 1925 by Mr. Edward Lees, Commissioner of the Supreme Court of Minnesota, opens with the statement that "the books are full of cases dealing with the property rights of persons who have disappeared and had no communication with relatives and friends." In several cases letters of administration granted by the Probate Court to the estates of persons not heard of for more than seven years upon the presumption that they were dead and acts done by the administrators in pursuance thereof had to be vacated at the instance of the supposed dead men on their re-appearance. The difficulty has been sought to be overcome in several states by means of statutes authorising the appointment of an administrator for the purpose of conserving property which is for the time being without an owner. "Such states," the learned writer states, "usually provide for published notice of the time and place of hearing the application for the appointment of a custodian of the property, authorise the person appointed to sell it and then distribute the residue of the funds in his hands among those who would take as heirs of the absent owner, if he were dead." A Massachusetts statute further provides that if the absentee does not appear and claim his property within a certain time, his next of kin may apply to the Probate Court for distribution of the assets and the distribution made operates as a bar to any claim the absentee may assert in case he re-appears.

A limitation clause like that in the Massachusetts statute would solve some but not all the difficulties that may arise out of the administration of the absentee's estate in this manner. If there are creditors, how may they enforce their demands? A judgment ob-

tained against a person treated as living though in fact he was dead is a nullity. So is one obtained against an administrator appointed on the assumption that he is dead, if in fact he is living. The risk and the uncertainty due to the inability to discover whether in fact the debtor is living or dead would be avoided if creditors were given power to sue the receiver or the administrator of the absentee person as if he were dead and to make the determinations of the Court binding on him on his re-appearance unless vacated by proceedings started within a given period of limitation. A perusal of the article makes it clear that the suggestion thrown out by Bucknill, J., is in the right direction, but evidently the suggested procedure cannot be made really effective unless it is enacted into a statute which should take into account and adequately provide for the various side-issues that are involved in this particular solution of the difficulties arising in connection with lost owners' estates.

Correspondence

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

The Code of Civil Procedure has now been in force for more than 16 years, and it is remarkable that a very patent error has not been brought to the attention of the proper authorities, although I am sure that it must have struck legal practitioners all over the country. The forms given in the appendixes to the First Schedule are parts of the statute, and under Or. 48, r. 3, they have to be used with such variation as circumstances may require. A reference to Appendix E will show that Form No. 7 thereof is intended to be used for a notice under Or. 21, r. 22, while the contents, if examined, will be found to contemplate the events referred to in Or. 21, r. 16. The error appears to have been repeated in the High Court Circulars as well, *vide* Civil Process No. 36 of the Calcutta High Court, and Form No. (P) 16 of the Patna High Court. As the appendixes form part of the First Schedule they can, I think, be amended by rules made by the High Courts under sec. 122.

I beg the favour of a publication of this letter with a view to attract the attention of all concerned.

Yours faithfully,
H. CHACRAVARTI,
Vakil, Gaya.

Reviews.

EVOLUTION OF LAW. *By Nares Chandra Sen Gupta, M.A., D.L., Advocate, Calcutta High Court, Professor of Law and Dean of the Faculty of Law, Dacca University. Calcutta University Press. 1925.*

Up till the present moment and for nearly half a century Maine's classical treatise on Ancient Law has remained the one book on which students of law have depended for whatever knowledge they gain of the evolution of law. Maine's brilliant generalisations, based as they were on inadequate data, have on the whole justified themselves in the light of results achieved by subsequent research. But these very results point unmistakably to the necessity of extensive revision and re-statement in matters of detail, and on some points even of a fundamental character. The data moreover on which Maine relied took hardly any account of the evidence furnished by Hindu law and Hindu social and legal history—evidence which not only had not been collected in Maine's time but is still in the process of accumulation—and that too in but a slow and haphazard way. One may therefore very well appreciate the difficulties which confront a teacher of law in an Indian University who is called upon to address a class of Indian students on such a subject as the evolution of law with Maine's Ancient Law as his one source book and text-book supplemented only by Sir Frederick Pollock's notes, valuable as they are. But though these difficulties have been keenly felt for a quarter of a century at least, it remained for Dr. Sen Gupta to make the first serious attempt to prepare an adequate text-book dealing with the subject for law students in general and for Indian students of law in particular. But in order to do so, it became necessary for Dr. Sen Gupta to embark upon researches of his own in Hindu legal history at the same time that he had to set himself to revising, supplementing and in places controverting Maine's theories and conclusions. This while it accounts for the disproportionately large space taken up by Indian legal history does at the same time make the book somewhat heavier reading than might otherwise have been the case. But the Indian material ought not to place serious difficulties in the way of Indian students and should on the other hand be helpful towards their obtaining a truer perspective of the sub-

ject than a mere presentation of abstract conclusions, however co-ordinated, would do.

Dr. Sen Gupta develops his thesis, whether confirmatory of Maine or controverting him, with a lucidity of presentation which can come only from a complete mastery over one's materials. His own conclusions, specially where they differ from those of Maine or other accepted opinions on the subjects dealt with, are stated with studied moderation, and at the same time are supported by cogent evidence. (See for instance his treatment of Maine's thesis that joint ownership is the most primitive form of ownership in Chap. X, and the Law of Contract, Chap. XI.) The book is the work of a scholar fully imbued with the true scientific spirit which knows how to subordinate speculations to facts. Evolution of law cannot be studied in the abstract and apart from the facts of concrete social history. That the author fully realises this is borne out by his treatment of each one of the fifteen topics into which he divides his subject. We welcome this book not merely because it is the one and only text-book on the subject which is comprehensive and up-to-date but as an original contribution on various aspects thereof specially in the collection and manipulation of Indian materials.

INTRODUCTION TO ROMAN LAW. *By Amulya Kumar Dutta Gupta, M.A., B.L., Lecturer in Law, Dacca University. Price Rs. 1-8-0.*

This unpretentious little book is a serious attempt to interest Indian students and initiate them in the study of Roman law, and is written by a teacher of law in one of the Indian Universities with practical experience of what it is in that law that repels Indian students. The key to Roman law is furnished by Roman history of which a brief account is given in part I. Roman law itself or rather Roman private law is dealt with in part II, in five chapters, *viz.*, on (1) the law of persons, (2) the law of property, (3) the law of succession, (4) the law of obligation and (5) the law of procedure. The treatment of each of these topics is succinct but at the same time lucid. It is very far from being a cram book, and is an introduction to the study of Roman law in its true sense, and may be recommended with confidence to students as such.

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REPORTS (See Index.)

The new Advocate-General of Bengal.

We are glad Mr. B. L. Mitter, who has filled the office of the Standing Counsel to the Government of Bengal with ability and credit for some years, has been appointed Advocate-General of Bengal in the place of Mr. S. R. Das, the present Law Member of the Viceroy's Cabinet. We offer our congratulations to Mr. B. L. Mitter. It is not invariably that the Standing Counsel has been promoted to the position of the Advocate-General. There was a time when even Mr. W. C. Bonnerjee, who had filled the office of the Standing Counsel with conspicuous ability for many years, was passed over in favour of Europeans who regarded the Advocate-Generalship as their special preserve. So we offer our congratulations to the Government as well for not overlooking Mr. Mitter's claims and importing an Advocate-General from England—an experiment which was not very successful. Mr. Mitter is a lawyer of ability and character and we are sure that he will do full justice to the high office to which he has been promoted. He is entitled to have his own views with regard to political questions but we are sure that he will not allow any political considerations to prevail with him in discharging the onerous duties of the chief law-officer of the Crown. Justice and fairplay ought to be the supreme consideration of the responsible position that he will now hold because, besides advocacy, he has duties to perform which are *quasi-judicial* in nature. We are quite sure that he will maintain the best traditions of the office as also of the Bar of which he will be the leader by virtue of his office.

Error in the Forms in the C. P. C.

Our thanks are due to the correspondent whose letter is published elsewhere for pointing out that the inaccuracy of the Form No. 7

in Appendix E of the Civil Procedure Code has already been rectified by the Repealing and Amending Act X of 1914. No change has however been made in Civil Process No. 36 in Appendix C, Vol. II of the High Court Rules and Circular Orders. The result seems to be the same as before inspite of the amendment, for it is the form prescribed by the High Court which is to be actually used by the subordinate Courts. Evidently nothing has been done by way of revision of the forms and such other matters, because no Rule Committee has been brought into existence during these many years that the new Code of Civil Procedure has been in force.

Amendment of the Calcutta Municipal Act.

We understand that in consequence of the decision of the High Court in *Ram Gopal Goenka v. The Corporation of Calcutta*, 29 C. W. N. 898, a bill will be introduced at the next sitting of the Legislative Council to amend the Calcutta Municipal Act in the manner necessitated by the aforesaid decision. The point in question is whether prosecutions ordered by the now defunct General Committee can be started and continued by the present Corporation. The facts out of which the case noted above arose are these: In March 1924 the General Committee of the Corporation resolved that an application should be made to the Municipal Magistrate under sec. 449 to remove certain unauthorised structures in a particular premises at the expense of the owner. On the 1st April 1924 the new Corporation came into existence under Act III of 1923 and on a subsequent date the cases sanctioned by the old committee were re-affirmed by the new Corporation and in June 1924 the Petitioner was prosecuted under a notice issued by the Municipal Magistrate under sec. 363 or sec. 364 of the new Act which corresponds to sec. 449 of the old Act and ultimately the Magistrate directed demolition of the structures complained of as they were unauthorised. The matter was taken to the High Court and the Magistrate's order was reversed.

Their Lordships made this Rule absolute on, amongst others, the ground that the proceedings under sec. 449 of the Calcutta Municipal Act (III, B. C., of 1889) could only be initiated by the General Committee and therefore in respect of unauthorised structures which existed before 1st April 1924 when the Calcutta Municipal Act of 1923 came into force, there was after the passing of the latter Act nobody competent to take proceedings under sec. 449 of the Act of 1889. When an existing corporation is superseded by statute by another it is no doubt embarrassing if the new body cannot continue the work of the old corporation in every respect, but it strikes one whether even at the present moment orders for prosecution made by the old corporation have not all been carried out. If they have been, the necessity of an amendment like the one in question is not obvious; on the other hand, if the state of things is otherwise it undoubtedly shows that those who are charged with the administration of municipal affairs follow very dilatory methods. Stale prosecutions are never to be countenanced and the highest Courts have frequently quashed criminal proceedings on the ground that they have been initiated too long after the event.

Constitutional progress by compromise.

We have often said that the political progress of a nation does not depend on an ideal paper constitution of a country but largely on the character and wisdom of the political leaders and the good sense of the people. France and America have written constitutions that guarantee the personal and political liberty of the people but it is well-known that the executive and the police in both countries are armed with almost autocratic powers. It is quite different in England which has no written constitution. In no country in the world the executive is more responsible to the legislature than in England. The following note from our legal contemporary of the *Law Times* is instructive in showing how it is by a spirit of compromise and not that of bringing about deadlocks that the British constitution has developed. Theory and practice must march hand in hand for securing such progress.

Mr. Chamberlain, in his speech to the Assembly of the League of Nations at Geneva, to which reference has been made in this column, invited the Assembly to study the history of this country for the past 250 years (presumably from the

Revolution epoch), and mentioned the immense changes in British national life. "In no case," he said, "did logic play a part. Every decision the British people had taken had been illogical." If the word "illogical" were omitted and the words "in the spirit of compromise" inserted in its place, Mr. Chamberlain would, perhaps, have more clearly conveyed his idea of what Professor Redlich has admirably termed "the incomparable elasticity of the British Constitution, and its contempt for dogmatic formulation." "Britain's practice," said Mr. Chamberlain, "is to eschew general principles. We proceed from particular to general, not from general to particular, inspired by our history and habits of mind." The illogical spirit, or the spirit of compromise, to which Mr. Chamberlain alludes as congenial to the political genius of the English people, has been described by Mr. Gladstone, as a statesman with practical experience, and by Mr. Lecky, as a theoretical writer. "The British Constitution," wrote Mr. Gladstone in 1876, "more boldly than any other, presumes the good sense and good faith of those who work it. If, unhappily, these personages meet together on the great arena of a nation's fortunes, as jockeys meet upon a race-course, each to urge to the uttermost, as against the others, the power of the animal he rides, or as counsel in a court, each to procure the victory of his client without respect to any other interest or right, then this boasted Constitution of ours is neither more nor less than a heap of absurdities. The undoubted competency of each reaches even to the paralysis or destruction of the rest. . . . But the assumption is that the depositaries of power will all respect one another, will evince a consciousness that they are working in a common interest for a common end, that they will be possessed together with not less than an average intelligence, or not less than an average sense of equity, and of public interest and rights. When these reasonable expectations fail, then it must be admitted the British Constitution is in danger." Mr. Lecky thus expounds and explains the spirit of compromise in the working of the British Constitution. "A danger," he writes, "exists in the British Constitution, for if a difference arose between its three constituent elements in which each obstinately refused to yield, the Government might be brought to a deadlock, or the nation to a revolution, or a war of classes. The complexity of the Constitution is retained, not because such a catastrophe is impossible, but because it is believed that the advantages preponderate over the disadvantages; because, although under certain circumstances, that complexity might create discord or revolution, it is, on the whole, admirably calculated to prevent or allay them. The blended force of interest and patriotism inspires the Sovereign, the aristocracy, and the Commons with the spirit of compromise which is essential to their co-operation."

Martial law is the negation of law.

We reproduce from the same source the following note on martial law regarding which Viscount Grey narrates an interesting anecdote in his recently published reminiscences. It supports the view we put forward in our editorial article on the same subject in 1921.

Lord Grey of Falloden, whose career as a statesman, more especially as Secretary of State for Foreign Affairs at a supreme crisis in the history of the British Empire has won for him the grateful appreciation of his own and of succeeding generations, has, in his Memoirs, just published, related with a delightful naïveté his first practical lesson in constitutional law. He states that he took no interest in public events till the news of the murder of Lord Frederick Cavendish in 1882. "I was then," he says, "an undergraduate at Balliol, and I joined in the clamour for martial law." His grandfather, however, "dashed his exuberance" with the critical comment, "Martial law is the suspension of all law." Lord Grey's grandfather, who made this true and accurate enunciation of martial law was the Right Hon. Sir George Grey, Bart., one of the most eminent statesmen of his time, who was a member of the House of Commons from 1832 till his retirement from public life in 1874. Sir George Grey was called to the Bar, at which he practised for some years, in 1836. He was appointed early in life to the office (then a political position, whose holder resigned with the Government, by whom he was appointed) of Judge Advocate-General, which gave him practical experience in the administration of the various spheres of military law. He subsequently sat in several Cabinets, as Chancellor of the Duchy of Lancaster, Secretary of State for the Home Department, and for the Colonies. The Phoenix Park assassinations, of which Lord Frederick Cavendish was a victim, were perpetrated on the 6th May 1882. Sir George Grey died in the September following, so we may place his definition of martial law, communicated to his grandson, as practically his last political utterance. That definition is of very special value from the fact that Sir George Grey was Home Secretary in 1849 when the whole doctrine of martial law was discussed at great length before a committee of the House of Commons, which sat to inquire into certain transactions in Ceylon. Sir David Dundas, then Judge Advocate-General, who had been previously Solicitor-General, explained his view at length, and was closely examined upon it by Sir Robert Peel, Mr. Gladstone, and others. Sir George Grey, a generation later, unconsciously reflected the views of Sir David Dundas, accepted by the Select Committee, and at a later time by Sir Fitzjames Stephen, that martial law is the suspension of all law." The following answer of Sir David Dundas, reproduced by Sir Fitzjames

Stephen with high approval, are emphasised by Sir George Grey: "The proclamation of martial law is a notice to all those to whom the proclamation is addressed that there is now another measure of law and another mode of proceeding than there was before that proclamation." Again: "I think a wise and courageous man would, if necessary, take a law to his own hands, but he would much rather take a law which is already made, and I believe the law of England is that a governor, like the Crown, has vested in him the right, when the necessity arises, of judging of it and being responsible for his work afterwards so to deal with the laws as to supersede them all, and to proclaim martial law for the safety of the colony."

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

With reference to the correspondence and the editorial note thereon, appearing in your paper of the 23rd instant, regarding the inaccuracy of the Form No. 7 in Appendix E of the Civil Procedure Code, I have the honour to invite your attention to the fact that the reference to Or. 21, r. 22 in that form was amended, by substituting Or. 21, r. 16 for it, by sec. 2 and Sch. I of the Repealing and Amending Act X of 1914, which received the assent of the Governor-General on the 17th March 1914. It will thus be seen that the legislature has already rectified the error. The error in civil process No. 36 in Appendix C, Vol. II of the High Court Rules and Circular Orders, Appellate Side, Civil, should, however, be similarly rectified by substituting Or. 21, r. 16 for Or. 21, r. 22, and a separate form, prescribed for Or. 21, r. 22.

Yours faithfully,

DHIRENDRA KUMAR MUKERJI,
Munsif of Pabna.

24-11-1925.

Reviews.

THE BENGAL TENANCY ACT. By Rai Surendra Chandra Sen Bahadur. Fifth Edition. M. C. Sarkar & Sons, Law Publishers and Booksellers, 90/2A, Harrison Road, Calcutta. 1925. Price Rs. 13.

A melancholy interest attaches to the publication of this the latest edition of by far the most popular commentary on the Bengal Tenancy Act. Rai Surendra Chandra Sen Bahadur

dur, the author, died when the book was being pushed through the press. We know of few authors who were more deeply in love with their work, and we cannot help feeling that he would have died happier had he but survived two short months and lived to see the edition issue out of the printer's hands. It does not surprise us to be told that the late author was thinking of it up to even a few minutes before his death.

The distinctive quality of Mr. Sen's commentaries, as we have noticed more than once before, is to be found in the thorough insight they display concerning not merely the intricate details of the Act and the judicial interpretations placed on them, but into the working of the enactment as a whole as judged by its application to the concrete facts of agrarian life in the provinces and districts to which the Act extends. As a repository of case-law, too, the work has proved invaluable to legal practitioners, the more so, because the late author has not contented himself with merely collecting and classifying the cases. They have been subjected, wherever the author has felt this to be necessary, to critical analysis, in the course of which every attempt has been made to balance opposing views with the object of arriving at what the author has thought to be the correct conclusion. The policy or the policies of the Bengal Tenancy Act are such a controversial subject that it is not likely that his opinions will be acceptable in all quarters and on many points we would, we know, strongly dissent from his views. But that can in no way detract from the value of the commentaries. It would be a work of supererogation to comment in greater detail on a new edition of a treatise as widely known and appreciated as the work under notice. Suffice it to say that the object of making the work a complete book of reference on the tenancy law of Bengal has been fully kept in view in the present edition. The case-law has been brought up to date, the Appendices of rules, notifications, miscellaneous notes and price-lists revised and the very few cases that have cropped up during the time the book was in the press appended in a classified addenda, whilst the amendments effected by the Devolution Act of 1920, the Utbandi Act of 1923 and the Bengal Tenancy (Amendment) Act I of 1925 have been bodily incorporated. We have finally to notice the improvements in the printing and paper which make the edition so much more attractive than its predecessors.

THE LAW OF SPECIFIC RELIEF IN BRITISH INDIA. Being a commentary, critical and explanatory, on the Specific Relief Act (Act 1 of 1877). By *S. M. Lahiri, M.A., B.L., Pleader, Judge's Court, Calcutta.* Eastern Law House, Law Publishers, 15, College Square, Calcutta, 1925. Price Rs. 6.

There have been several commentaries, some of great merit, on the Specific Relief Act. A newcomer in the field must therefore make good his position, if at all, by the merit of his work. Mr. Lahiri is a newcomer, but one who, we feel confident, will make good his position, because he has not merely compiled and classified, but has read and studied the cases and the text-books, and thought over things for himself and though the material (barring recent decisions) are old, the treatment is throughout vigorously fresh. It is not only fresh, it is informed and wide-awake; and that is just the reason why he has been able to keep it within reasonable compass. Considering all things, one gets extraordinarily good value for the published price in this attractively printed and got-up volume of over 530 pages, of sound and solid material, which will be appreciated by students and practitioners alike.

LAW OF SPECIFIC RELIEF IN INDIA. By *Mr. Harnam Singh, M.A., P.C.S. Punjab.* Published by the Law Printing House, Madras.

This is a very handy edition of the Specific Relief Act. We have examined the notes on some of the more important and difficult sections of the Act, such as, sec. 9, sec. 42, sec. 45. We find that while the notes and commentaries on the two former are exhaustive, those on the latter are not quite so. The application before Ghose, J., before the Calcutta High Court for restraining the President of the Bengal Legislative Council from admitting a motion for a supplementary grant is noticed but not the subsequent developments with regard to it. The application, *S. N. Halder v. S. N. Mullik*, is also noticed in the Addenda. But the notes thereon do not clearly indicate the issues involved in the decision. But these being very recent cases this does not detract from the general merit of the work. The general principles of the section are explained in the notes and references are made to both English and Indian cases to further elucidate them. On the whole the work will be found useful both by the Bar and the Bench.

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Damages under the Fatal Accidents Act.

Secretary of State for India v. Gokal Chand, I. L. R. 6 Lahore 451, is a case under the Fatal Accidents Act and is worthy of notice. Sec. 1 of Act XIII of 1855 provides that whenever the death of a person shall be caused by wrongful act, neglect or default and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof the party who would have been liable if death had not ensued shall be liable to an action or suit for damages notwithstanding the death of the person injured and every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the deceased and shall be brought by and in the name of the executor, administrator or representative of the person deceased. Sec. 2 lays down that in any such action or suit the executor, administrator or representative of the deceased may include a claim for and recover any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default, which sum, when recovered, shall be deemed part of the assets of the estate of the deceased.

In the case in question one Bansi Lal who was travelling in a train belonging to the North-Western Railway sustained serious injuries in consequence of that train colliding with another train of the same railway administration and the wounded man succumbed to his injuries shortly afterwards. His legal representatives brought an action for the recovery of damages for the pecuniary loss which resulted from his death to the members of his

family and also included in the action a claim for a certain amount on the ground that the deceased was carrying with him currency notes of that amount and that the notes were lost by reason of the negligence of the railway administration. The trial Court found that the deceased had with him currency notes of the amount stated and that the notes were not mentioned in the list of property found at the place of the accident. The evidence gave no indication as to how the loss took place or whether any person stole the notes. The trial Court decreed the suit in its entirety and the railway administration preferred an appeal to the High Court which was confined to the question as to whether the suit could succeed as to the value of the currency notes lost by the deceased.

The argument in the High Court was that the word "occasioned" used by the legislature in respect of the loss caused to the estate in sec. 2 is different from and wider in scope than the term "caused" used in the first section of the statute in connection with the death of the injured person. The High Court did not accept this contention as in its opinion the legislature did not intend to draw any distinction between the two words and to alter the rule against the award of remote damages by the mere use of the term "occasioned" and that the statute by enacting the rule allowing the legal representatives to include in their suit a claim for the loss to the estate did not create any fresh liability but merely recognised what already existed under the common law and prescribed only the procedure for enforcing it. In this view it was held that the loss of the notes was not a necessary consequence not even a probable consequence of a person being injured in a railway collision and as it was only a remote consequence of the Defendants' negligence the Plaintiffs were not entitled to recover from the Defendants

compensation for that loss. In coming to this conclusion reliance was placed on the English case of *Sharp v. Sowell*, (1872) L. R. 7 C. P. 253, in which the Defendant in breach of a Police Act, washed a van in a public street and allowed the waste water to run down the gutter to a grating a few yards off from which in the ordinary state of things it would have drained into the sewer. In consequence of a hard frost the grating was obstructed by ice and the water in consequence flowed over the pavement and froze. There was no evidence that the Defendant knew of the grating being obstructed. The Plaintiff's horse slipped on the ice and broke its leg. It was sought to recover from the Defendant the value of the horse but it was held that the damage was too remote not being one which the Defendant could fairly be expected to anticipate as likely to ensue from his act.

Corruption in high office and its treatment in English Polity.

The following review of Lord Birkenhead's article on English Judges in the columns of the *Law Times* mentions a very interesting anecdote of how Lord Chancellor Thurlow, who, while occupying the position of a Cabinet Minister in the Pitt Ministry, was conspiring with the Prince of Wales to set him up as the Regent during the insanity of George III against the wishes of the Prime Minister and was caught red-handed by a most amusing incident which led to his being marked out as a political traitor and disgraced him for life and after. Other instances of corrupt Chancellors are also mentioned in the article. But they are few and far between. It is worthy of note that though corruption undoubtedly existed in the past political life of England, this politically minded people have never lacked the courage to expose the same to public censure and not unoften subject the miscreants, no matter how high their positions, to severe sanction by impeachment or otherwise.

Lord Riddell, in a delightful article in a weekly paper, entitled "English Judges," founded on the Lives of Twelve English Judges, by Lord Birkenhead, published in the *Empire Review* and about to be issued in book form, writes, in reference to the resignation of the Great Seal in 1865 by Lord Westbury owing to charges of corruption: "If my memory serves me, there have been some two hundred Chancellors during the last 1300 years, and only three have been found

guilty of serious impropriety—not a bad record for British justice." The other two Lord Chancellors whom Lord Riddell impliedly places on this list of censure are undoubtedly Lord Bacon and the Earl of Macclesfield (Thomas Parker), who was impeached on charges of corruption in June 1725 and, being convicted at the Bar of the House of Lords, was removed from the Chancellorship and fined £30,000. The list of Lord Chancellors guilty of "serious impropriety" cannot, however, be confined to these three persons. Two other names, at least, should be placed on that list—the names of Lord Thurlow and Lord Loughborough (Earl of Rosslyn). In 1789, at the time of the crisis produced by the madness of George III, Pitt's Chancellor was Lord Thurlow. The Prince of Wales (George IV) naturally expected to be Regent during the illness of the King but feared that Pitt would propose to limit the exercise of the Royal power in a manner which would be distasteful to him. The Prince had a confidential adviser in Sheridan, who guessed at the character of Thurlow, the Chancellor, and thought he might be bribed, by the promise of the Chancellorship from the Prince, to undertake to defeat in the Lords whatever the Prime Minister, his colleague in the Cabinet, might propose in the Commons on the powers of the prospective Regent. Thurlow took the bribe and promised to be perfidious to Pitt. Thurlow, against all good faith and notions of honour, used to steal round to the Prince's apartments in Windsor, either before or after the Cabinet Councils, when held in the Palace, and there communicate with the Prince as to their future plans and schemes. Pitt for a time was deceived. Eventually, according to Lord Stanhope, in his Life of Pitt, and to Lord Campbell, in his Lives of the Chancellors, Thurlow was detected by his hat. On the occasion of a Cabinet Council at Windsor the Ministers were assembled to depart, but Thurlow was detained for want of his hat. At last a page came running with the hat of the Lord Chancellor in his hand, saying aloud: "My Lord, I found your hat in the closet of His Royal Highness the Prince of Wales." The Ministers heard what was said, and the hat so found opened the mind of Pitt to the treachery of his colleague. The incident probably formed the basis, in 1792, of Pitt's insistence on Lord Thurlow's dismissal from the Cabinet in the memorable words: "Either he or I must go." Lord Loughborough, who was eventually Chancellor, disappointed in the expectation of being Chancellor in the prospective Regency by Thurlow's treachery, determined to secure the next best thing in the Prince's expected regime. "The fact," writes Lord Chief Justice Whitehead, "appears, astonishing though it be, that Lord Loughborough drew up a paper suggesting that the Prince of Wales as next heir, might and ought to seize the Regency without any authority from Parliament whatever

His design was discovered by Pitt's Ministry. The Ministers were resolved, if Lord Loughborough's project was propounded, immediately to arrest him for high treason and consign him to the Tower—a resolution of which I [Lord Chief Justice Whiteside] heartily approve, because I think a Chancellor should be hanged as readily as any other criminal if he deserved it. His wig ought not to save his head if guilty." Lord Brougham writes: "That the advice of Lord Loughborough was hinted to the Heir Apparent, or at least a subject discussed with him, and of which a memorandum remains in his writing, is very confidently affirmed from ocular inspection." He adds: "That the individual to whom this perilous advice was tendered could not have acted on it without a civil war appears sufficiently evident." Lord Brougham records that when King George III heard of Lord Loughborough's death he exclaimed, "He has not left a worse man behind him."

LONDON NOTES

(FROM OUR CORRESPONDENT.)

Oct. 22nd.—Judgment was delivered by LORD PHILLIMORE in *Saklat v. Bella*, an appeal from Lower Burma which raised a question of considerable importance to the Parsi Community.

The Respondent Bella had been brought up by a wealthy Parsi inhabitant of Rangoon and was initiated into the Zoroastrian religion. Thereafter she attended at certain religious services. A section of the Parsi Community were offended and brought a suit for a declaration that Bella was not entitled to use the temple or participate in the ceremonies. The Board held that the temple endowments were for the benefit of persons holding the double qualification of Zoroastrians and racial Parsis. They were of opinion that Bella was duly initiated and had become a member of the Zoroastrian faith, but that the temple being for the Parsi Community, Bella had no right of entering there. They accordingly allowed the appeal and granted the declaration prayed for.

Oct. 26th.—A number of criminal petitions for special leave to appeal were heard by LORDS DUNEDIN and SUMNER and SIR JOHN EDGE. In each case leave was refused.

Ahmed Nabi Ahmed v. King-Emperor and *Anandrao Gangaram Phanse v. King-Emperor* were applications by the accused who were convicted of implication in the Malabar Hill Tragedy which re-

sulted in the death of Mr. Bawla. *Sir John Simon, K. C., Sir Geo. Lowndes, K. C.* and *Messrs. Parikh and Pillai* appeared for the applicants and *Messrs. Dunne, K. C.* and *Kenworthy Brown* represented the Crown. On behalf of the accused Anandrao Phanse, it was urged that although he had supplied the motor car for the purpose of bringing back Mumtaz Begum, there was no evidence to justify the verdict of murder that was brought in by the jury. The major part of the summing up was on the charge of abduction and there was misdirection in that the jury were not adequately instructed on the charge of murder.

Mr. Dunne contended that there was evidence of a conspiracy to abduct which imported the possibility of violence and if violence ensued and death resulted the accused was responsible for it as a probable consequence of his act.

Leave was refused, LORD DUNEDIN intimating that the Board would give their reasons in writing at a later date.

In *Indar Singh v. King-Emperor*, *Mr. Wallach* applied for special leave on the ground that the accused was convicted on a confession made to a zaildar which was not recorded and of which oral evidence was given at the trial.

In *Pakhar Singh v. King-Emperor*, *Sir G. Lowndes, K. C.* and *Mr. Parikh* made a similar application on the ground of the wrongful admission of hearsay evidence.

In each case their Lordships intimated that the application had not been brought within the narrow rule laid down in *Dillet's case*.

In *Wali Mahomed v. Mahomed Bakhsh*, *Messrs. DeGruyther, K. C.* and *Wallach* applied for special leave to appeal from concurrent findings of the lower Courts on the ground that there was an important question of law, viz., the inferences to be drawn from certain Government records, and they referred to L. R. 46 I. A. 197. Leave was granted.

Before LORDS DUNEDIN and WRENBURY and SIR J. EDGE, the appeal of *Natha Singh v. Amir Shah (Lahore)* was heard and dismissed.

The suit was for specific performance of a contract for the sale of land.

Messrs. DeGruyther, K. C. and *Wallach* for the Appellant contended that the original con-

tract had never been broken and that if it had, a new contract had been made.

Sir G. Lowndes, K. C. and *Mr. Dubé* for the Respondents were not called upon.

Nov. 2nd.—*Abdul Rahman v. King-Emperor*. Before LORD DUNEDIN, LORD SUMNER and SIR JOHN EDGE an application was made for special leave to appeal from a decision of the High Court at Rangoon. The applicant was convicted by the District Magistrate of Rangoon under secs. 466-109 and 466-116 of the Indian Penal Code and was sentenced to two years' rigorous imprisonment.

The High Court upheld the conviction upon the first charge but reduced the sentence to one of rigorous imprisonment for nine months.

Sir John Simon, K. C., *Mr. K. C. Chaudhuri* and *Mr. Walter Frampton* represented the Petitioner. They contended that there were two grounds on which they relied and which came within the narrow limits prescribed by the Judicial Committee.

(1) That the appeal to the High Court was heard on a record which disregarded the provisions of secs. 360 and 365 of the Criminal Procedure Code.

The procedure adopted was that while the Clerk of the Court was reading over his evidence to the witness who had last left the box another witness was being examined and the accused and his Counsel were unable to check any errors in the deposition of the witness and at the same time to listen to the evidence of the new witness. Furthermore the depositions of many of the witnesses were read by them silently. Their depositions were not read over and explained to the accused. The provisions of secs. 360 and 365 of the Criminal Procedure Code are mandatory and the omission to carry out those provisions is an illegality vitiating the trial. *Hira Lal Ghose v. Emperor*, (52 Cal. 159), *Dargahi v. Emperor*, (52 Cal. 499) and *Subrahmania v. King-Emperor*, (28 I. A. 262).

(2) The non-compliance with the section was brought to the notice of the Court by an affidavit and a report was obtained from the trial Magistrate and was in the hands of Counsel for the Crown at the time of the hearing of the appeal but no communication was made to the accused or to his advisers.

Mr. Kenneth Brown for the Crown.—
This was not a matter of substance affecting

the result of the trial, nor can it be said that it has led to a miscarriage of justice. If any irregularity has been committed it was concurred in by the defence so that it could in any case be cured by applying sec. 537.

In granting leave LORD DUNEDIN said that it would be confined to the questions raised by the applicant on the present application. His Lordship continued—"Having regard to the recent cases which have been brought to our notice which were decided in India, and which, according to the view that their Lordships take, are not in accordance with what was said by this Board in a judgment that was pronounced by Lord Halsbury, their Lordships think that leave to appeal should be given in this case in order that there may be a formal judgment in the matter." Leave granted.

G. D. M.

Review.

GHOSE'S DIARY.

We welcome the series of Ghose's Diaries which are early in the field to maintain their position as popular diaries, which they have made for themselves during the last decade. They are issued in various sizes to suit the requirements of customers of different classes. The one issued this year in Demy 8vo size a day to a page would be found very serviceable for office use. The lawyer's diary is of medium size. The gem is a well-got-up pocket diary. There are some of intermediate sizes to suit the tastes and purses of all classes. The prices vary from Rs. 2-4 to 8 as. The get-up is uniformly neat.

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Should India be a signatory to the Locarno Pact?

Sir Sivaswamy Iyer has given notice of a motion to be moved by him at the next session of the Legislative Assembly that the Government of India should not be a signatory to the Locarno Pact without giving the Assembly an opportunity to discuss it. He says that India was not represented at Locarno and is also not directly interested in the agreement concluded between the great European Powers for the preservation of European peace and therefore there is no sufficient reason why the Government of India should be a party to it. While we recognise that the Locarno Pact marks a new era in the history of European diplomacy and statesmanship and that it is likely to prove the most potent instrument in the preservation of European peace, on which the peace of the world so much depends, yet we do not see any reason why India should be saddled with any prospective burden, financial and military, for enforcing the sanction provided under the pact, should any of the signatory European Powers violate the terms of the agreement. The self-governing Dominions like India were not represented at Locarno and the British Government is now in communication with the Dominion Governments and the Government of India as to whether they would be parties to the Pact. We doubt whether the Dominions will. We believe, that they would prefer not to enter into any binding obligations to back up the guarantee that has been given by the British Government on its own behalf under the Pact. Of course, if Britain gets involved in any European war by reason of the violation of the terms of the Pact by any European Power the Dominions as also India will be prepared to offer voluntary help, as they did during the

last war, but there is no reason why she in common with the Dominions should enter into any binding obligations under the Pact. We are of opinion that Sir Sivaswamy's resolution is a very fit and proper one for discussion by the Assembly and that the views expressed above will commend themselves to the Assembly and the general public.

The following extract from the *Law Times* will show that India, which acquired an international status, under the Treaty of Versailles and by her representation in the League of Nations, is as much entitled to say whether she will be a signatory to the Pact as any of the Dominions. The Indian Legislature should therefore be given every opportunity of expressing its views on the question and the Governor-General in Council should abide by its decision. It is by establishing conventions of this kind that India can advance her international and constitutional status as Canada has done in spite of her defective paper constitution.

To students of the working and development of the British Constitution and of the Constitution of the Community of Nations forming the British Commonwealth of Nations—in other words, the Constitution of the British Empire—art. 9 of the Treaty of Mutual Guarantee, commonly called the Security Pact, initialled at Locarno on the 16th inst, is of absorbing interest. It is itself an object-lesson of the fact that the Constitution of the British Empire is, like the Constitution of Great Britain itself, a living and a changing organism. The article is as follows: "The present Treaty shall impose no obligations upon any of the British Dominions or upon India, unless the Government of such Dominion or of India signifies its acceptance thereof." A provision in a treaty to which Great Britain is a party from whose obligations British Dominions and India are exempted, unless the acceptance by them of such obligations is signified, is absolutely without precedent, and is contrary in its very essence to the strict law of the Constitution of the British Empire. According to the strict letter of that Constitution, the Dominions and

Colonies of the Crown and India are absolutely bound, in matters of peace and war and in their relations with foreign powers, by the prerogative of the King acting on the advice of a Cabinet responsible only to the House of Commons, and through the House of Commons to the people of Great Britain. The King exercises that great prerogative under the advice, not of an Imperial, but of a British Cabinet. When Great Britain declares war the Dominions and Colonies are at war: when Great Britain makes peace the Dominions and Colonies are bound by that peace. "Imperial treaties," writes Professor Dicey, "legally bind the Colonies, and the treaty-making power, to use an American expression, resides in the Crown, and is therefore exercised by the Home Government in accordance with the wishes of the Houses of Parliament, or, more strictly, of the House of Commons." Again: "The principle of the law is that a Colony is bound by treaties made by the Imperial Parliament, and does not, unless under some special provision of an Act of Parliament, possess authority to make treaties with any foreign power." This apparent severance of the Dominions from Great Britain, and their freedom from the obligations of the Locarno Treaty, unless acceptance of these obligations be signified, is, paradoxical as it may seem, in its true inwardness a most significant indication of the intelligent co-operation of the Dominions, not under any constraint, moral or legal, but of their own free will, in the foreign policy of the British Empire. This provision of the Treaty of Locarno, when rightly understood, is a proof that the day-dream of Edmund Burke in 1775 will have its perfect realisation in the holding of the Dominions to the Mother Country, not irrespective of their own wishes, but "in the close affection which grows from common aims, from kindred blood, from similar privileges and equal protection—ties which, though light as the air, are strong as links of iron." The independence of the Dominions in relation to foreign policy generally, as manifested by this art. 9 of the Locarno Treaty, is a result of the Great War, and is in reality a proof, not of severance, but of union with the Mother Country.

Criminal Intimidation by threat of divine punishment.

A very interesting question arose in the case of *Doraswamy Ayyar v. King-Emperor*, 48 Mad. 774, whether the offence of criminal intimidation can be committed by threat of 'divine punishment'. The facts are interesting and are as follows. The accused sent anonymous letters by post to one Abdul Jaffar, a well-to-do citizen of the locality purporting to come from the deity directing him to pay cer-

tain sums of money to a person specified in the letters whom he was to seek out and threatening him with ruin and death from divine displeasure if he failed to do so. As reference was made to the recent death of his father as having resulted from disobeying such warnings Jaffar was frightened and accompanied by a relative of his went to the place named with Rs. 300 and there met the accused. On that occasion for some reason or other accused denied that he was the person they were in search of and ridiculed their taking the anonymous letters seriously. Seeing that Jaffar went away and did nothing more thereafter the accused went to the place where Jaffar lived and pretended that he had two letters from God wherein he was commanded to go to Jaffar and explain the serious situation to him and to receive Rs. 300 from him. He also showed them the identification mark mentioned in one of the letters, a big mole on his left arm to convince Jaffar that he was the man referred to. Jaffar was anxious to pay but a relative of his dissuaded him from doing so and the accused was not paid then and went away. Very shortly after Jaffar received another letter sent by the accused saying that that was the last communication that he would receive and that dire consequences would follow without further warning. This letter also purported to come from God himself. On receiving this letter Jaffar got frightened and sent for the accused; in the meanwhile one of his relatives had informed the police of what had happened. Accused came to Jaffar's house and discussed the matter with him and two others and agreed to receive three currency notes of Rs. 100 each if offered on a silver plate with sugar and fruits. On the offer being so made accused took the notes and put the bundle under his armpit and was leaving the house when he was arrested by the police. The accused was convicted by the Magistrate under secs. 420 and 507, I. P. C. On appeal the Sessions Judge altered the conviction to one under secs. 385 and 506, I. P. C.

The matter came up to the High Court and Krishnan, J., held that ability to carry out the threat offered was an essential element for the offence of criminal intimidation and this was absent in the case. For a conviction under sec. 507, I. P. C., it must be shown that the accused committed criminal intimidation by using threats of injury which he was in a

position to put into execution. The injury need not be one to be inflicted by the accused himself personally but it is enough if he can cause it to be inflicted by another.

Further it was held that the conviction under sec. 508 also could not stand because under that section it was necessary that there should be some act contemplated to be done in future by the offender. This is perhaps the reasonable view to take so far as the offences under secs. 507, 508 are concerned. But it is a pity that the arm of the law is not long enough to reach the accused and visit him with the punishment he deserves. The case also shows that even at the present moment people are to be found who are credulous enough to believe statements like those made by the accused to his victim.

Futility of certain provisions of the Code of Criminal Procedure.

The Code of Criminal Procedure is one of the most carefully prepared statutes but still there are some sections in it which for all practical purposes are a puzzle. To refer to one or two, sec. 263 of the Code says that in cases of summary trials where no appeal lies the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge but he or they shall only record the materials required by the section. Sec. 362 lays down that in every case tried by a Presidency Magistrate in which an appeal lies such Magistrate shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation in open Court and evidence so taken down shall ordinarily be recorded in the form of a narrative. In other cases such Magistrates are not required to record evidence *in extenso*.

Under sec. 411 an appeal lies to the High Court against a conviction by a Presidency Magistrate where the accused has been sentenced to imprisonment for a term exceeding six months or to a fine exceeding two hundred rupees.

Under sec. 414 an appeal lies in cases of summary trials where the accused has been sentenced to any term of imprisonment or to a fine exceeding two hundred rupees.

Now secs. 263 and 362 impose a duty on a

Magistrate which it is difficult for any man to perform. Under these sections a Presidency Magistrate or a Magistrate empowered to act under the summary form of procedure is to make up his mind long before he has heard the whole of the evidence and the arguments on both sides as to what sentence he will pass in the case, in other words, before the case is tried out he is to decide whether he is going to convict the accused and not only that but the measure of punishment that he will inflict. It is a violation of the fundamental principle of trial in a Court of law that a man should be prejudged before every step provided by law has been followed. A person brought up for trial in a Court of justice is to be presumed to be innocent unless he is proved to be guilty and the onus is on the prosecution to bring home the charge to the accused. For this purpose the prosecution is to produce evidence before the Court and the accused has the right to test that evidence by cross-examination and to give evidence in defence. Over and above that the legislature has empowered the Court to call any witness at any stage of the case in order to find out the truth and elicit information on any point which has been left in the dark either by the prosecution or the defence. Now the net result of invoking the aid of the sections referred to above is that the Magistrate should for the purpose of a particular case give the go-by to all the wholesome provisions of law which have been enacted always bearing in mind the fundamental idea that the accused is to be presumed to be innocent until his guilt is proved beyond all reasonable doubt. It is really difficult to reconcile these sections with the general policy of the Code.

Sec. 363 of the Calcutta Municipal Act (B. C., III of 1923).

We publish the following communication that we have received regarding the point at issue and the decision in the case of *Ram Gopal Goenka v. The Corporation of Calcutta*, on which we commented in our issue of the 30th November last.

"There seems to be some misconception *re* the decision of the High Court in *Ram Gopal Goenka v. The Corporation of Calcutta*, 29 C. W. N. 898, cited in the editorial note of the Calcutta Weekly Notes of 30th November 1925, under the heading "Amendment of the Calcutta Municipal Act."

The facts of the foregoing case are these : The General Committee constituted under the repealed Act of 1899 resolved that an application be made to the Municipal Magistrate under sec. 449 of the said Act for demolition of certain unauthorised structures constructed by the owner Ram Gopal Goenka. As the General Committee had ceased to exist when the new Act came into force on 1st April 1924, their resolution to institute proceedings under sec. 449 could not be given effect to. But the new Corporation constituted under Act III of 1923 re-affirmed the resolution of the General Committee and sanctioned prosecution under sec. 363 of the said Act, without giving the owner an opportunity of being heard, which they were bound to give, under the provisions of the said section.

Their Lordships made the Rule absolute on the ground that if the proceedings were treated as being under sec. 363 of the new Act, there was a material irregularity as the owner was not given an opportunity of being heard by the Corporation before applying to the Magistrate. Neither could the case be treated as proceedings under sec. 449 of the old Act as the General Committee under the said Act, which alone could initiate such proceedings, no longer existed.

The question whether a prosecution under sec. 363 of Act III of 1923 can be instituted regarding structures erected before that Act came into force, after giving the owner a hearing as contemplated under sec. 363, came up before the High Court in a later case, *Sandell v. Corporation of Calcutta*, Criminal Revisional Jurisdiction (Revision No. 60 of 1925), but the High Court did not decide the point. The lower Court had ruled that such a prosecution can lie and in the absence of an authoritative decision of the High Court to the contrary the propriety of the proposed amendment of the Calcutta Municipal Act remains extremely doubtful."

The above does not seem to be inconsistent with what we stated in our editorial notes referred to.

Correspondence

AMENDED SEC. 162 OF THE CRIMINAL
PROCEDURE CODE OF 1923.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

Kindly allow me a short space in your

journal to say a few words on the controversy between Mr. Susil Kumar Mukerjee, Subdivisional Officer of Noakhali and Mr. Romes Chandra Bhattacharya, Pleader, Mymensingh, regarding the interpretation of the amended sec. 162 of the Criminal Procedure Code. According to the former if the words "any person" in the new sec. 162 are taken to include an accused person, then the section must be held to have, by implication, repealed sec. 27 of the Evidence Act; and according to the latter, the word "statement" in the new section means only "written statement" and as such the section does not affect sec. 27 of the Evidence Act. In my humble opinion both the above interpretations are incorrect. The words "any person" as Mr. Bhattacharya rightly observes, for the reasons given by him, cannot be limited to mean any person other than the accused, viz., a witness. Similarly the word "statement" cannot be limited to the sense of a "written statement" only, in which case the words "or any record thereof" used immediately after the word "statement" in the section would have been meaningless or at least redundant. But at the same time if the words "any person" include an accused person as well, as I think it does, the section need not be taken to have, by implication, repealed sec. 27 of the Evidence Act. For sec. 27 of the Evidence Act does not speak of a statement merely but of some information by an accused person in police custody which leads to *discovery*. Surely, such an information even if given to a police officer by an accused person in custody is not the same thing as a mere statement. Under the present amended sec. 162 of the Criminal Procedure Code, no statement as a general rule made to a police officer by an accused person or a witness during investigation can be proved, the only exception being an information given to a police officer through a statement by an accused person which leads to *discovery*.

This view of the meaning of sec. 162 of the new Act, while it obviates the necessity of putting arbitrary limitations to the natural meaning of the words "statement" and "any person" deliberately used by the legislature, leaves sec. 27 of the Evidence Act untouched.

Yours, etc.,

KIRAN CHANDRA GHOSH,
Pleader, Khulna.

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The abuse of party system.

We have been of opinion that the formation of political parties in this country has been premature. They have only served to create division in our own camp. The post-war reforms in the Indian and Provincial Legislatures that were introduced were but a preliminary measure and though it did not give us all that we desired, yet it was possible to progress on the path of responsible Government by practical working of the constitution under the Government of India Act of 1919. But the premature formation of parties in the legislatures produced dissensions amongst us and the result has been that the constitution has not been worked to the country's advantage. A party, which at first declined to have anything to do with the legislature, split up before long into two and one section entered the legislature with a view to offer wholesale obstruction. But soon they changed their policy and assumed the more reasonable one of supporting some measures and opposing others on their merit. The members of the legislature all over the world do the same. The only distinguishing feature of this party is that they decided to decline the assumption of any responsibility or office as ministers in two provinces and also opposed the members of other parties in forming a ministry. This has not produced any deadlock in the machinery of the Government but has resulted in its reversion to the exercise of the executive functions in all its departments without the control of the legislature. The result has been not progress

but retrogression. We fail to follow how a persistence in such policy would lead to constitutional advance. If obstruction has proved to be barren of results, the policy ought to be changed. For this the parties ought to put their heads together and adopt a new policy. If instead of this each party sticks to its own programme, no progress is possible. The chief concern of every party should be the country's interest and not any self-interest or longing for power in the interest of any individual, group or party. When the latter becomes the chief concern of a party, it cannot claim to be called by that dignified name and in countries which have for long enjoyed parliamentary form of Government, such as England and America, they are known as faction or caucus. There is no two opinions that we should develop our constitution on the western model and, therefore, we cannot do better than keep before us its best ideals and traditions. The parties in these countries always sink their differences when there is any occasion for common action for the furtherance of the country's interest. The compromise recently effected between the North and South of Ireland who were deadly enemies but yesterday and are fast friends to-day, is an example worthy of emulation.

When a party becomes a faction or caucus.

Lord Cecil, son of a late Prime Minister, a man of distinguished academic and political career, a public man of great probity and honesty, who has since the War declined to hold any office in the party which is in power and made it a mission of his life to promote the peaceful progress of the world, in the course of his Rectorial address at the Aberdeen University dealt with the abuse of the party system of government, which we will do well to bear in mind. Our legal contemporary of the *Law Times* referring to it says as follows :—

Lord Cecil of Chelwood, better known as the Right Hon. Lord Robert Cecil, K.C., in his

Rectorial Address at Aberdeen University, took for his subject the use and abuse of the party system, and, albeit unconsciously, reflected the sentiments of Burke and of Bolingbroke. Describing the party system as a whole as a legitimate means to an end, he said: "It must never become an end in itself. It must be based on a real foundation and must correspond with definite political ideas. As soon as it ceased to do that it became an 'organised hypocrisy.'" Lord Cecil's description of party is in complete harmony with Burke's ideal. "Party," said Burke in his *Thoughts on Present Discontents*, "is a body of men united for promoting by their joint endeavours the national interest upon some particular principle in which they are all agreed." If we substitute the term "faction" for Lord Cecil's phrase, "organised hypocrisy," the description of party not based on a real foundation is an echo of the debasement of party denounced by Bolingbroke in his *Dissertation upon Parties*. "When parties have lost sight of principles in pursuit of objects less worthy they have degenerated into factions." "National interests," he writes, "would be sometimes sacrificed and always made subordinate to personal interests, and that, I think, is the true characteristic of faction." Again: "Convictions in politics are essentially necessary to the full performance of our public duty, but are accidentally liable to degenerate into faction." The best exposition and explanation of the English party system has been given by Sir Erskine May within the narrow compass of a few words: "The parties in which Englishmen have associated at different times and under various names have represented cardinal principles of Governmental authority on the one side, popular rights and privileges on the other. The former principle pressed to extremes would tend to absolutism, the latter to a republic; but, controlled within proper limits, they are both necessary for the safe working of a balanced Constitution."

When a dissenting Minister should resign and when not.

Lord Cecil in the course of the same address dealt with the above question regarding which our contemporary observes:—

"Lord Cecil, in dealing with the position of a Cabinet Minister who differed from his colleagues, said that, 'if the issue were really vital, the Minister would do well to resign.'" Mr. Gladstone considered that to a Minister in such a position a less extreme course of action was open. In a letter to Lord Granville, on the 24th March 1884, Mr. Gladstone has attempted a definition of divisions in a Cabinet which need not immediately be considered. Lord Morley thinks it will be of general interest to students of the working of the Constitution. "The de-

finition is," he writes, "characteristic of Mr. Gladstone's subtlety, if that be the right word in drawing distinctions." "What," asks Mr. Gladstone, "are divisions in a Cabinet? In my opinion difference of views stated, and, if need be, argued, and then advisedly surrendered with a view to a common conclusion, are not divisions in a Cabinet. By that phrase I understand unaccommodated differences on matters standing for immediate action." Mr. Gladstone, however, was strict in his insistence on the recognition of the principle that a Cabinet Minister, both in action and in speech, should bear in mind that he was not an individual, but a member of a Cabinet. On the 1st July 1883 Mr. Gladstone deals, in a letter to Lord Granville, with a speech of Mr. Chamberlain, then a member of the Cabinet, in which views were expressed which were clearly out of harmony with the general sense of his colleagues in the Cabinet, although it was stated that such views were not intended to be translated into action in the immediate future, and were to be regarded as his own individual opinion. "Chamberlain admits without stint that, in a Cabinet, concessions may be made as to action, but he seems to claim an unlimited liberty of speech. Now I should be as far as possible from asserting that under all circumstances speech must be confined within the exact limits to which action is tied down. But I think the dignity and authority, not to say the honour and integrity of Government, require that the liberty of speaking beyond these limits should be exercised sparingly, reluctantly, and with much modesty and reserve."

The Cabinet and its inner circle.

The meetings of the British Cabinet are very different from those of debating societies. The policy of the government is initiated by a few responsible Cabinet Ministers and the questions so decided by them are deliberated upon at fuller meetings of the Cabinet. These deliberations partake more of the character of business meetings than that of a debating club. The following account of the Cabinet meetings from the columns of our contemporary will give us an insight into its working:—

A lay contemporary makes itself responsible for the statement that a meeting of the Cabinet is expected to take place next week, but that a preliminary meeting of members of "the Cabinet inner circle" in the persons of the Prime Minister, Mr. Chamberlain, Mr. Churchill, and Lord Birkenhead, will probably be arranged for some day previous to the Cabinet meeting. The inner conclave, which sometimes, notwithstanding the development of Parliamentary Government, grows up within a Cabinet, must be distinguished from the inner circle of Ministers, "the confidential

Cabinet," who, during a great part of the eighteenth century, determined the policy of the country—the Cabinet itself being a large body meeting occasionally for the formal settlement of business which had been practically settled by the smaller inner group, the efficient or "confidential Cabinet," a group whose members were favoured by the communication of confidential State papers. The Cabinet inner circle of the present day whose existence does not impair collective Cabinet responsibility, to which the existence of non-efficient Cabinet Ministers constituted an insuperable barrier, has been thus described and explained by Sir William Anson: "It is quite plain," he writes, "that among a group of nineteen or twenty persons there must be some who enjoy the special confidence of the Prime Minister, some whom he would be disposed to consult in respect of special lines of administration, others in general questions of policy—party or imperial. But this must depend on the quality of a Cabinet and on the idiosyncrasy of the Prime Minister. Every Cabinet must contain men of very unequal merit, who are placed in the Cabinet for very various reasons. There is a good deal of specialism in politics—one man may be exceptionally useful for party purposes in platform speaking throughout the country, another a powerful debater in the Commons, a third a skilled administrator, a fourth an expert in the details of party management, and there is usually a heritage of previous Cabinets—men who are there because it is difficult to leave them out. It must rest with the Prime Minister whether he will present his policy to the Cabinet as the outcome of his single brain or whether he will take previous counsel with such of his colleagues as he considers capable of dealing with general questions of public interest." The disappearance of the titular external Cabinet must have been gradual. The existence of a circle of non-efficient Cabinet Ministers, who made collective responsibility impossible, was ended by Addington (Lord Sidmouth) on the formation of his Cabinet in 1801, by a letter to Lord Loughborough, who, on being displaced by Lord Eldon as Lord Chancellor, attended a Cabinet meeting, informing him that: "His Majesty considered your Lordship's attendance at the Cabinet as having ceased upon the resignation of the seals," and adding that "his opinion, expressed and acted on, was that the number of Cabinet Ministers should not exceed that of the persons whose responsible situations in office require their being members of it." The inner and outer circles of the Cabinet of today are not only dissimilar to the inner and outer circles of the Cabinet of the eighteenth century, but the very reverse of those institutions.

• Evidence in bad livelihood cases.

Two very important points arising out of proceedings under sec. 110 of the Code of

Criminal Procedure have been discussed by Boys and Banerji, JJ., in *Emperor v. Budhan*, I. L. R. 47 All. 733. The first is whether evidence which goes to show that a substantive offence has been committed is admissible in a bad livelihood case and can form the basis of an order for good behaviour and the second is whether the fact that a person against whom proceedings under sec. 110 of the Code of Criminal Procedure are taken has been acquitted in some of the cases put in evidence against him entitles him to have all evidence excluded of the incidents which formed the subject of the previous trials. The judgment under review seems to take a narrow view of the law on the subject. As regards the first point no Court has held that such evidence is inadmissible but it has been repeatedly held that when on the evidence adduced by the prosecution it appears that a substantive offence has been committed the accused should be prosecuted for having committed that offence and the sections enacted in the Code for the prevention of offences should not be brought into play against him. The matter is of considerable importance regard being had to the very frequent mis-use of sec. 110 of the Code, when the police have failed to get the accused convicted on a charge for a substantive offence. The fact of evidence of the commission of substantive offences being not inadmissible in evidence in the trial of a proceeding under sec. 110 of the Code does not lead to the conclusion that it can be made the basis of an order for the execution of a bond for good behaviour. To take such a view is to go contrary to the accepted interpretation of the law which is in harmony with the general policy enunciated in the Code.

On the other point we think that the decision of their Lordships in the case in question is open to more serious objection. The effect of an acquittal in a trial in a Court of law must be taken to be that the allegation made against the accused in that case could not be substantiated at all and having failed totally the person against whom that allegation was made must be considered to be exactly in the same position in which he would have been if the allegation in question had not been made at all. In the case in question the learned Judges hold that they do not agree to the general proposition that the fact that he has been acquitted entitles the accused to have

all evidence excluded of the incident which formed the subject of his trial. It is pointed out that it is perfectly certain that if he was acquitted on the ground that the case was totally false against him no Magistrate or Judge would think of taking it into consideration against him; on the other hand, if he was only given the benefit of the doubt there is no reason why the incident should not be put in evidence and given whatever value it might be worth. We think no such distinction should be drawn between the two classes of cases. An acquittal is an acquittal for all purposes irrespective of the fact whether it was based on the ground that the case was totally false or that the circumstances were such as to entitle the accused to the benefit of the doubt. The inconsistency in allowing the facts of a prosecution for a substantive offence to be put in evidence in a proceeding for bad livelihood is that if this course is allowed the Magistrate trying the latter proceeding is called upon to believe or disbelieve all the evidence which was not accepted by the other Court, in other words, to all intents and purposes to try again the case which once ended in an acquittal. This is too anomalous and irregular to be tolerated.

Review.

INDIAN SUCCESSION ACT. By S. C. Sarkar. Published by Messrs. M. C. Sarkar & Sons, Calcutta. Price Rs. 1-12.

Act XXXIX of 1925 has consolidated and superseded no less than fourteen enactments and the present volume places in the hands of the bench and the bar a very handy edition of the Act with some annotations. In order to bring into prominence the new matters which have been added to the old sections they have been printed in italics. The book will be useful to those for whom it is intended.

Notes of Cases CALCUTTA HIGH COURT,

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CUMING AND B. B. GHOSE, JJ. S. A. No. 2203 of 1923. EASIN SHEIKH, Plaintiff-Appellant *v.* KASIMUDDI SHEIKH and others, Defendants-Respondents. The 3rd December 1925
Civil Procedure Code (Act V of 1908), sec.

2, cl. (12), Or. 20, r. 12—*Mesne profits, assessment of—Wrong-doer, if liable to the extent of the actual profit derived by him from the land—Remand.*

This was an appeal against the decision of the Subordinate Judge of Khulna confirming that of the Munsif, 2nd Court, Khulna, in a suit for recovery of mesne profits. The lower Courts relying on some old decisions (3 C. W. N. 748, 6 C. W. N. 409, 732 and 10 C. W. N. cclxxxvi) passed while the old Civil Procedure Code was in force held that the Plaintiff who had obtained a decree for *khas* possession against the Defendants and who had before the decree been in possession through tenants on receipt of rent from them should get mesne profits on the basis of rents and not on the basis of the actual produce of the land. It was contended on behalf of the Appellant by the learned Advocate that under the definition of mesne profits in the present Civil Procedure Code, the Plaintiff was entitled to what was obtained by the wrong-doers who were bound to disgorge everything and could not make any sort of profit. As they cultivated the land and derived profits by producing crops, they were bound to pay the price thereof with interest. Reliance was placed on 15 C. W. N. 825 and 22 C. W. N. xcvi :

Held—That the person in wrongful possession is liable to pay the actual profit he derived from the land during the period he was in wrongful possession.

Bireshsur Dutt Chowdhury v. Baroda Prasad Ray Chowdhury, (1911) 15 C. W. N. 825 : s.c. 11 I. C. 504 and *Jagat Chandra Chowdhury v. Bharat Chandra Das*, (1918) 22 C. W. N. xcvi, relied on.

The appeal was decreed and the case remanded to the trial Court for assessment of mesne profits on the basis of the produce of the dispossessed land.

Dr. Jadunath Kanjilal and Babu Purna Chandra Chandra for the Appellant.

Babus Shib Chandra Palit and Surendra Nath Bose for the Respondents.

H. D. C.

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New Year Judicial Honours.

We congratulate Mr. Justice C. C. Ghose upon the knighthood conferred on him. He is the eldest son of the late Rai Bahadur Debendra Nath Ghose, who was for a long time the Government pleader at Alipur. Sir C. C. Ghose joined the Calcutta High Court as a vakil and after some years' practice went to England and got called to the Bar. He joined the Calcutta Bar in 1907 and enjoyed a good junior practice and was elevated to the Bench in 1919. His rise at the Bar and on the Bench has been rapid and he has rendered a good account of himself as a Judge. He is intelligent, industrious and expeditious in the discharge of his duties. We note also that Knighthoods have been conferred on the following occupants of the Bench in India. Mr. Justice J. G. Rutledge, Chief Justice, Rangoon High Court. Mr. Justice Saiyed Md. Abdul Raoof of the Lahore High Court. Mr. Justice L. Stuart, Chief Judge, Oudh Chief Court. Mr. Justice B. H. Heald of the Rangoon High Court. Mr. Justice W. W. Phillips of the Madras High Court.

Penalty for not voting at an Election.

The self-governing Dominions are often more go-ahead and even drastic in the matter of constitutional reforms than their mother country. For instance, it is the Dominions that led the way to manhood suffrage, with the

double purpose of conferring equal right of vote on all citizens as also for removing the chances of corruption, as it is not possible for any member to corrupt all the voters of any constituency. The extract given below will show that Australia has now passed a law that anyone withholding his vote at any election would be punishable with a fine of £2. This also has a similar two-fold object, one being that no one may be made to abstain from voting for any consideration and further that it imposes an obligation on every citizen to do his duty at the polling-booth. England is too conservative a country to appreciate the penalization of abstention from voting at elections and India even much more so.

We shall not be surprised if some self-governing colony some day provides amongst the rules and orders of the legislature also some pain or penalty for absence of members from its sittings. At present such rules only provide that the seat may be declared vacant for prolonged absence. Parliamentary practice provides for the grant of leave of absence by the Speaker. The Speaker of the House of Commons also enjoys the authority of compelling the attendance of members and to bring up a member under arrest and commit him to custody if he disregards his summons. In the past, instances were by no means rare when lawyers on their legs in the law Courts used to be brought down to the House of Commons by the Serjeant-at-Arms armed with the summons of the Speaker. The Hon'ble Judges did not dare obstruct the officer, as by so doing their Lordships might commit a breach of privilege of the House. Here the power of the Judges to commit for contempt would be of no avail and they might have the table turned on them. We wonder how the lawyer members of the legislatures in India would

fare, if the President were invested with similar powers. We would mention, however, that in recent times it has not been necessary for the Speaker to exercise such extraordinary powers as the party whips take the necessary steps for securing the attendance of the party's supporters. There is however no law or rules or orders that would compel a member to record his vote one way or the other. Judging from the rapid changes that are taking place with regard to the obligations of the citizens and their representatives to the State, we would not be surprised if some of the more go-ahead legislatures would make it a rule that every member should under some pain or penalty record his vote one way or the other. The penal provision recently passed by the Australian Commonwealth as noticed below may be a precursor of some more drastic measures that are to follow.

Says the *Law Times* :—

In this country, although voters are under no obligation to attend the poll, every member of Parliament is under a constitutional obligation to attend the service of the House to which he belongs. There is, however, no compulsory process by which members can be obliged to vote. Motions for leave of absence from the House of Commons were of importance in the sixteenth and seventeenth centuries, when constituencies had little chance of knowing whether their members were discharging their duties, and when members were not entitled to their wages if they went away without a licence from the Speaker. The practice of asking for leave of absence, Sir William Anson reminds us, cannot be said to have wholly fallen into disuse, for as lately as May 1900 a member asked and obtained a week's leave. Another disguised method of enforcing attendance is a call of the House, disobedience to which, without excuse, might lead to commitment and such sentence as the House might inflict. The most important occasion on which the House of Lords was called over in modern times was in 1920, when the Bill for the degradation of Queen Caroline was pending, and, by a resolution of the House, fines and imprisonment were imposed on such lords as should not attend the sittings of the House. No call of the House of Commons has been enforced since 1836, on the occasion of Mr. Whittle Harvey's motion on the Pension List. On several subsequent occasions calls of the House have been ordered, but in every case the order has been discharged or negatived. Absence from the House of Commons is now a matter which concerns the party whips and the constituencies more than the House itself. The enforcement of the attendance

of members in either House savours of the futile, having regard to the fact that there is no procedure by which they can be compelled to record their votes.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Oct. 29th, 1925.—*Pyar Singh v. Rani Sona Bahuji* (C. P.). This appeal was heard by LORD SHAW, LORD PHILLIMORE and SIR JOHN EDGE.

The suit was instituted by the Appellant who claimed possession of the Mandhata Estate. The Respondent claimed to be an adopted son of the deceased Raja and successfully defended his title. The appeal was dismissed.

Messrs. DeGruyther, K. C. and Parikh for the Appellant.

Sir G. R. Lowndes, K. C. and Mr. M. R. Jardine for the Respondents.

Kalikanand Singh v. Raghunandan Prasad Singh (Patna). In this appeal the Appellants were challenging mortgages made by the *karta* of a joint Hindu family. Both Courts in India had found that the mortgages were for the benefit of the joint family and that view was adopted by the Judicial Committee who dismissed the appeal without calling on the Respondents.

Messrs. DeGruyther, K. C. and Wallach for the Appellant.

Sir G. Lowndes, K. C. and Mr. Kenworthy Brown for the Respondents.

Oct. 30th.—*Jawahir Singh v. Udai Prakash* (Allahabad). The property claimed in this appeal belonged to a Hindu proprietor whose descendants are the Plaintiffs. Their father purported to sell the property to Udai Ram but Dalip Singh pre-empted and obtained the property. On appeal it was argued by *Mr. Dubé* *ex parte* that the original sale was in discharge of an antecedent debt and that the pre-emptor who merely stepped into the shoes of the purchaser was not bound to see in what manner the purchase-money was being applied. Judgment was reserved.

Correspondence.

DELIVERY OF POSSESSION BY CIVIL COURT AND CRIMINALITY.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
DEAR SIR,

Under the Civil Procedure Code only a decree-holder or an auction-purchaser can apply for delivery of possession of immoveable property. The principle being the same in both the cases let us consider the case of an auction-purchaser.

When the property is in the possession of the judgment-debtor or some person on his behalf or some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property the possession to be delivered is actual or *khas* possession—if need be—by removing any person who refuses to vacate the same (Or. 21, r. 95).

When, however, the property is in the occupancy of a tenant or other person entitled to occupy the same the delivery of possession is to be by affixing a copy of the certificate of sale in some conspicuous place on the property and with a proclamation by beat of drum, etc. (Or. 21, r. 96). This latter mode of delivery is known as symbolical delivery of possession.

It is to be noted that the only form prescribed in Appendix E—Execution for delivery of possession to a certified auction-purchaser—is the form No. 39, which is in accordance with Or. 21, r. 95, that is to say, for actual possession.

At the time of granting the certificate under Or. 21, r. 94 the Court is not always in a position to determine whether the property is in the immediate possession of a judgment-debtor or in the possession of a third party and, as a matter of practice invariably orders delivery of possession in form No. 39. The Code, however, takes into account cases of resistance to delivery of possession by providing for an enquiry into the question of possession.

Does it follow, from the above, that the Code contemplates delivery of actual possession to the auction-purchaser unless the delivery is resisted and that in cases of symbolical possession the Court must write out specifically the order in terms of Or. 21, r. 96, there being no form prescribed for same?

Decided cases have laid down that symbolical possession is actual possession as against the judgment-debtor or his representatives.

Suppose, the immoveable property to be in the possession of a third person not bound by the decree. The Court has ordered delivery of possession in form No. 39. There is no resistance and possession is delivered to the auction-purchaser. The auction-purchaser then collects and removes the crops on the land grown by the third person. Is he liable criminally? He has been put into possession by a competent Court and therefore should be at liberty to exercise his rights of possession.

On the other hand, if, after the above delivery of possession, the third person collects and removes the crops, is he criminally liable? He grew the crops, he was not bound by the decree. He should be quite justified in thinking that the delivery of possession as against him must in effect have been merely symbolical—in terms of Or. 21, r. 96.

Apart from the question of *bond fides* what, if any, should be the legal test of criminality in the above circumstances?

Criminal case-law does not seem to help us much to answer the above questions. A few cases may be mentioned, which add to the difficulties:

In *Hazari Khan v. Nafer Ch. Pal Choudhury* (32 C. W. N. 479), it is held: Where a party is given symbolical possession and shortly afterwards proceedings are instituted under sec. 145, Cr. P. C., in respect of that same land, it is incumbent on the Magistrate to go into the question of actual possession between the two dates. In *Ram Krishna Singh v. Emperor* (3 Pat. L. T. 335), it is held:—The Criminal Court whether acting under the preventive sections of the Criminal Procedure Code or enquiring into an offence under the *Indian Penal Code* is bound to maintain the possession of a purchaser in execution to whom possession has been delivered by order of the Civil Court. The Criminal Court is not entitled to re-open the question of possession once a *dhakhal dewani* is proved to have been effected to the satisfaction of the Magistrate. (The italics are mine). In *Kamala Prosad Singh v. Govinda Sahay* (3 Pat. L. T. 326), it is held:— Or. 21, r. 95, Civil Procedure Code actually puts the purchaser into possession of the property and the person claiming the right to prevent possession of such property has either to move the Court delivering the possession or to sue in the Civil Court. (Italics are ours), etc., etc., etc.

A very large number of criminal cases crop-

up on the question of delivery of possession by the Civil Court. An exhaustive discussion, therefore, with your comments, is invited through the columns of your much esteemed journal.

Yours truly,
SUDHIRLAL MAJUMDAR, B.L.

Notes of Cases CALCUTTA HIGH COURT,

Recent decisions not yet reported
(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before GREAVES AND PANTON, JJ. LLOYDS BANK, LTD., (Defendant) Petitioner v. SURAJ MULL JAHUR and others, (Plaintiffs) Opposite Party. The 18th December 1925.

Civil Procedure Code (Act V of 1908), sec. 115—Or. 6, r. 17—Written statement, amendment of—Discretion—Jurisdiction, failure or refusal of.

The suit out of which this application for revision under sec. 115 arose, was one for enforcement of a charge executed in Plaintiffs' favour. The Bank Defendant claimed certain charges in priority to the Plaintiffs' which were set out in their written statement, dated the 28th June 1924. The amendment sought by the present petition for amendment, was to enable the Bank to plead two other securities, dated the 15th May 1922 and 8th January 1923 which the Bank alleged were in priority to the Plaintiffs' charge. In July 1924 the Bank discovered their failure to plead the above two securities. They then made no application for amendment, as they instituted a suit in November 1924 in the Original Side on those two securities. Being advised that it would be also desirable to plead those two securities in this suit they applied for an amendment of their written statement and the learned Subordinate Judge of Howrah refused the Bank's application for amendment on 14th August 1925. He was influenced in arriving at his decision by the delay which had taken place in making their application for amendment by the Bank.

The learned Subordinate Judge took the view that these securities might have been pleaded when the original written statement was filed. He said that the delay was utilised

for manufacturing these two documents and the two further securities were not registered documents. He did not mean to find that these two documents were not genuine documents. Their Lordships of the High Court also formed no opinion as to whether these two documents were genuine, but they assumed they were genuine documents.

These facts and circumstances of the case led the Subordinate Judge to refuse the amendment prayed for by the Bank.

Sir Provash Chandra Mitra for the Bank Petitioner.—The principles and conditions on which leave to amend should be granted being satisfied in this case, the Court below has failed to exercise a jurisdiction vested in him by law in refusing amendment. Cited *Mani Lal v. Horendra Lal*, (1910) 12 C. L. J. 556, (560) and *Upendra v. Janaki*, (1917) 45 C. 305; s.c. 22 C. W. N. 611. Submitted compensations may be made by awarding costs if any injury is caused to the other side at all.

Quoted passage from the judgment of Brammull, J. J., in *Tildesly v. Harper*, (1878) 10 Ch. D. 393, (396-97).

Mr. N. Sircar for the Plaintiffs opposed.

Held—The question of amendment of pleadings being a question of discretion, the High Court is not justified in interfering under sec. 115 unless the High Court is satisfied that the Court below, after applying its mind to the facts and circumstances with regard to those documents, exercised this discretion on entirely wrong lines—or that he refused to exercise a jurisdiction vested in him.

In the absence of any failure or refusal of jurisdiction by the Court below, the High Court is not competent to revise under this section.

The case of *Mani Lal v. Horendra Lal*, (1910) 12 C. L. J. 556, does not apply to the case.

The operation of this section is confined to cases in which there has been material irregularity so far as jurisdiction is concerned. either a failure to exercise a jurisdiction vested in the Court or a wrong exercise of jurisdiction: it cannot be utilised to correct errors of law.

Sir P. C. Mitra (with *Mr. Charu Chandra Biswas* and *Babu Lalit Mohan Sanyal*) for the Defendant, Petitioner.

Mr. N. Sircar (with *Babus Rupendra Kumar Mitra* and *Rajendra Chandra Guho*) for the Plaintiffs, Opposite Party.

H. D. C.

Rule discharged.

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REPORTS (See Index.)

Chief Justice's departure for England owing to Lady Sanderson's illness.

We are sorry to learn that Lady Sanderson is lying seriously ill in London. The news reached His Lordship on Tuesday last when he rose from the Bench and did not resume his seat on the Bench on Wednesday. His Lordship left for England by the last mail. Sir Nalini Ranjan Chatterjea, the Senior Puisne Judge, will officiate as Chief Justice of the Calcutta High Court during the absence of Sir Lancelot Sanderson.

Should the Attorney-General be a Cabinet Minister?

We are glad to note that the above question is engaging the attention of our legal contemporaries in England. They are unanimously of opinion that he should not. It was in 1912 that our present Viceroy, Lord Reading, who was then the Attorney-General, was given a seat in the Cabinet. During the War he continued to occupy that position. Our contemporaries say that there might have been some justification in including him in the Cabinet under such exceptional circumstances. Lord Reading, then and even afterwards, was entrusted with diplomatic duties and missions. But now that matters are assuming normal conditions, the rule of law is being restored in England. The reasons advanced for keeping the principal law officer of the Crown independent of the executive are identical with the views that we expressed when we said that the Advocate-General, in this country, who occupies somewhat similar position, should be above politics. He has to advise the executive with regard to the initiation of criminal proceedings and has to exercise also some quasi-judicial functions such as entering *nolli prosequi* in suitable cases. It is therefore desirable

that he should be independent of the executive. Now-a-days we pay very little attention to questions of practical politics and that is why we hear no more anything about the separation of executive and judicial functions which loomed so large in the programme of reforms of Indian politicians of the last generation. It is high time that we should turn our attention to practical politics.

Free Speech and Seditious.

Our English legal contemporaries are discussing the right of freedom of speech and its legal limitations in connection with the recent censure motion of Mr. Ramsay MacDonald that the recent prosecution of some members of the Communist Party is contrary to the rights of free speech and publication of opinion. This is how our contemporary of the *Law Times* distinguishes between freedom of speech and seditious.

It is not surprising that the motion of censure by the Labour Party with reference to the recent Communist prosecution at the Central Criminal Court was defeated by a majority of 224. Mr. Ramsay MacDonald moved: "That the action of the Government in initiating the prosecution of certain members of the Communist party is a violation of the traditional British rights of freedom of speech and publication of opinion." It is perfectly clear, in the first place, that the Government did not initiate the prosecution; and secondly, that the offences for which the accused were convicted were entirely foreign to the "rights of freedom of speech and publication of opinion." Conspiracy to publish seditious libels; and conspiracy to incite to mutiny and breaches of the Mutiny Act are crimes, and it might just as well be said that prosecutions for conspiracy to incite to murder, or incitement to murder are an interference with the right of freedom of speech and publication of opinion, should the persons conspiring or inciting be of opinion that murder should be committed. Freedom of speech is limited by the law of the land, and that is its only limitation, and no one can be prosecuted for holding an opinion. But if speech incites to crime, or if the opinion when published incites to crime, the person speaking or publishing becomes amenable to the penalties of the law.

Should agents provocateur form a part of the detective service?

The following note from the columns of our contemporary is very instructive on the above question. We wish the Government would take note of it. Our contemporary says:—

Mr. Justice Swift, in allusion to criticism of police methods

in cross-examination for the defence in the trial of the Communists, said: "Everyone regretted that such methods had to be adopted, but if crime was committed in secret, secret methods had to be adopted to detect it. That being so, it had nothing to do with the jury if detectives had represented themselves to be Communists." It should, however, always be borne in mind that the development of the spy into the *agent provocateur* is easy. Sir Erskine May places immunity from suspicious and jealous observation next in importance to personal freedom and declares that the freedom of a country may be measured by its immunity from the baleful agency of spies and informers. He mentions that in 1833 complaint was made that police had been concerned in 'equivocal practices too much resembling the treachery of spies,' but a Parliamentary inquiry elicited little more than the misconduct of a single policeman. "The organisation," he writes, "of a well-qualified body of detective police has at once facilitated the prevention and discovery of crime, and averted the worst evils incident to the employment of spies."

Defamatory statement impliedly affecting the complainant.

The question of criminal liability for a defamatory statement made against a class of persons in an action brought at the instance of an individual member of the class was discussed in the case of *Protap Chandra Guha Roy v. The King-Emperor*, 29 C. W. N. 904. In Indian law, under Explanation 2 of sec. 499, I. P. C., it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such. In the case referred to B. B. Ghose, J., held that the words in Explanation 2 of sec. 499 mean that a collection of persons as such may be collectively defamed in the same manner as a company and the true rule is that if a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation. His Lordship further pointed out that all circumstances which were apparent to the bystanders at the time the alleged defamatory words were uttered and what meaning such words would have fairly conveyed to their minds have to be considered to determine whether the words were defamatory and whether they referred to the complainant. In the same case Buckland, J., held that an imputation concerning a company or association of persons as such cannot by virtue of the explanation justify a charge of defaming an individual and a charge cannot combine the explanation with the definition of the offence of defamation for such a purpose.

The *Harvard Law Review* contains a discussion on the subject of defamation in which the question discussed, though not identical

with that raised in the case noted above, is akin to it. The learned commentator observes as follows:—"According to the usual formula a Defendant is liable, if he has published a defamatory statement 'of and concerning the Plaintiff.' This manner of phrasing the Defendant's liability, however, immediately raises a question upon which there has been a great deal of controversy: from whose viewpoint is a jury to decide whether the statement refers to the Plaintiff. The Defendant may describe the subject of his statement in such a way that ordinary readers knowing the Plaintiff would think that the latter was meant while with knowledge of the circumstances under which the statement was made they would know that the Defendant had no such intention. Two distinct answers to this question appear in the decisions. According to one of them the jury must be satisfied from a consideration of all the considerations under which the statement was published that the Defendant meant the Plaintiff regardless of whether or not those circumstances were known to the readers. This may with sufficient accuracy be termed a 'subjective' standard since the words are construed not in the sense in which an ordinary reader would understand them but in that in which a person in the position of the writer would interpret them. The second view first clearly enunciated by Mr. Justice Holmes in his dissenting opinion in *Hanson v. Globe Newspaper Co.*, 159 Mass. 299, indicates that the allegation that the words were used 'of and concerning the Plaintiff' is satisfied by evidence that reasonable men reading the publication with no special knowledge of the circumstances under which it was written thought that it referred to the Plaintiff. This standard is objective in that it interprets the words in the sense in which they are reasonably understood rather than in that in which they were meant. Neither of these views as they have been developed in the decisions will achieve desirable results in all cases. A logical application of what we have termed the objective standard would lead to the imposition of liability upon a Defendant who had been guilty of no culpable conduct. And indeed it seems to be a fear of this application of Mr. Justice Holmes' view that leads some Judges to prefer what we have termed the subjective standard. This however results in denying relief in cases in which the Defendant, although not meaning the Plaintiff, was

negligent in describing the subject of his statement."

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Oct. 30th, Nov. 2nd and 3rd.—*Man Singh v. Nārolakhabati* (Patna). This litigation arose out of a deed executed by two Hindu widows governed by the Mitakshara, by which they purported to relinquish and surrender their joint life-interest in the estate of their deceased husband thereby accelerating the vesting of the estate in the next reversioners, one of whom is the Appellant.

The main question for determination is as to the validity and construction of the deed of surrender. Judgment was reserved.

Messrs. DeGruyther, K. C. and Hyam for the Appellant.

Sir G. Lowndes, K. C. and Mr. H. B. Raikes for the Respondents.

Nov. 5th and 6th.—*Maharaj Bahadur Singh v. Hukm Chand*. This was a suit by the Sitambari Jains for a decision as to the rights of worship of their own and of the Digambari sect in the temples at Pareshnath. The Sitambaris claimed to have founded the majority of the temples and claimed a right of exclusive worship.

The Courts in India found that the Digambari had a right to worship in certain tanks and temples but not in others.

There were cross-appeals by both sects. Judgment was reserved.

Mr. L. DeGruyther, K. C., Sir G. Lowndes, K. C. and Mr. B. Dubé for the Plaintiff.

Messrs. A. M. Dunne, K. C., E. B. Raikes and C. R. Jain for the Defendants.

Nov. 5th.—LORD DUNEDIN pronounced the judgment of the Board giving reasons for their refusal to grant special leave to appeal in the Malabar Hill Tragedy.

Nov. 6th.—*Chiranjit Singh v. Har Swarup* (Allahabad). This was a suit relating to a contract for the sale of the Markham Grant Estate. The sale fell through and the suit was brought by the vendor for the re-payment of money paid by him to the purchaser. The High Court made a decree for payment of the amount less 20,000 which they held was earnest money and was forfeited. Judgment was reserved.

Messrs. Dunne, K. C. and Dubé for the Plaintiff.

Messrs. DeGruyther, K. C. and Parikh for the Defendant.

G. D. M.

Reviews.

LAWYER'S COMPANION DIARY. *Law Companion Office, Mount Road, Madras.*

This is a very handy and neat diary. It gives a page to a day. A lot of useful information, such as the personnel of the Government of India and of the Provincial Governments, the material provisions of the Court Fees, the Stamp and Registration Acts, the postal rates, weights and measures are given. A Hindu Calendar in tabular form is prefixed which gives the dates and months prevailing in the different Provinces corresponding to the English dates. Lawyers will find the diary useful.

THE INDIAN ELECTION PETITIONS, VOL. II. *By the Hon'ble Mr. F. L. L. Hammond, I.C.S., C.S.I., C.B.E. Pioneer Press. Price Rs. 7-8.*

We welcome the second volume of the reports of decisions in connection with the election petitions that were filed after the General Election of 1923, which have been edited by the Hon'ble Mr. Hammond, who is a well-known authority with regard to rules and regulations governing elections to the provincial and central legislatures under the Government of India Act of 1919. The first volume of the same work covers all cases of disputed elections that were fought to a finish after the general election in 1920. The reports in the present volume are as carefully edited as in the last. The material portions of the petitions, the relevant facts, the rules and regulations governing the issues as also how far the allegations were established or not may all be gathered from these reports. The reports are classified province by province and this is convenient for reference to the rules and regulations that obtain there. The index which the learned editor appends to the report is the most valuable part of the work. It furnishes a ready reference to the grounds on which any election may be challenged as also how the same was disposed of in the cases where they were raised. We would advise all candidates for the next general election to equip them-

selves with these two handy volumes both as a weapon of offence and defence. The Hon'ble Mr. Hammond is doing the pioneer's work in this line and when a sufficient number of reports are thus collected, then it will be time to digest them and crystallise the law on the subject on the lines of well-known standard English works on the subject.

TAGORE LAW LECTURES, 1922. Recent Developments in International Law. By Prof. J. W. Garner, Ph. D., LL.D., Prof. of Political Science in the University of Illinois. Published by the Calcutta University.

The Calcutta University is to be congratulated on its securing the services of that well-known American publicist Dr. Garner as Tagore Professor of Law for 1922. His lectures, 15 in number, have now been published in a book form intitled "Recent Development of International Law" by the Calcutta University. As an authority on the Science of International law and as the author of that learned treatise "International Law and the World War" Dr. Garner needs no introduction to serious students of International law.

Dr. Garner's lectures deal with International law and customs as existed at the beginning of this century and the gradual development and evolution of those rules, as a result of treaties, conventions and instructions issued by the great powers to their respective commanders, military and naval, during the World War as well as other wars during the last 25 years. The book is by no means a catalogue of all different treaties and conventions that have come into existence in recent years but each and every one of them have been carefully examined and scrutinised, their merits and demerits have been elaborately discussed and suggestions have been made regarding the lines on which such rules should be developed in future. The writer's observations on the probable lines of development, having regard to the rapidly changing conditions of international life, owing to a variety of causes, are more or less speculations. But even as speculations, coming as they do from such high authority, they certainly will have the effect of educating public opinion, which has all along been the cornerstone of International law. Any treatise dealing with the development of International law during the 20th century must, of necessity, devote a very large proportion of space to the "law of war"

as most of the conventions, treaties and pacts during this period are directed towards the regulation of the conduct of states in their abnormal relations with one another. And Dr. Garner's book, as he himself admits, is no exception to this rule.

Dr. Garner has in his lectures discussed the establishment and growth of international arbitration and other agencies for the peaceable settlement of international disputes during the period under review. One cannot too highly value the effect of such settlement of international disputes and here also suggestions have been made as to the future lines of development resulting in speedy and satisfactory settlement of international dissensions. The learned writer has dealt very elaborately with the organisation and the procedure adopted in the permanent Court of arbitration and hopes that in future it would be a world Court in its fullest sense where all the nations from the mightiest to an international atom would carry their controversies for decision. Let us hope that inspite of insurmountable apparent difficulties, Dr. Garner's hope will be fulfilled and will bring in the millennium which the late Tsar Nicholas had so fondly hoped, when he convened the Hague Conference of 1899.

Dr. Garner very rightly considers the establishment and organisation of the League of Nations as a marked achievement of the era under review, but one is rather disappointed in finding that he has not devoted more space in his book in dealing with this very important organisation. It may be because America has not yet joined it and the League has yet to justify its appellation. Anyhow we miss his valuable observations on this topic.

The book as a whole is a masterly exposition of the entire panorama of the development of International law within the last 25 years and the work is worthy of the author and the University which made such an excellent choice of the subject and the lecturer. The book is a great contribution to the literature on the science of International law and we assert with confidence that even if a small fraction of the valuable suggestions made by the learned author is put into practice by the comity of nations his labours will be amply rewarded. The book will be read with profit not only by students of International law but also by politicians and statesmen abroad who wield the destinies of nations.

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Moral hospitals for the cure of criminals.

His Excellency Lord Lytton on Tuesday last delivered a very interesting address at the Rotary Club on the use and abuse of punishment in the moulding of human character and the substitution of reformation for retribution as a basis of our penal code. We presume that when discoursing on this very interesting problem of penology and criminology, which have formed the subject-matter of study and investigation by eminent men in Europe and America for over a century, His Excellency did not desire to speak as the responsible head of the Government of Bengal but as a private individual who has devoted both study and thought on the subject-matter of his discourse. He was putting before his audience the ideal which a particular school of criminologists has in view. In common with them His Excellency expressed the view that "punishment can instil fear and enforce habits, it cannot inspire goodness. As a means of moral regeneration, therefore, it is worse than useless and should be abandoned. A morality which is only enforced by pains and penalties is a false morality and those who would secure moral standard should employ other methods."

We are at one with His Excellency that punishment cannot inspire goodness and that the moral sense in a man cannot be inculcated by pains and penalties. But we are not so sure that fear does not play any important part in the growth and development of the moral sense of a man. Fear of pain and misery in future life, which is held out by many systems of religion, has in no small degree been instrumental in the promotion of moral ideals

amongst mankind. Even in the more enlightened forms of religion which do not look beyond the moral life of a man amongst his fellow-beings and fellow-creatures on earth, the doctrine of pain forms the starting point and it is this pain that leads on to knowledge and knowledge to enlightenment and emancipation. Fear is indissolubly associated with pain. Ignorance or wrong conduct brings on nature's own remedy in the form of pain or penalty and leads on to knowledge. This His Excellency also admits. One who has burnt his finger in the fire will fight shy of it. In this way pain or penalty cannot altogether in our view be ruled out as a corrective of human conduct. Punishment for wilful or perverse conduct may, from fear of it, deter many from its repetition. It may also bring on remorse and repentance to those who are not perverse by nature and thus rouse their moral consciousness. With the latter such sanction of law held in terrorem is often a sufficient corrective and may prove even useful as a means of reclamation. But with hardened criminals the task of reclamation is more difficult. Many of them resemble people affected with chronic, incurable and infectious diseases and in the interest of society they require segregation. But we quite agree that they should never be regarded as hopeless cases or subjected to inhuman or unkind treatment. Although it is the duty of the state and of society to keep them out of mischief's way segregated in a moral hospital, it is no less their duty to make a scientific study of their mentality and devise means for their reclamation. Every jail in this sense should conform to the ideal of a moral hospital. This ideal may not be easy of accomplishment. But no progress is possible in this world without idealism. With these preliminary remarks we commend the following conclusions and illustrative examples in His Excellency's speech to our readers.

The following is the sum and substance of His Excellency's suggestions regarding the reformation of criminals:—

To sum up, then, punishment, if resorted to at all, must always be aimed at teaching habits necessary for the well-being of the individual or discipline necessary to the well-being of a community. I do not say that punishment will always succeed; the form of punishment selected in any particular case may be well or badly suited for the attainment of its object. Again, I do not say that punishment is the only way of achieving these objects. What I say is that those are the only objects which can be obtained by punishment. The one thing which can never be acquired by coercion is goodness or moral conduct. All punishment, therefore, which aims at correcting wickedness or teaching goodness is definitely mischievous. Goodness is a condition of mind, as health is a condition of body. Moral defects of character are no more to be cured by punishment than defects of the body. It may be necessary in the interests of the health of a community forcibly to segregate a person with an infectious disease: equally it may be necessary on the same ground to segregate persons whose moral defects are a danger to society; but it would be just as senseless and mischievous to try and cure a man of scarlet fever by shutting him up with a number of persons suffering from measles, tuberculosis, leprosy as it is to try and cure a man of stealing or cheating by shutting him up with other thieves and cheats. If punishment is not admissible as a means of inculcating goodness or curing moral evil, how, you may ask, are moral standards to be maintained? What are you to do to the naughty child, to the wicked man or woman? Supposing I were to say to you "What am I to do with a sick man, if I may not send him to prison?" What would your answer be? You would, of course, reply, "Send him to hospital", and my answer to the question I have put into your mouth is, "You must provide moral doctors and moral hospitals for your criminals."

The following is an illustrative example of how the work of reformation is carried on in England by the probation officers who are so many moral doctors:—

I am well aware that I am using words which have no general currency and I must, therefore, be more explicit. Here in Bengal the penal system does not as yet recognise anything which may be described as a moral doctor or a moral hospital. In England the probation officer is the nearest approach to a moral doctor and a few institutions exist maintained and managed by private individuals which may be described as moral hospitals. I would like to conclude by telling you something about each of these.

The first is a story of a good probation officer.

In a business firm in London a man had been employed for many years and held an unblemished character. His two sons were also employed in the firm. One day he succumbed to a great temptation and in order to obtain money to help a friend he robbed his firm. The Magistrate who tried the case placed him for two years in charge of a probationary officer. The first thing which the officer found was that both the man and his two sons had been dismissed from employment and the whole family was deprived of their livelihood. By persistent representations to the employer he eventually succeeded in getting the latter to take back both the father and the two sons and the man's reformation was secured. Without the intervention of this probationary officer whom I have described as a moral doctor, all three would have gone under. Not only was it more economical for society that they should be maintained in honest employment than in jail, but even the injured firm was better served by the man's reformation than by his degradation.

Now let me tell you something of two reformatory institutions which differed from all other penal institutions in that they were free, there was no restriction upon the liberty of their inmates. They were prisons without walls or locks in which the inmates not only remained voluntarily, but to which they returned after they had left, as old boys return to a school they have lived. You remember the words of Corneille that Charlotte Corday quoted after the murder of Marat "*Le crime fait la honte et non pas le chatiment.*"

Unfortunately in modern society the exact opposite is the case and public opinion which could forget and forgive a crime can never forget or forgive the brand of the punishment. But these institutions were prisons, which left no stigma of ignominy and even provided those who had been detained in them with a new certificate of character.

Colony for reclaiming young criminals.

This is how hardened young hooligans are reclaimed.

The first was a small colony in the country to which only the most hardened young hooligans—boys and girls, were sent. The children (aged from 15 to 18) lived in separate cottages, the boys worked in the farm, the girls did the house work and gardening. Each house made and enforced its own rules and all disciplinary matters were settled by the children's court, presided over by a Judge, who was elected by themselves. There were three distinctive features of it which were responsible for its success:—

(1) There were no unclimbable walls to invite the adventurous to try and escape.

(2) There was no individual authority which a child could show its courage by defying. There was no appreciative gang of law-breakers to appeal to—the authority was that of the whole community.

(3) There was a real economic basis to the community life corresponding to actual conditions outside. The children were paid for their work with an aluminium coinage which only had currency within the community but which was converted into coin of the realm when they left. Every child was provided with food and clothes on arrival and therefore began in debt to the community—this debt was paid back from his earnings as soon as he began to work.

By making their own rules and enforcing them by penalties of their own devising they learnt to respect law which till now they had spent their lives in defying, from being on the side of the criminal they become on the side of the policeman. They learnt the obligations and limitations of freedom and to understand the foundations of all civilised society. Every one of these young hooligans went back into the world not merely cured but strong advocates of obedience.

In Europe and America various humanitarian and philanthropic societies composed of highly cultured selfless men and women are constantly engaged in this sort of nation-building work. We have no adequate conception of the amount of philanthropic work that are done by voluntary agencies in the West for the well-being of the people. It is in this sort of work that we ought to emulate our Western brethren.

Improper use of statements made to the police.

We have from time to time pointed out in these columns how sec. 537 of the Code of Criminal Procedure, which is intended to cure certain defects of procedure in a trial unless failure of justice has actually been occasioned, is frequently misapplied so as to bring about the result which according to the spirit of the section is the only justification for the reversal of a trial. In one view of the section it can cure almost every defect of procedure while according to the other which is the more rational view it can bring within its scope very few material departures from the law of procedure enacted in the Code. The misapplication of this section was already a source of considerable embarrassment to accused persons and the members of the profession called upon to defend them. The case of *Ramyad Dusadh v. The King-Emperor*, 1926 (Pat.) 13,

is an instance of a new source of trouble arising out of the invocation of the aid of sec. 167 of the Evidence Act which is intended to play the same part in the law of evidence as sec. 537 in the law of criminal procedure, the only difference being that the law of evidence governs both civil and criminal trials while sec. 537 controls only criminal trials. In other words, the chances of mischief likely to be caused by the improper application of sec. 167 of the Evidence Act are greater than those in connection with sec. 537, Cr. P. C. It is a matter of great importance that the legislature in amending the Code of Criminal Procedure in 1923 has stringently excluded the use for any purpose in a criminal trial of any statement to the police whether recorded or not except to contradict within very strict limitations a statement made at the trial by a prosecution witness.

This view of the law has been so scrupulously given effect to by the Calcutta High Court that it has been held that a map prepared by an investigating police officer which shows thereon places pointed out by witnesses cannot properly be put to the jury on the ground that it incorporates statements made to the police. This is the proper way of giving effect to the intention of the legislature as expressed in the section of the statute. In the case noted above the Patna High Court while unequivocally laying down that the prohibition of the use of statements made to the police contained in sec. 162 is strict has gone out of its way to bring into play sec. 167 of the Evidence Act and declare the illegality committed by the lower Court as not sufficient to vitiate the trial. Such instances of the operation of sec. 167 of the Evidence Act in criminal trials are rare and somewhat curious. It does not at all stand to reason that the violation of an imperative provision of law relating to a criminal trial should by virtue of sec. 167 of the Evidence Act be so far condoned as to permit an illegality which the legislature says must never be allowed. The facts of the case in question are somewhat peculiar. It appears that in cross-examination of the prosecution witnesses on behalf of the accused the damaging fact was brought out that the accused had in fact been mentioned by the witnesses before the police and this portion of the evidence was considered and relied on as

an answer to the defence case. It was ingeniously and rightly contended that the provisions of sec. 162, Cr. P. C., were ignored by the lower Court and that the folly of the Counsel appearing on behalf of the defence in bringing out in cross-examination a fact against the accused would make no difference to inadmissibility in evidence of the statements in question. Their Lordships while agreeing with Counsel for the defence that the provision of sec. 162 of the Code had not been complied with held that under the circumstances of the case the improper admission of the evidence objected to was under sec. 167 of the Evidence Act not a ground for a new trial or for the revision of the decision of the Court below.

Reviews.

THE PENAL LAW OF BRITISH INDIA. *By Sir Hari Singh Gour, Kt., M.A., D.C.L., LL.D., Bar-at-Law. Published by Butterworth & Co. (India), Ltd.*

We welcome the third edition of Sir Hari Singh Gour's commentary on the Indian Penal Code in two volumes, which he styles the Penal Law of India and contains not only a vast amount of information on the subject-matter of his work but also a good deal of information, historical and otherwise, of the Penal laws of other countries. In this respect it bears a kinship with the other works of the author which are equally bulky. Such works have their advantages as also disadvantages. But with regard to this treatise on Penal law the former preponderates over the latter. The author's treatment of the subject is all his own. It opens with an excellent introduction which traces the history of criminal jurisprudence from its genesis. It gives us a bird's eye view of the comparative merits and demerits of the three ancient systems of criminal law, viz., that of Manu, that of Mahomet, and that of the Twelve Tables. It closes with the history of the present Penal Code, its arrangement, its scope, its treatment of crimes and punishments with the author's own view on them methodically discussed. Then for the main work itself, under each section have been collected the analogous provisions of English and Indian law with the English and Indian decisions on the point. Yet the work is not a mere bead-roll of cases. The author has taken great pains to explain the principles on which

the law is founded. This method of treatment of the subject is no doubt greatly responsible for the bulk of the book, which is capable of reduction to a certain extent without impairing its value; but we are inclined to think that the author has consciously sacrificed conciseness at the altar of the saying—"He knoweth not the law who knoweth not the reason thereof," and it is now accepted as a truism that a careful study of the general principles will not be wholly useless even to one in the practical duties of the profession. The writer has not merely depended upon the reports for his commentary but has discussed all the points that are likely to arise or be of practical utility and for which the aid of precedents is unavailable.

In this edition has been incorporated a new Chap. IX-A, dealing with election offences created by Act XXXIX of 1920, and other considerable additions necessitated by material changes undergone by the Indian Penal Code and its companion Procedure Code since the publication of the second edition; while all important decisions available till June 1925 have been noted in their proper places. The get-up of the book is all that could be desired.

THE LAW RELATING TO BAD LIVELIHOOD AND COGNATE PREVENTIVE MEASURES. *By Sripati Roy, Bar-at-Law. Third Edition. Published by Messrs. R. Cambay & Co., Rs. 8.*

We have before us an enlarged edition of Mr. Roy's well-known work on the law relating to Bad Livelihood and cognate measures. In this edition the main arrangement of the book has been maintained and the case-law on the subject has been brought up-to-date and various new matters to which it may be necessary to refer in connection with the execution of bonds for the prevention of offences have been added so as to enhance the utility of the work. The present edition has considerably increased in size being nearly double of the previous edition and it will be a welcome addition to every lawyer's library.

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Dam Dupat as an Ideal Usury Law.

The *Journal of Comparative Legislation* for November will be found of special interest by Indian readers. Mr. S. G. Vesey-FitzGerald, M.A. (Oxon), contributes an excellent article on the law of "Dam Dupat." He points out how Usury Laws have been uniformly a failure all over the world and suggests, though not in so many words, that the only rule of law that could prevent Shylocks from sapping the life-blood of the poor, the needy and the distressed, was the universal adoption of the provision of Hindu law known as the rule of "Dam Dupat." He maintains that this rule is not only just and equitable but is also in perfect accord with sound principles of law and economics. It is but a law of limitation and he shows that the evils of usury can only be met by such law alone; that the enforcement of such law would not in the least interfere with trade and commerce but would give a much-needed relief to the victims of money-lenders. The writer is very well-acquainted with the texts of Hindu law and the transformations that they have undergone under judicial interpretations in the British Indian Courts and by the modern commentators on the analogy of the principles of English law. He points out that even an erudite lawyer like the late Dr. Priyanath Sen in his Tagore Lectures on "Hindu Jurisprudence" regarded the rule as more suited to the requirements of primitive society than those of modern times. Dr. Sen, the writer points out, ignored the

Roman parallel (*alterum tantum*) to the law of *Dam Dupat* and though Mr. I. B. Sen, in an earlier article contributed to the *Journal*, referred to the identical rule of Roman law, he too characterised it as a "surviving relic of the remote past." The writer shows that "*alterum tantum*, in fact, was a civilized expedient super-imposed upon the failures of ruder times." After a very interesting and instructive review of the law, the learned writer submits in conclusion that "all over the world this rule of *dam dupat* or *alterum tantum* has shown itself to be the only successful law against the evils of usury."

We welcome such articles on Eastern institutions by English scholars as it is such intellectual intercourse that serves to establish a better understanding between the East and the West and paves the way to a new world culture. Reference to some other articles and notes in this *Journal* will go to show that the cultured classes in Europe regard party politics (which is at present an obsession with us) as a fruitful source of dissipation of energy and all thoughtful persons are more concerned with questions of the social, moral and economic well-being of the people.

Reclamation of juvenile offenders.

We also invite the attention of our readers to "The Work of Juvenile Courts" contributed to the same *Journal* by Miss N. Adler, J.P. The writer gives a comparative account of such work in England and America with the following prefatory remarks:—

No social development of recent years is fraught with more potential value than the efforts which are being made throughout the world of civilization to stem the tide of juvenile and adolescent delinquency at the source. The keynote of the International Prison Congress, held in London early in August 1925, was the prevention of crime rather than the punishment of the offender, and many of the departments of child welfare work in the United States, in Europe and the Dominions, and more recently in the South American States, both directly and indirectly, have this aim in view.

In America the age limit up to which Children's Court can exercise jurisdiction is generally 16 and in some States 18 and for some purposes even 21. With regard to offences, all but those punishable with death or life imprisonment, nay even some such cases, may be transferred to Children's Court. The expression delinquents is used instead of juvenile offenders. In America no punishments, not even fines (so common in England), are inflicted but reformation is effected through probation officers and remand homes.

Lord Lytton said the other day that any scheme for such reformation cannot be put into operation in this country because there are no remand homes or probation officers here. In England and America such homes and services are offered voluntarily by philanthropic persons. This shows that the task of nation-building rests largely with the people themselves and the Government can at best help or guide the people but cannot possibly provide all the ways and means for the material and moral well-being of the people. The latter must contribute in work and money and co-operate with Government in all such work. If the people be apathetic, the Government can do little. It is the spirit of self-help, energy and idealism of a nation that go to determine its destinies in this world.

Hindu Polity.

We find that Prof. Berriedale Keith, D.C.L., is the largest contributor to this issue of the *Journal of Comparative Legislation*. His contributions cover a variety of subjects, such as, "Imperial Constitutional Law," on which he is an authority, as also on the "Personality of an Idol" and "Hindu Constitutional Law." In his article on the "Personality of an Idol," he displays the legal insight of a scholar who has not merely mastered the intricacies of Hindu law but has also applied his mind to enter into its spirit. We reproduce elsewhere his analysis of the recent Privy Council decision in the case of *Pramatha Nath Mullik v. Pradyumna Kumar Mullik & anr.*, which, we are sure, will be found of great interest by our readers.

The learned Professor's review of Mr. K. P. Jayswal's work on Hindu Polity is entitled to no less respect, coming as

it does from one who is not only a great authority on constitutional law but also an eminent Sanskrit scholar. Dr. Keith gives Mr. Jayswal every credit as a pioneer in this field of research and expresses his appreciation of his "ingenuity and power of imaginative construction." But he advises students of comparative politics to accept Mr. Jayswal's generalisations and conclusions with caution. Prof. Keith is disposed to regard Mr. Jayswal's belief that republican constitution of a truly democratic character was common in early India, nay in Vedic times, as based on a misconception of the term *Vairajya*, which occurs in *Aitareya Brahmana*. Mr. Jayswal interprets it to mean "the Kingless State." Prof. Keith says that the meaning of the term is "plainly merely that in certain regions the title taken by the ruler was *Viraj*." He refers to another passage in the same text (viii, 15) in support of what he regards as the obvious meaning of the word *Vairajya*. He similarly joins issue with Mr. Jayswal's view, that the "Indian Kingship" was even in Vedic times, somewhat akin to constitutional sovereignty. Prof. Keith says, that this view might with some justification be said to find support from late Brahmanical speculation, incited to diminish the importance of royalty, but not certainly from Vedic coronation ceremony. He points out, Mr. Jayswal's conception is not only an anachronism but is based on a mere mistranslation of a passage in the *Catapatha Brahmana* (V. 4, 4, 7) as also of a passage in the *Arthashastra* (i. 15 & ii. 117). Prof. Keith concludes by saying, "Finally, it must be noted that the author's ascription of dates to his authorities is not to be accepted without great hesitation, in special, the *Jatakas* are not evidence for the 6th century B. C., and despite an elaborate argument, the *Arthashastra*, is not a contemporary treatise describing the constitution of the India of the Mauryas." In reviewing Mr. Jayswal's valuable work, a portion of which was first published in these columns, we gave him great credit for being the pioneer in this line of research and while expressing great admiration for his ingenuity and bold generalizations we also advised caution regarding the latter. Good-humouredly we used to tell him that his *kahini* required further historical corroboration. Our diffidence in accepting the conclusions based on the interpretation of some isolated old Sanskrit texts as unequivocal,

arises from the fact that we are apt to interpret ancient institutions in terms of our ideas and conceptions with regard to modern ones which have evolved under conditions and circumstances very different from those that prevailed in ancient times and the latter in our view require further research and investigation. In noticing Prof. Keith's criticism in some detail, we do not in the least desire to detract from the great merits of Mr. Jayaswal's valuable work but are only desirous of stimulating further research with regard to this interesting subject.

Punishment of refractory witnesses in a Civil Court.

The provisions in the Code of Civil Procedure relating to refractory witnesses are giving rise to a conflict of judicial opinion and the recent decision of the Madras High Court in *Peta Nagayya*, 47 Mad. 941, is opposed to the view taken by the Calcutta High Court. The law on the subject is contained in Or. 16 of the Code, r. 10, of which sub-sec. 1 lays down that where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall if the certificate of the serving officer has not been verified by affidavit and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court touching the service or non-service of the summons. Under sub-sec. 2 where the Court sees reason to believe that such evidence or production is material and that such person has without lawful excuse failed to attend or to produce the document in compliance with such summons or has intentionally avoided service it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein. In lieu of or at the time of issuing such proclamation or at any time afterwards the Court may in its discretion issue a warrant for the arrest of such person and may make an order for the attachment of his property to such amount as it thinks fit not exceeding the amount of the costs of attachment and of any fine which may be imposed under r. 12.

R. 11 provides that where at any time after the attachment of his property *such person ap-*

pears and satisfies the Court that he did not without lawful excuse fail to comply with the summons or intentionally avoid service and where he has failed to attend at the time and place named in a proclamation issued under r. 10 that he had no notice of such proclamation in time to attend, the Court shall withdraw the attachment. R. 12 lays down that the Court may where *such person* does not appear or appears but fails *so to satisfy the Court* impose upon him a fine not exceeding five hundred rupees and may also mulct him with costs.

Now to put it shortly, r. 10 lays down the procedure where a witness fails to comply with the summons issued to him which includes the issuing of a proclamation or attachment of property in the first instance or issuing a proclamation first and then attaching property if the proclamation becomes infructuous. It is left to the Court to decide which process of the law is to be adopted to meet the requirements of the particular case before it.

R. 11 provides for an attachment being withdrawn on a witness appearing and giving an explanation of his non-attendance to the satisfaction of the Court. This rule contemplates something which can only take place subsequent to an order of attachment.

In r. 12 we find the procedure to be followed where the witness does not appear. It is then abundantly clear that the procedure to be followed for dealing with a refractory witness is that at the first instance a proclamation or an order for attachment of property may be issued.

In the case of a proclamation it must be followed by an order of attachment of property. That this is so is apparent from r. 11, cl. (a) of which refers to a case where the summons has been followed by an attachment of property and cl. (b) to a case where the summons has been followed by a proclamation and that again by an attachment of property.

R. 12 comes into play where even after the attachment of property the witness does not appear. Rr. 10, 11 and 12 lay down the complete procedure which must be followed in cases of disobedience of summons. It is noteworthy that the words in r. 11 are "where at any time after the attachment of his property

such person appears and satisfies the Court, etc." Such person undoubtedly means a person referred to in r. 10, in other words, a person to whom a summons had been issued but who failed to attend and to secure whose attendance a proclamation or an attachment of property had been issued or a proclamation first and then an attachment of property.

The words in r. 12 are "where such person does not appear or appears and fails so to satisfy the Court." The words are unequivocal and leave no room for doubt as to the stage of the proceedings contemplated by r. 12. It does not at all stand to reason that a Court can act under r. 12 at once without following rr. 10 and 11. This is the common sense view of the matter and this has been accepted by the Calcutta High Court. In the Madras case referred to above it has been held that r. 12 deals with all cases of disobedience not covered by r. 11 whether there has been attachment of property or not and the issue of a proclamation or an order for attachment of property are not conditions precedent to the imposition of a fine for non-attendance in answer to a summons.

THE PERSONALITY OF AN IDOL*

BY

PROF. BERRIEDALE KEITH, D.C.L.

Students of the evolution of religion, no less than jurists, are grateful to the Judicial Committee for its masterly pronouncement, of 28th April, on the true nature of Hindu idols in the case of *Pramatha Nath Mullick v. Pradyumna Kumar Mullick and another*. From the juristic point of view, the merits of the Committee have been misapprehended in some quarters; it is not an instance of the application of Western judicial thought to Eastern religions, nor does it prove the pervasive and elastic character of the English common law. Few things, in point of fact, have done more harm in Indian legal history than the effort to apply principles of the common law beyond their sphere, as in the famous instance of the permanent settlement of Bengal. The true ground on which the Committee deserves appreciation is the power which it has shown to carry out to their logical conclusion prin-

ciples of Hindu law itself, a system which, in complexity and subtlety, often puzzles the keenest judicial intellect.

The relevant facts in the case at issue were really simple enough. Some years before his death, in 1846, a wealthy Hindu of Calcutta had consecrated and established in a private chapel in his dwelling-house an idol of his family deity, Radha Shamsunderji, and in his Will, which included the idol in the enumeration of his property, he provided an endowment for the upkeep of the family worship and entrusted the carrying out of the ceremonials to his widow until his adopted son reached the age of twenty, when he in turn was to undertake the task. This son, Jadulal, took, in 1881, an important step, for he substituted, for the family dwelling with its chapel, two distinct houses, between which a chapel was erected with a private entrance from either house. Seven years later he executed a trust deed, in which he provided specifically for the allocation of certain premises in the chapel for the use of this and other family idols, and expressly forbade the removal of the idol from the appointed place unless provisions were made for the supply of other quarters at least equivalent. In 1891 Jadulal's mother died, leaving by Will a large endowment for the maintenance of the worship of the idol of Radha Shamsunderji, and Jadulal himself died in 1894. His estates were large, and, after an arbitration, it was decided that his three sons were entitled to equal shares of the residue; as there were only two houses, one was allotted to each of two of the brothers, while the third was given funds to acquire a third house for himself; the chapel was declared to be joint property and the duties of worship were to be carried out in rotation by the brothers. A similar arrangement was also made regarding the performance of worship under the terms of Jadulal's mother's Will.

The second son set up, in 1910-11, the separate establishment contemplated, and both in 1911 and 1914, when his turn of caring for the idol came round, it was removed from the original chapel and conveyed to his house, where due reverence was paid to it. In 1917, however, exception was taken to this proceeding by Pradyumna Kumar, who had by that time attained his majority, and who held that the terms of Jadulal's trust deed of 1888 precluded the removal of the idol from its original abode. Hence litigation, resulting in a decree of the

* From the *Journal of Comparative Legislation and International Law*.

High Court in Calcutta in 1922, which was reversed in the following year by the same Court on appeal, while both decisions have now been set aside by the Judicial Committee, on the ground that the Court below had failed to give full effect to the implications of the true doctrine of the nature and character of a Hindu idol.

The case for the Respondent in the appeal at one time rested on the seemingly common-sense view that an idol was a chattel, which his adoptive father had bequeathed to Jadulal, and that the latter had full power over it; counsel, indeed, before the High Court, went so far, when pressed, as to hold that Jadulal might have thrown it into the river without breach of obligation. On this view, the deed of 1888 meant exactly what it said, and it sufficed to locate absolutely the idol, without power of removal for periodic worship elsewhere. The contention was not so irreverent as it might seem. The Veda, Indian belief asserts, is the source of all law, and the Rig-Veda itself (iv. 24, 10), presents us with the appeal of a seer to the public to hire his idol: "Who," he asks, "will pay ten cows for my Indra? When he has slain with his aid his foe, let him restore him to me." Here we have the highest authority for the conception of an idol as a piece of merchandise, and Jadulal therefore might be excused if he had held himself entitled to treat the image of his god as an heirloom as to the disposal of which he had entire control.

But the Judicial Committee and the High Court agreed in rejecting this doctrine. They recognized that religious belief is not stationary, and that it is not in the Vedas, but in the epics, the Purānas, the Tantras, and the law books that the modern Hindu finds the essence of his religious practices laid down. If the Vedic Indian, like his Iranian cousin, was indifferent to idols, the epic already bids men provide in their houses painted images of the house deity and worship them with incense, flowers, perfumes, food and other enjoyable things, promising the inestimable boon of children to the obedient. Here we have the germ of the idea fully recognized in Hindu law, the real personality of the idol as opposed to mere symbolic significance. If an image be duly consecrated with the rites enjoined in the Tantras, then it becomes a real being, in which dwells the divine spirit, and, like all beings, it is capable of ownership of property.

Jadulal's father, when he consecrated the image of Radha Shamsunderji and included it in the inventory of his property, had no intention of dealing with a chattel; on the contrary, he was dedicating property to and for the benefit of the deity, recognized as a legal entity, to which a dedication might be made, and Jadulal himself acted on precisely the same view in his further dispositions in favour of the idol.

The point of difference in the views of the Judicial Committee and the High Court arose regarding the mode of securing due respect for this personality of the image. The Committee recognized that, under the arrangements in force, the idol had not been represented in the Courts by any impartial custodian intent only on expressing the wishes of the deity, based on the interest both of himself and of the members of the family entitled to worship, including the four daughters of Jadulal, to whom no share in the management of the worship has been allotted. The legal custodians were clearly incapable of voicing the Will of the deity in view of their conflicting interests, and the Committee accordingly directed that the case should be reconsidered, the idol being represented by a disinterested next friend appointed by the Court, and the female members of the family being made parties, with a view to the framing of a scheme for the continuance of the family worship. A deity is not an infant, but his spokesman will, as in the case of the custodian of an infant's estate, have to perform the duty of recommending such a course of action as may best accord with the dignity and honour of the god and the interests of his worshippers. The Court will control, if need be, his interpretation of the wishes of the god, but, no less than he, it will aim to secure that the result shall be such as may be deemed most adequately to express the Will of the deity, even should it conflict with the expressed wish of Jadulal. The logic is perfect, granted the premises, which none of the beneficiaries could or doubtless would contest.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

Nov. 9th, 10th, 12th and 13th.—Only one Board has been constituted for Indian appeals during the past week, a separate Board being occupied in the hearing of appeals from Australia and the Crown Colonies. LORD SHAW presided over the Indian Board, the other members being LORD PHILLIMORE, SIR

JOHN EDGE, MR. AMEER ALI and LORD SALVESEN. Their Lordships have been hearing arguments, which are not yet concluded, in an appeal from Madras by the *Maharaja of Vizianagram* against the *Secretary of State*. The Government had levied a penal assessment on certain lands in the Godavari under the provisions of Madras Act III of 1905. The lands in suit are *lankas* formed in the river which the Appellant claims as accretions to his *kolapulu lanka*, while the Respondent contends that they are a reformation *in situ* of a Government *lanka*. Messrs. Upjohn, K. C., Narasimham and Subba Rao represent the Appellant and Messrs. DeGruyther, K. C. and Kenworthy Brown the Respondent. The further hearing was adjourned as LORD PHILLIMORE was unable to be present during this week.

In the meantime an appeal from Bombay, *M. P. Bharucha v. Wadial Sarabhai & Co.*, is being argued before the following Board: LORDS DUNEDIN, SHAW and SUMNER, SIR J. EDGE and LORD SALVESEN. The Appellants claim damages for losses occasioned in dealings on the stock exchange. The Appellants sold shares to Ghora and on receipt of his cheque handed to him the documents of title. The cheque was dishonoured on presentation but in the meantime Ghora had resold the shares to the Respondents who purchased while aware of Ghora's financial condition. The Appellants contend that the contract for sale to G. incorporates a rule of the stock exchange to the effect that the contract for the sale of shares may be rescinded if payment is not made within a certain time and he relies on sec. 55 of the Contract Act. The Respondent relies on sec. 121 and contends that the shares were delivered and the seller has no right of rescission.

Messrs. Clauson, K. C., E. B. Raikes and Henry Johnston for the Appellants.

Sir John Simon, K. C., Sir George Lowndes, K. C. and Mr. Dubé for the Respondents.

LORDS DUNEDIN, SHAW and SUMNER, SIR JOHN EDGE and LORD SALVESEN composed the Board which has been hearing Indian appeals during the past week.

Nov. 17th, 19th and 20th.—*Maneckji Pestonji Bharucha v. Wadial Sarabhai & Co.* This appeal from Bombay raises an interesting question as to the rights of an unpaid vendor of shares. The shares were sold by the Plain-

tiffs to G., a certified broker, and in pursuance of the contract they handed over to G. the scrip relating to the shares in exchange for the latter's cheque for the purchase-money. The cheque was dishonoured on presentation the following day, and G. was declared a defaulter. In the meantime the Respondents who are alleged to have had full knowledge of G.'s inability to meet his cheque obtained from G. possession of the share certificates and transfers. The Plaintiffs claimed the return of the certificates and transfers and damages assessed at the loss in value of the shares. The trial Judge decreed the suit on the ground that the Plaintiffs as unpaid vendors had an equity in them which entitled them to call on the Respondents for the return of the shares and to recover damages for the wrongful refusal to return them. The High Court on appeal reversed that decision and held that on delivery of the documents to G. no interest remained in the Plaintiffs on which an equity could be founded. Judgment has been reserved.

Messrs. Clauson, K. C., E. B. Raikes and H. Johnston for the Appellants.

Sir John Simon, K. C., Sir Geo. Lowndes, K. C. and Mr. B. Dubé for the Respondents.

Nov. 23rd.—The arguments were concluded in the appeal by the *Maharaja of Vizianagram* against the penal assessment levied by Government on certain *lankas* in the Godavari which the Appellant claims to be an accretion and reformation *in situ* of certain other *lankas* which admittedly belong to him. Judgment was reserved.

Nov. 20th.—Mr. Saunders applied for leave to appeal to the Privy Council against a conviction for murder in *Maung Kan v. King-Empoor* (Rangoon). The application was dismissed.

Nov. 24th and 26th.—*Chandar Shekhar Baksh Singh v. Mt. Raj Kunwar*. This is an appeal from Allahabad in which the main question relates to the existence or not of a custom and the validity of an adoption. The arguments are not yet concluded.

Messrs. DeGruyther, K. C. and Wallach for the Appellants.

Sir G. Lowndes, K. C. and B. Dubé for the Respondent.

G. D. M.

Correspondence.**RECENT AMENDMENTS OF THE
CHOTA NAGPUR TENANCY
ACT.**

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

Will you kindly spare a small space in the columns of your esteemed journal for the insertion of the following :—

With the amendment of sec. 139 of the Chota Nagpur Tenancy Act (Act VI of 1908) as introduced in the B. & O. Act of 1920, various difficulties which arose in connection with the interpretation of the provisions of the old section have now been settled. Cl. (3) of the old section, for instance, which laid down provisions for recovery of arrears of rent on account of—(a) agricultural land, and (b) rights of pasturage, rights to take forest produce, rights of fishery or other similar rights, has now been sub-divided into two parts: the new cl. (2), sub-cl. (c) deals with the first item and the new cl. (3), sub-cl. (e) deals with the second item of cl. (3) of the old section, and in the latter case the word "rent" has been substituted for the words "anything payable." The amendment is intended, as explained in the Statement of Objects and Reasons, "to apply to rights of pasturage, rights to take forest produce, rights of fishery and other similar rights, payments in respect of which are already recoverable in the same manner as arrears of rent of agricultural land" some of the provisions of the Act relating to land." "Rent" was defined in the Act itself and in the absence of any other provision with regard to the aforesaid rights the old section presented much difficulty and it was necessary to explain in the Statement of Objects and Reasons that "payments in respect of rights of pasturage, rights to take forest produce, rights of fishery and other similar rights are recoverable under the procedure laid down for rent suits, though they are not 'rent' under the definition of that term." The amendment thus remedied an ambiguity but did not rest there.

The amended sec. 139 of 1920 did not come into operation on the date on which the Chota Nagpur Tenancy Amendment Act (B. & O. Act, VI of 1920) came into force. It was reserved for future operation and effect was given to this section on the 1st March 1924, after it had undergone another amendment in B. & O. Act,

V of 1923. With regard to cl. (32) of the Amendment of 1920, the Statement of Objects and Reasons explains as follows :—"It is proposed to give jurisdiction to the Deputy Commissioner (except during pendency of proceedings under Chap. XII) in respect of all matters connected with those rights, but it is made clear that the provision does not refer to rights acquired under registered instrument such as a timber contract." Rights created under registered contracts are thus excluded from the operation of this section.

The present sec. 139 of the Chota Nagpur Tenancy Act, as modified by the amendments referred to above, presents another difficulty which still remains to be solved. It is with regard to the question of limitation. Under the old section the Deputy Commissioner had the exclusive jurisdiction to try rent suits and sec. 234 of the Chota Nagpur Tenancy Act provides the special law of limitation for all suits for arrears of rent. After the amendments of 1920 and 1923 the jurisdiction has also been extended to the Revenue as well as Civil Courts; but it is not made clear whether suits for recovery of anything payable in respect of rights of pasturage, etc., are to be governed by the general law of limitation provided under sec. 231 or special law of limitation for rent suits, under sec. 234 of the Chota Nagpur Tenancy Act, inasmuch as there is no provision in it akin to sec. 193 of the Bengal Tenancy Act (Act VIII of 1885) which lays down : "The provisions of this Act applicable to suits for recovery of arrears of rent shall, so far as may be, apply to suits for recovery of anything payable or deliverable in respect of rights of pasturage, forest-rights, rights over fisheries and the like." It is still less clear whether "rights created under registered contract" which are excluded from the operation of the amended sec. 139, and consequently from the Tenancy Act, are to be governed by Art. 110 or Art. 116 of the Indian Limitation Act.

There is another point which requires elucidation for the purposes of limitation. Can the right to institute suits for recovery of money payable in respect of rights of pasturage, etc., acquired under registered instruments which are clearly barred under the old section by the special law of limitation provided under sec. 234, revive under the amended section, if Art. 116 of the Indian Limitation Act is to apply to suits for recovery of payments in respect of these rights? There is no provision in

the Chota Nagpur Tenancy Act corresponding to cl. (b) of sec. 184 of the Bengal Tenancy Act. The attention of your numerous enlightened readers is invited on the subject.

I remain,
Sir,
Yours truly,
GOLOKE BEHARI RAY,
Pleader, Ranchi.

Ranchi,
The 13th January 1926.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL, APPELLATE JURISDICTION. Before
WALMSLEY AND MUKERJI, JJ. S. A.
Nos. 779 AND 780 OF 1923. SHIB CHAN-
DRA BANERJI, Plaintiff-Appellant v.
UMESH NATH ROY and others, Defen-
dants-Respondents. The 4th December
1925.

*Village Chowkidari Act (VI of 1870, B. C.),
sec. 61—Order of the chakran commissioner—
Finality of—Title suit.*

The Appellant brought these two suits along with others for recovery of *khas* possession of lands on the allegation that those lands having been resumed by Government under the provisions of the Village Chowkidari Act (Bengal C. Act VI of 1870) were transferred to the zemindar and that the Plaintiffs took settlement of the same from the zemindar. The Defendants alleged that the lands were not chowkidari lands but that they had a *jamai* right to those lands and that they appertained to their holdings and the Appellants were therefore not entitled to get *khas* possession thereof.

The only questions for decision in this second appeal were, whether the report or the order of the chakran commissioner appointed under sec. 58 of the said Bengal Council Act No. 6 of 1870 to enquire into and determine under sec. 59 of the said Act the question, whether any particular land is chowkidari chakran land and demarcate their boundaries in proceedings under sec. 61 of the said Act, is final under the concluding portions, *viz.*, para. 2 of the said section, so that the Civil Court is not competent to try the question of title to the same :

and whether the suit was barred by the statute of limitation.

Mr. Ram Chandra Mazumdar (with *Babu Norendra Nath Chowdhury*) for the Appellants contended that the order of the chakran commissioner under sec. 61 is final and conclusive, that the lands in question were chowkidari chakran lands. So long as that order stands it is conclusive evidence that the lands are chowkidari chakran lands, and therefore binding upon the Respondents and cited *Madhusudan Banerjee v. Girish Chandra Ghose*, (1905) 2 C. L. J. 302 : s. c. 9 C. W. N. cxxiv (124) and *Nobokrista Mukherji v. The Secretary of State for India in Council*, (1885) 11 C. 632.

Mr. Hemendra Nath Sen (with *Babu Gopendra Nath Das*) for the Respondents contended that the commissioner's order under sec. 61 does not oust the jurisdiction of Civil Court to try the question of title and cited *Hira Lal Mukerji v. Prema Moyi Debi*, (1906) 2 C. L. J. 306 (310).

Babu Norendra Nath Chowdhury in reply.—The observations of their Lordships in *Hira Lal Mukerji's* case are merely *obiter*.

Held—When there is a compliance with the provisions of sec. 61 of the Village Chowkidari Act (VI of 1870, B. C.) the propriety of the order of the commissioner cannot be questioned in the Civil Court.

The commissioner's orders are "final and conclusive" in this sense that the Defendants are debarred from asserting that the lands are not chowkidari lands. The words "*final and conclusive*" are not ambiguous and must be taken in their ordinary and literal sense.

Madhusudan Banerji v. Girish Chandra Ghose, (1905) 2 C. L. J. 302 : s. c. 9 C. W. N. cxxiv and *Nobokrista Mukherji v. The Secretary of State for India in Council*, (1885) 11 Cal. 632, followed.

The remarks in *Hira Lal Mukerji v. Prema Moyi Debi*, (1906) 2 C. L. J. 306 at p. 310 are regarded as *obiter*.

H. D. C.

'Appeal decreed.

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Lady Sanderson's death.

It is with deep regret that we notice the death of Lady Sanderson, wife of the Chief Justice of Bengal, which took place in London on the night of Saturday the 23rd instant. Sir Lancelot Sanderson, who had left for home on receiving news of Lady Sanderson's serious illness, just arrived in time to see her alive. Lady Sanderson died five hours after her husband's arrival. We convey our sincere condolence to His Lordship the Chief Justice and the members of his family. His Lordship is very popular for the amiable qualities of his character, for his uniform courtesy and kindness to all. Naturally his bereavement has evoked deep sympathy from all. Lady Sanderson was a very talented lady. She was an artist and the author of some beautiful poems. She was associated with many philanthropic and social institutions in Calcutta and used to work in their connection till she fell ill and left for home. It is the mutual devotion of Sir Lancelot and Lady Sanderson, that has touched the heart of the Indian people most.

Defective constitution in politically progressive countries.

We often complain of our constitution. But it is not always the constitution but the men that matter. New Zealand has a nominated second chamber and usually all legislation is originated and drafted in that house. The house of representatives is elected on man-

hood suffrage and it occupies itself with the finance and, to use the phraseology so common in India, with nation-building departments. The reform or reconstitution of the second chamber has been mooted, now and again, but neither the people nor the house of representatives bother about it. They think that it is rather an advantage to leave the drafting of legislation to the elder and more experienced politicians who are nominated to that house. Still we find that New Zealand is the most democratic and go-ahead amongst the British Dominions. The New Zealanders were the first to introduce in their country many socialistic reforms such as old-age pension. They provide free, compulsory, elementary education for all boys and girls. About cent. per cent. of their population is literate, including the Maories, the original natives of the country. They have made great improvement in agriculture and industries and in railways, transport and communication. They are very industrious and consequently a very prosperous people and pay a very high percentage of tax for education and the development of the country. Take next Canada. The Canadian model of Self-Government has been adopted by the Irish Free State for their constitution. But under the Canadian constitution the upper house originally was a nominated body. The Canadians, however, have by working the constitution made it responsible to the legislature (the House of Commons). In America the Senate is a very powerful body yet it is not elected by the direct vote of the people but by the vote of the State legislatures. It consists only of 90 members and is considered "The masterpiece of constitution-makers." It wields often greater power than the Congress, which represents the people of America. The Congress is only supreme in financial matters but the Senate often dictates the policy of the Government. The House of Lords in England was till lately representative of a privileged class. Its powers have

now been curtailed. The reform and reconstitution of the House is being periodically discussed by eminent men but the English people are always averse to making any drastic changes in their constitution.

Reform of the House of Lords.

In this connection the suggestion that is made by the Rt. Hon. Sir John Ross, LL.D., last Lord Chancellor of Ireland, for the reform of the House of Lords in the last number of the *Journal of the Society of Comparative Legislation* will be found very interesting. The learned writer says that the House has enjoyed a fame and prestige from a period earlier than the Norman Conquest. To uphold its past traditions the Lords should be allowed to elect 150 such members as have held high offices or been members of the House of Commons and 100 members should be nominated by the Crown on the advice of Ministers. The reason assigned for his suggestion is that by no system of election the services of such men could be secured for the due discharge of the duties of an efficient revising chamber. If a second chamber was elected on a broad franchise, the second chamber would be but a duplication of the first. In support of his view the learned writer says, "the latest experiment, in the appointment of a nominated Senate in Ireland, has so far been a distinct success." The last word with regard to constitution-framing is furnished by Ireland and this seems to be the strongest argument in the learned writer's favour. Elected representatives generally represent majority interest and it may with good reason be urged that the representation of minority interests and special interests, could only be secured by nomination. The Rt. Hon'ble Ex-Chancellor is no great admirer of party government. For, he says, that "nearly all great nations in the past have been brought to ruin by fierce party conflicts and intense dissensions." He also suggests that a reformed second chamber in England should have representatives from "the Dominions, the Empire of India and the Dependencies of the Crown" which, in his view, "would give the chamber a strong Federal and Imperial character." But we have said before that the British people are very averse to make any drastic changes in their constitution and prefer to build it up by slow stages by the establishment of constitutional conventions when there is any occasion for any change.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Dec. 1st, 1925.—Judgment was delivered in *Chhuranjit Singh v. Har Swarup* (Allahabad) and the appeal was dismissed.

Dec. 2nd.—Judgment was delivered in *Man Singh v. Nawlakbati* (Patna) and the appeal was dismissed.

Narain Singh v. Niranjan Chakravarti (Allahabad). This was an application for a review and for rectification of the order of Council passed in 1923.

The suit which raised important questions as to the rights and powers of *ghatwals* came on appeal to the Judicial Committee and judgment was delivered in October 1923. The suit was to enforce by sale mortgages executed over his property by the Hundwa Raja and the defence was that the property was *ghatwali* and inalienable.

That defence prevailed before the Privy Council. The case is reported in 28 C. W. N. 351.

Messrs. Upjohn, K. C., DeGruyther, K. C. and *Wallach* for the applicant abandoned the application for a re-hearing, but contended that there had been an error in the Order in Council in that the suit had been dismissed and the Plaintiff's right to recover the loan on the personal covenant had not been safe-guarded. The Board were of opinion that no personal relief had been prayed for in the suit and they dismissed the application.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* appeared in support of the Order in Council.

G. D. M.

Notes of Cases.

PRIVY COUNCIL.

[APPEAL FROM RANGOON.]

AT THE COURT OF BUCKINGHAM PALACE.

Present :

THE KING'S MOST EXCELLENCY
MAJESTY.

LORD PRESIDENT,
SIR JOHN GILMOUR,
LORD CHAMBERLAIN,
SIR ARTHUR STEEL-MAITLAND,
SIR BEILBY A. STON.

1925,

16. December.

V. M. ABDUL
HAMMAN
".
KING-EMPEROR.

Special leave in Criminal cases, grant of—

Violation of the principles of law and natural justice.

In this matter an application to the Privy Council was made for special leave to appeal on 2nd November 1925. The following is the text of the order that has been issued. As special leave in Criminal cases is granted in cases only where there has been some disregard of the principles of natural justice and on very rare occasions, we reproduce *in extenso* the ORDER OF HIS MAJESTY IN COUNCIL below which is as follows :—

Whereas there was this day read at the Board a report from the Judicial Committee of the Privy Council, dated the 2nd day of November 1925, in the words following, *viz.* :—

“ Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble petition of V. M. Abdul Rahman in the matter of an appeal from the High Court of Judicature at Rangoon between the Petitioner-Appellant and your Majesty Respondent setting forth (amongst other things) that the Appellant was convicted by H. S. Sitzler, Esq., District Magistrate, Rangoon, on the 1st June 1925 on two charges framed under secs. 466-109 and 466-116 of the Indian Penal Code, respectively, and sentenced to two years' rigorous imprisonment on the first charge, no sentence being passed on the second charge : that the Appellant appealed against the convictions and sentence to the High Court and by judgment delivered on the 27th August 1925 the High Court upheld the conviction upon the first charge but reduced the sentence awarded to one of rigorous imprisonment for nine months : that after the hearing of the appeal and before the delivery of judgment therein on the 7th August 1925 the High Court called upon Mr. Sitzler to furnish a report upon certain questions relating to the procedure adopted at the trial and the report was furnished by Mr. Sitzler on the 8th August 1925 : that the subject-matter of the report related to one of the grounds of appeal which was argued at the hearing : that the report, the contents of which were adverse to the Appellant's contention, was adopted by the Judges and is cited *seriatim* in their judgment : that the contents of the report were not communicated at any time prior to the judgment to the Appellant or his legal advisers nor was any opportunity given for any observations to be addressed to the Court thereon on behalf of

the Appellant : that prior to the hearing of the appeal a report dealing with the same matters had been furnished by Mr. Sitzler to the Assistant Government Advocate, Rangoon, which report was in the possession of the prosecution at the hearing of the appeal : that neither the existence nor the terms of this report were at any time communicated to the Appellant or his legal advisers and the report itself is in some particulars inconsistent with the later report of the 8th August 1925 : that prior to the furnishing of the report, dated the 8th August 1925, on the 6th August 1925 Mr. Sitzler had a private interview with one of the Judges who had heard the appeal at which neither the Appellant nor his legal advisers were or were invited to be present : that the trial of the Appellant was conducted and the appeal to the High Court was heard on a record prepared in disregard of the provisions of secs. 260 and 361 of the Code of Criminal Procedure : that the trial was conducted on a charge framed in contravention of sec. 233 of the Code of Criminal Procedure : that the trial was conducted in disregard of sec. 191 of the Code of Criminal Procedure : that at the trial inadmissible evidence was admitted, the nature of which was highly prejudicial to the Appellant and such evidence was acted upon by the District Magistrate in arriving at his decision : that at the trial the evidence of accomplices and persons in the position of accomplices was received and acted upon by the Magistrate without any corroboration of their testimony being either required or given : that the two charges were distinct and separate charges but the evidence adduced in the support of one charge was accepted and acted upon by the District Magistrate and High Court as evidence in support of the other : that the District Magistrate misdirected himself on the question of the motive which the Appellant might have had for the commission of the offences with which he was charged and that on the appeal the Judges fell into the same error and further regarded possible motive as evidence supporting the commission of the alleged offence : that the District Magistrate and the Judges of the High Court without reference to the Appellant constituted themselves experts in respect to the nature of certain documentary alterations which formed the subject of the first charge without having the assistance of an expert for the purpose : that by reasons of the matters above set forth the trial of the Appellant was

conducted in violation of the principles of law and of natural justice: And humbly praying Your Majesty in Council to grant him special leave to appeal from the judgment of the 27th August 1925 or for such other order as to Your Majesty in Council may seem fit.

"The Lords of the Committee in obedience to His late Majesty's said Order in Council have taken the humble petition into consideration and having heard Counsel in support thereof and in opposition thereto their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his appeal against the judgment or order of the High Court of Judicature at Rangoon, dated the 27th day of August 1925:

"And their Lordships do further report to Your Majesty that the proper Officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the appeal upon payment by the Petitioner of the usual fees for the same."

His Majesty having taken the said report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Rangoon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

Sir John Simon, Mr. K. N. Chaudhuri and Mr. Walter Frampton represented the Petitioner.

Mr. Kenworthy Brown for the Crown.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter)

TESTAMENTARY AND INTESTATE JURISDICTION.

Before BUCKLAND, J. In the goods of SYED MAHOMED REZA SHOOSTRY, deceased. The 20th January 1926.

Oral Will, probate of, of a Mahomedan.

Probate was granted of an oral Will made by a Mahomedan.

This was an application for the probate of an oral Will of a Mahomedan governed by Shia law who died on 3rd May 1925 leaving pro-

perties both within and without the jurisdiction of this Court. On 21st March 1925 the testator invited three of his friends to dine with him in the evening and in their presence and in the presence of his sister declared his last Will in Urdu language and requested them to be witnesses to the same; the English translation of the substance and purport whereof is as follows:—

"I have a daughter Sooghra Begum and a full sister Hossaini Begum with whom I am living. My sister Hossaini Begum looks after and tends me and my daughter Sooghra Begum. I have given her away to my sister Hossaini Begum. And Hossaini Begum is bringing her up as her own child and she (Hossaini Begum) is also taking care of her. She also tends and takes care of me. Therefore I direct (by Will) that after paying up my liabilities and meeting the expenses of coffin and interment I absolutely bequeath one-third of my properties to my sister Hossaini Begum and two-thirds to my daughter Sooghra Begum. I appoint my sister Hossaini Begum the executrix of my entire estate and the guardian of my daughter Sooghra Begum as I have no other brother or sister of my own. This is my sincere desire and intention and this is my last Will."

The petition was filed by the Executrix for the probate of the said verbal Will. After usual citations the matter came before BUCKLAND, J.

Mr. M. N. Kanjilal on behalf of the Executrix argued that the testator dictated the Will in presence of several witnesses, two of whom have sworn affidavits in support of the application. Notices have been issued as directed and there is no opposition. [Cited *Mahomed Abba v. Mariambai and others*, (1899) I. L. R. 24 Bombay 8 and *Gokul Chand v. Mangal Sen and others*, (1902) I. L. R. 25 All. 313.] The deponents are present in Court to be examined.

BUCKLAND, J.—Since there is no opposition there is no need to examine them. Has any different procedure been laid down with regard to an oral Will?

Mr. Kanjilal.—As appears from the reported cases the procedure is the same.

BUCKLAND, J.—Let the probate issue.

Messrs. Nan and Das, Solicitors for the Applicant.

P. D.

Probate granted.

THE

[No 13

NOTES

EXTRACT

NOTES OF CASES

Calcutta High Court.

(CIVIL REVISIONAL.)

Sasadhar Choudhury v. Bishnu Narain Kundu, Bengal Tenancy Act, s. 174 (3)—Auction-purchaser of tenure, if may apply to set aside sale under Or. 21, r. 91, C. P. C., on the plea that decrees not rent decrees " " " " "

REPORTS (See Index.)

We understand that information has been received that His Lordship the Chief Justice of Bengal, who went home on account of Lady Sanderson's illness, after his sad bereavement, has decided to return to India and resume his duties on the 8th of March next.

We publish in another column the communications that passed between the General Council of the Bar in England and the Calcutta Bar and the Bar at Rangoon regarding Barristers' robes and the resolutions passed by the Bar Council in this connection as published in the report of the General Council of the Bar.

Mrs. Besant's Commonwealth of India Bill, which, after it was settled by Sir Henry Slesser, K. C., the Solicitor-General in the late Labour Government, has been read for the first time in the House of Commons is not before us. We saw the original draft which was prepared by Mrs. Besant with the help of some of her lawyer colleagues. It followed in many respects the lines of the Irish Free State Constitution. But the fundamental difference between the constitution outlined in the Bill and the Irish constitution lies in the fact that the latter is not a federal constitution. The Irish Free State has therefore declared in their constitution that the Dominion Status of Canada is their model. But as provincial autonomy is an

ideal with us, there is no other alternative before us than that of a federal constitution for our Central Government. We have pointed out before that the statutory Canadian constitution is in many respects unsatisfactory. The Provinces in Canada are by no means autonomous and cannot be called self-governing. The statutory constitution of the Central Government of Canada, though defective in form, has, however, by working it in the spirit of the English constitution and by the establishment of conventions, been made a thoroughly self-governing and responsible one.

The constitution of the Commonwealth of Australia is that of a Federal State like that of the United States. The constitution of the Commonwealth of Australia was framed at the close of the last century and it has been working for only a quarter of a century. But its success is due to the fact that the States, such as Victoria, Tasmania, Queensland, New South Wales, etc., had become autonomous and self-governing by their own constitutional struggles with the Colonial office. Federation between them thus became possible. The representatives of these States met in Convention and the Commonwealth of Australia Act was drafted by them and submitted to and passed by the British Parliament in 1900. So long as we cannot agree and formulate our own constitution in any definite form, there is little chance of any constitutional reforms coming to a head. We therefore welcome the Commonwealth of India Bill as a pioneer attempt in this direction. We cannot express any opinion on it till we have the full text of the Bill introduced in Parliament before us. There is no chance of its being passed in the present Parliament. But we may say here that a great deal of spade-work will have to be done before we can frame a satisfactory constitution for the Provinces and the Central Government of India. For instance we shall have to

decide whether the Provincial Legislatures should be uni-cameral or bi-cameral. In Australia many States have a bi-cameral constitution but in Canada most of the provincial legislatures are uni-cameral. In Australia, although the States are self-governing yet we may mention that in some of the States such as Queensland and New South Wales the members of the Second Chamber are nominated by the Governor for life on the advice of the Ministers. Popular Governments are thus ordinarily provided with a brake to prevent it from running a headlong course.

In view of the above facts the following note on the Commonwealth of India Bill from our London legal contemporary of the *Law Times* will be found interesting :—

The Commonwealth of India Bill, which has been drawn up by Sir Henry Messer, K. C., the Solicitor-General in the late Labour Government, and Mr. Arthur Henderson, jun., proposes to confer upon India the status of a self-governing Dominion, with certain reservations. The Constitution would be of a federal type with autonomous Provinces. It is proposed that the Commonwealth Legislature would consist of a Legislative Assembly and Senate, while for the present the Provincial Legislatures would be single chambers, though provision is made for provinces to determine whether they will have second chambers. This tendency to depart, in the framing of Provincial Legislatures in a federal Constitution, from "The Principle of Two Houses," or the "Bicameral System," as it has been phrased by Jeremy Bentham, which, in the words of Professor Lieber, "accompanies the Anglican race like the common law," is not without its parallel in the various Constitutions, which are versions of their great prototype, the British Constitution. Thus, in the federal Constitution of the Dominion of Canada, the Dominion Parliament consists of the Governor-General and two Houses - a Senate and a House of Commons - but the Provincial Legislatures consist of a Lieutenant-Governor and one House of elected representatives, except in Quebec and Nova Scotia, to whose Legislatures respectively there is added a second House called the Legislative Council. Under the provisions of the Commonwealth of Australia Act (63 & 64 Vict., c. 12) the Constitution of the several States, and the powers of their Parliaments, which were originally bicameral, remain as before except where expressly altered by or under the Constitution of the Commonwealth. The fact that while in the Legislatures, with the exceptions mentioned, of the Provinces of the Dominion of Canada, the unicameral system obtains, whereas the Legislatures of the States of which the Commonwealth of Australia is composed are bicameral, may be explained by the contrast between the federations of Canada and Australia. The constituent parts of the federation in Canada are provinces, whatever their status before the British North America Act of 1867 (30 & 31 Vict., c. 3), establishing the Dominion of Canada; they are not self-governing colonies after it; whereas the States of which the Commonwealth of Australia is composed are, and remain, self-governing Colonies, while at the same time combining in federation to form a larger whole. The provision that the Legislatures of the constituent parts of the proposed Commonwealth of India should be unicameral, while the bicameral system would be maintained in the Commonwealth Legislature, may arise more from considerations of convenience than of constitutional morality.

Bi-Cameral Legislature and its advantages.

In our last issue we noticed the opinion of the last Ex-Chancellor of Ireland on the advantages of an efficient Second Chamber and his views with regard to the reform of the House of Lords. In an article on the same subject by Brigadier General F. G. Stone, contributed to the November number of the *Nineteenth Century and After*, he maintains that the British Legislature after the Parliament Act of 1911, has practically become uni-cameral and he discusses at length the dangers to the community from outbursts of popular passion and class-war that are likely to follow from it. Leaving out his historical review of the past and the present situation in this connection, we only give below his conclusions with regard to the advantages of an efficient Second Chamber.

Every constitutionally governed country has the safeguard of a Second Chamber, the constitution of which is determined by various factors and considerations peculiar to the country for which it is framed. There is one point which is common to the constitution of all Second Chambers, which is, that the Second Chamber shall not be a mere replica of the Lower House, but shall have sufficient authority and independence, and enjoy such a measure of the confidence of the country as will enable it to exercise its functions in the best interests of the country, even when its views do not coincide with those of the other House. To ensure this independence it is the universal practice so to safeguard the tenure of seats in the Second Chamber as to prevent a dissolution of the Lower House from affecting the composition and continuity of function of the Second Chamber. The Second Chamber therefore in all countries represents stability and continuity, it is unaffected by evanescent waves of popular passion, sentiment, or prejudice, which may determine the composition or the life of the Lower House, and it is at the same time equally a bulwark against the assumption of autocratic powers by Presidents or Ministers who may too easily bend the Lower House to their dominating will and induce it to accept measures which are opposed to the common weal. In some cases the members of the Second Chamber are wholly removed from the influence of the caucus or party machine, and in all cases are less dependent on such influence than are the members of the Lower House.

Trial by jury of less than required number.

In a recent American case the Plaintiff brought an action of slander against the Defendant. At the trial it was found that the eight men required by statute to make up the jury could not be obtained. The parties agreed to proceed with the trial before seven jurors. A verdict was returned in favour of the Plaintiff and from a judgment given thereon the Defendant appealed. The Plaintiff took the preliminary objection that no appeal lay. The objection was allowed, the Court holding that by proceeding with an incomplete jury the

trial Court lost its judicial character and became a board of arbitration. The following comment on the case which appears in the *Harvard Law Review* is instructive. Appellate jurisdiction includes only the hearing of appeals from a judicial tribunal acting in its judicial capacity. There is some authority for the proposition that when the parties waive their right to a jury trial without statutory authority they in effect submit the facts to the judge as arbitrator and there is no appeal. But the Court in the principal case while admitting that the parties may dispense with the jury entirely without losing the right of appeal argues that the submission of the facts to a body of seven men, a tribunal unknown to the law, is an even further departure from a judicial proceeding. This view seems unduly technical. To expedite the trial parties are frequently willing to proceed with less than the required number of jurors, the right of appeal being unquestioned. It may happen of course that the proceedings in the trial Court are so clearly extrajudicial that there is no basis for Appellate Jurisdiction. But unless this is the case it would seem that the intent of the parties should govern.

Contempt of Court.

In the same journal a peculiar case of contempt of Court is noticed. Two persons were convicted and sentenced to a term of imprisonment. In the jail they were allowed liberties unauthorised by law amounting to a technical escape under circumstances rendering it evident that the sheriff who was keeper of the prison knew of and authorised the action. An American statute makes it criminal for sheriffs to abet the escape of prisoners. It was held, however, that the sheriff was in contempt of Court. The learned commentator observes that interferences with a Court's administration of justice are punishable as contempts and a sheriff is guilty of contempt if chargeable with the loss of a prisoner for judicial proceedings; likewise, if he wrongfully frees a civil contemner preventing the Court from enforcing its decree. But since the Court's role ends after final sentence in a criminal case it has been argued that a subsequent interference with the prisoner is of no concern to the sentencing judge and thus no contempt of Court is involved. Preventing the enforcement of its

past sanctions weakens the Court's power but such interference seems too remote and the argument that it is contempt to disobey the order of commitment would apply to failure to fulfil any judgment. Yet most decisions find contempt. In the case of a criminal contempt which though similar is not a crime it does seem that the Court retains some control over and interest in the prisoner until by completing the sentence he has purged his contempt. On this narrow ground the case in question seems clearly right. That the Defendant's acts were also indictable as crimes under the general penal law of the land does not prevent this additional sentence for contempt.

Extract.

VI.—Barristers' Robes.

(1) *Advocates in India.*

The council received a communication, dated the 12th March 1925, from the Calcutta Bar calling attention to the decision of the judges of the High Court of Calcutta that vakils who had been admitted as advocates should wear barristers' robes, together with a copy of the resolution passed by the members of the English Bar practising in Calcutta as follows:

"That in view of the decision of the honourable judges of the High Court in allowing the vakil advocates to use barrister's gown and bands, the Bar should send a representation to the General Council of the Bar."

The following resolution was passed by the council:—

"That in their opinion the barrister's gown and wig are, by long usage, the distinctive costume of an English barrister. In India the wig has been discontinued, but the gown still remains the distinctive costume of a barrister.

"The wearing of this costume is equivalent to a statement that the wearer is a member of the English Bar.

"The council are of opinion that persons should not be permitted to wear that costume who are not members of the Bar.

"The council have dealt above only with the English Bar, but according to their information what they have said applies with some modifications to the Scottish and Irish Bars, and possibly some Colonial Bars."

The council also resolved that their views should be respectfully submitted to the Chief Justice of Bengal and the other judges of the High Court of Calcutta.

The council also received a communication, dated the 7th May 1925, from the Patna High Court Bar Association, enclosing a copy of their resolution protesting against advocates who are not barristers wearing the barristers' robes. In a subsequent letter of the 28th May 1925, the

council were informed of the decision of the judges of the High Court, Patna, to the effect that barristers' robes should not be worn by advocates who were not members of the English Bar.

(2) *Advocates in Burma.*

The following communication, dated the 9th July 1925, from the Bar at Rangoon was received by the council:—

Dear Sir,

I have been asked by some of the barrister members of this association to obtain your advice on the following:—

We have now a High Court here (formerly a Chief Court) and barristers are admitted to practise therein as "advocates" wearing the usual barrister's gown and bands. Vakils and first-grade pleaders and solicitors are also allowed to practise therein as "advocates," but hitherto wore such gowns as appertained to vakils, first-grade pleaders and solicitors.

Some months ago the judges issued an order that there was to be one uniform robe for advocates generally, and fixed on the English Bar gown and bands for all alike.

The members of the Bar raised an objection to any advocate other than a graduate of one of the Inns of Court wearing the gown and (or) bands.

The honourable judges gave way on the question of the gown (substituting a gown like the Cambridge B.A. gown) but retained the bands. However, some who are not barristers still appear in Court in the Bar gown and bands.

We are anxious to find out whether we have any and what power to prevent other than a graduate of an Inn of Court from wearing our gown and bands or either.

If you can help us in the matter with your advice, we shall thank you very much

I am, dear Sir,

The Secretary was directed to communicate the resolution of the council, referred to in sub-par. (1), to the judges of the High Court, Burma, and to the Bar at Rangoon.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before RANKIN, J. SASADHAR CHOUDHURY, Petitioner v. BISHNU NARAIN KUNDU and others, Opposite Party. The 8th December 1925.

Bengal Tenancy Act (VIII of 1885), sec. 174 (3)—Auction-purchaser of tenure if may apply to set aside sale under Or. 21, r. 91, C. P. C., on the plea that decree not rent decree.

The Petitioner bought a *patni* tenure on 12th May 1924 in execution of a decree obtained in a suit for rent due in respect thereof wherein all the co-sharer landlords were not parties and applied under Or. 21, rr. 91 and 93 of the Civil Procedure Code, for refund of his purchase money by setting aside the sale on the ground that the judgment-debtor's interest having passed to a mortgagee who purchased the *patni* at a sale held in 1912 in execution of a mortgage decree, the *patnidar* had no saleable interest in the *patni* at the time of its sale in May 1924 in execution of the above rent decree.

Both the Courts below negatived this contention of the Petitioner on the ground that as the sale was one under the Bengal Tenancy Act, Or. 21, r. 91, C. P. C., did not apply and he was therefore not entitled to a refund of the purchase money.

The Petitioner's vakil contended that the decree not being a rent decree under the Bengal Tenancy Act, he was entitled to the ordinary rights of an auction-purchaser under the Code.

The Respondents' vakil contended that when the decree-holder produces a decree, which on the face of it is a rent decree, Court cannot go behind it, at the instance of the auction-purchaser, to investigate into the character of the decree for determination of the question whether sec. 174 (3) of the Bengal Tenancy Act bars a proceeding under Or. 21, r. 91 of the Code:

Held—That Or. 21, r. 91 applies only to cases where the thing put up for sale is the tenant's interest and not the tenure under Chap. XIV of the Bengal Tenancy Act.

There is no universal doctrine that in this very common type of cases any person may at any time call upon the Court to decide as to the nature of the decree and to treat proceedings taken under the Act as proceedings under the Code.

Amrita Lal Bose v. Nemai Chand Mukhopadhyaya, (1901) 28 C. 382; 5 C. W. N. 474, referred to.

Babu Gopendra Nath Dass for the Petitioner.

Babu Panchanon Chowdhury for the Opposite Party.

H. D. C.

Ruiz discharged.

THE Calcutta Weekly Notes.

Vol. XXX.]

MONDAY, FEBRUARY 15, 1926

[No. 14.]

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REPORTS (See Index.)

Assembly's error in rejecting proposal for securing greater efficiency in the Judicial Committee.

We are of opinion that the Legislative Assembly has been ill-advised in rejecting the proposal of the Government of India for making provision for the employment of two Judges of Indian experience on an annual salary of £4,000 each for hearing appeals from India, the salary of one Judge being charged on the revenues of India and that of the other to the British Exchequer. We think it would have been worth while to incur some additional expenditure for securing the services of eminent Judges of Indian experience to sit in the Judicial Committee. The additional burden on Indian revenue would not have been £4,000 but only a tenth of the same or a little more as we shall presently show. It may be noted in this connection that under the provision of sec. 30 of the Judicial Committee Act of 1833 (3 & 4 Will. IV, c. 41) two Indian or colonial Judges serving in the Judicial Committee receive an allowance of £400 out of the British Treasury. Sir John Edge and the Rt. Hon'ble Mr. Ameer Ali, at present, ordinarily sit in the Judicial Committee under the provisions of the statute. The former, a retired Chief Justice, draws, we believe, a pension of £1,800 out of the Indian revenues and the latter a pension of £1,200. Thus India is now paying £3,000 for their services. If we assume that if two retired Chief Justices

were appointed in their places drawing pensions amounting to £3,600, India would have to pay only £400 more for their services in the Judicial Committee. The burden on the British exchequer, on the other hand, would be greater because England now only pays £400 as allowance to them. If the Government of India's proposal were accepted, England would have had to pay £4,000 in its place. We presume that most of the members of the Assembly who voted for the rejection of the proposal did not realize this clearly. It would be a great advantage to India if for a paltry sum of £400 or so, we could get eminent judges like Sir Lawrence Jenkins to sit ordinarily in the Judicial Committee. We would therefore advise the Government of India to get the measure passed by the Council of State on the grounds above-stated and re-submit the proposal to the Assembly for its approval and we have little doubt that the Assembly will extend its approval to it, if it is put in the proper light.

The reason assigned for the rejection of the proposal was that an Imperial Court of Appeal should be established in India. But it must be remembered that High Courts in India are ordinarily the final Courts of Appeal. It is only in exceptional cases that appeals from them are taken to the Judicial Committee of the Privy Council. Their number relatively to the extent of the country and its population is infinitesimal. Some lawyers in their own self-interest are anxious to have an Imperial Court of Appeal established at Delhi. But the Presidencies and Provinces in India are sure to oppose any such idea strongly. As provincial autonomy is our ideal we are decidedly of opinion that our provincial High Courts should be our final Courts of Appeal. When provincial autonomy is attained we would take care that these Courts are quite efficiently manned. It will then be time for us to consider whether any further appeals should be allowed to the

Judicial Committee of the Privy Council and, if allowed, the limits to which it should be confined. No doubt some of the Dominions have imposed strict limitations on the right of appeal to the Privy Council. But so long as our Central and even Provincial executives remain irresponsible, as they are at present, it is an advantage to us to have the privilege of taking our appeals to the Judicial Committee of the Privy Council which is far removed from the influence of the Indian executive. Amongst many others, we may mention the *Moment* case (17 C. W. N. 169) and the special leave recently granted by the Judicial Committee in the case of *Abdul Rahman v. King-Emperor* (noted in our issue of the 1st February last) as specific instances which go to show the advantages of such an independent tribunal.

An Imperial Court of Appeal at Delhi, under the existing circumstances, can hardly be expected to rise above the executive influence and environments. Then again the Judges of any such Court would be appointed on the recommendation of the Indian executive by the Secretary of State for India and they cannot be expected to be as independent as the Law Lords and other veteran English Judges. The latter can bring a fresh mind to bear on the cases before them and look at them in a spirit of detachment and are ordinarily uninfluenced by any other consideration except that of doing justice. For securing international justice the arbitration Court is located at a place where it would be above the influence of the contending parties or of the more powerful States. On that principle a judiciary above the influence of the local executive is also to be preferred. So long as we do not attain full Dominion status in India it would be a monumental folly on our part to try to curtail the jurisdiction of the Judicial Committee or to replace it by any Imperial Court whose members will be daily in touch with the executive in this country. We are sorry that the attention of the members of the Assembly was not drawn to these considerations and they were misled by false analogies by some interested lawyers who are given to building such air-castles in the expectation of making a mint of money out of them. Let us work for gaining the Dominion status first and we shall think of curtailing the jurisdiction of the Privy Council afterward. To do otherwise would be putting the

cart before the horse. We shall be well-advised to secure greater efficiency in the Judicial Committee in the meantime. We would therefore appeal to the Assembly to reconsider their decision, should the proposal be brought up before them in the manner we have suggested.

THE CALCUTTA RENT (AMENDMENT NO. II) BILL, 1922.

The new bill suggests a number of amendments with a view to improve the position of the tenant both as to ejectment and increase of rent. 'The interest of the landlords has not been' considered 'in the amendments suggested and in some cases the object has been to punish them for possessing lands. In a question where the interests of rival parties are concerned it is difficult to please both, but it is only proper that some attempts should be made for compromise.

It is clear if the Calcutta Rent Act is to continue protecting tenants in Calcutta, some amendments are essentially necessary. Opinions differ as to whether it is necessary to protect the tenants any longer, but assuming that they deserve protection the interest of the landlord should not be overlooked. As it is they are to remain content with an increase of 10 per cent. over the rent of 1918 up to 1927 whereas the depreciation to their buildings may have been more than 20 per cent., not to speak of the general increase in prices. As the Act stands at present many honest landlords have suffered and many more honest tenants have failed to take advantage of the Act but the clever people have found means of evading the Act.

As experience would show the chief difficulty in the way of the tenant is his liability to be ejected if he fails to pay or deposit rent in terms of sec. 11, sub-secs. (4) and (5). A day's delay, however accidental, would deprive the tenant of all benefits under the Act. About 50 per cent. of the ejectment suits are decreed against the tenant because of his failure to pay or deposit rent in time. It has also been held in *Jetha Bhulchand v. F. C. Grace* (26 C. W. N. 678), that once there has been a default in this respect subsequent acceptance of rent by the landlord would not amount to a waiver on the part of the landlord of the breach of the statutory condition. On the other hand, it would be hard on the landlords if they could not eject the tenant if the

tenant does not pay the rent regularly. But surely the landlord should not be helped if he was instrumental in procuring the default. But the Act does not provide against similar contingencies. The English Courts found similar difficulties in relieving tenants against such defaults, however accidental, and so it was provided in the Act of 1920, sec. 5, that the Court could make an order for ejectment "if the Court considers it reasonable to make such order." This provision has also been embodied in sec. 4 of the English Act of 1923. A similar provision in the Calcutta Rent Act would afford protection to many an honest tenant who would have paid or deposited the rent if they knew how stringent the law was. There would be ample discretion left to the Judge who would consider all the circumstances of the case. The clause in sec. 11 may be again modified as follows:—"The tenant pays rent tenancy or is ready and willing to pay rent, etc." This is contained in sec. 9 of the Bombay Act of 1918, and in sec. 10 of the Burma Act of 1920. The modification suggested in the proviso to sub-sec. (5) of sec. 11 would do away with all distinctions between honest and dishonest tenants and the Courts will have no discretion in the matter. It is too drastic to be seriously considered. It contemplates the possibility of a tenant refusing to pay rent and when the landlord finding no other means of recovering the rent thinks of proceeding to Court the tenant has only to deposit the rent due and defeat all the attempts of the landlord to eject him. Even under sec. 114 of the Transfer of Property Act the Court has some discretion to relieve the tenant against forfeiture for non-payment of rent.

Again curiously enough the Bill does not suggest any protection to sub-tenants who have been hard hit by the Amending Act, 1924, which has excluded premises yielding a monthly rent of more than Rs. 250 per month. There being no privity between the landlord and the sub-tenant, when there is a decree for ejectment against the tenant, the sub-tenant has no right to stay on even though he has been paying rent regularly and performing all the conditions of the tenancy. Again a tenant who pays rent, say Rs. 1,000 a month, may have a number of sub-tenants paying rent between, say 100 to 50 a month. Now since the tenant is not protected in such a case, the sub-tenants are not. To meet this difficulty sec. 15 (3) of the English Act of 1920 provides as fol-

lows:—"When the interest of the tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued." Again in sec. 5 (5) of the same Act it is provided that an order or judgment against a tenant shall not affect the right of the sub-tenant to whom the premises or any part thereof have been lawfully sub-let before proceedings for recovery of possession were commenced, to retain possession under this section, or be in any way operative against any such sub-tenant. Similar provisions should be introduced in the present Act, if it is desired to protect those who are mostly in need of protection.

M. N. K.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Dec. 4th.—*Maharaj Bahadur Singh v. Seth Hukm Chand* (Patna). In these appeals which raised questions of the rights of worship by the Sitambari and Digambari Jains on Poresh Nath Hill, the judgment of the High Court was upheld and the appeal and cross-appeal were dismissed.

Jawahir Singh v. Udai Prakash (Allahabad). Judgment was delivered and the appeal dismissed.

Dec. 9th.—The appeal of *Md. Khaleel Shiraji & Sons v. Les Tanneries Lyonnaises* which was part-heard last term has been further argued before the same Board—VISCOUNT FINLAY, LORD BLANESBURGH, SIR J. EDGAR and MR. AMEER ALI—during the past week. The appeal relates to contracts for the sale of sheep skins and goat skins for the purposes of the French Army during the war.

Sir G. Lowndes, K. C. and *Mr. K. Brown* for the Appellants.

Messrs. Dunne, K. C. and *Blanco White* for the 1st Respondent.

Mr. E. B. Raikes for the 2nd Respondent.

G. D. M.

Correspondence.

PRINTED CIVIL FORMS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

DEAR SIR,

The public feel much inconvenience in getting Civil printed forms from the record rooms; so I hope you may move the High Court or the Local Government if necessary to sell the same through stamp vendors like the printed forms for application for copy at a reasonable price.

Yours faithfully,

DARAJUDDIN AHMED,

Pleader.

Review.

THE CRIMINAL COURT MANUAL. *Law Journal Office, Mylapore, Madras. 1925.*

This is a portly volume of over 1500 pages in which are collected the Imperial Acts relating to the Criminal law in force in India. The speciality of the volume consists in explaining the scope of some of the older Acts and Regulations which are still in force by prefatory notes relating to the circumstances that led to such legislation and giving the objects and reasons thereof. The amendments to all the Acts contained in this volume up to November last have been incorporated in them. Below the text of the Acts the case-laws on the various sections have been noted and brought down to November 1925. The Rules and Orders of the Local Government for the guidance of the judiciary and the executive authorities have also been given in *extenso*. The annotations to the sections are not merely bald references to the cases but are classified under appropriate headings and the points in the decisions are sufficiently set out. The work will be very useful to practitioners in the Criminal Courts and they will need only refer to some of the local Acts, which are not included in this volume. But so far as the Imperial Acts are concerned the volume is quite comprehensive.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before CUMING, J. CIVIL RULE No. 1030 OF 1925. **BAGANT LAL**, Petitioner v.

PURNO CHANDER, Opposite Party.

The 26th January 1926.

Indian Contract Act, sec. 73—Interest Act, sec. 1—Interest on arrears of house rent, not contracted for, if can be awarded by way of damages.

The Plaintiff-Opposite Party brought a suit against the Defendant-Petitioner for recovery of arrears of house rent, in the 1st Court of the Munsif of Bankura who is invested with the powers of a Small Cause Court Judge, and obtained a decree for rent with interest thereon by way of compensation for damages. The Defendant-Petitioner, obtained a Rule upon the Plaintiff-Opposite Party to show cause why the decree for damages in lieu of interest for default in payment of rent should not be set aside, in the absence of any provision of law under which the same could be granted. The Petitioner's vakil contended that there was no contract for payment of interest and no demand in writing in proof of actual loss, and that neither sec. 73, Indian Contract Act (IX of 1872) nor the Interest Act applied to the case and relied on *Prosonnomoji Ghosani v. Gopal Lal Sinha*, (1919) 31 C. L. J. 348, *Kallar Roy v. Ganga Pershad Singh*, (1905) 33 C. 998 (1000) and *Muhammadden Abdul Saffur Rowthar v. Hamida Biri Ammal*, (1919) 42 M. 661.

It was contended for the Opposite Party that apart from any contract or any statute, a landlord, the payment of whose rent is withheld by the tenant, is equitably entitled to claim damages for the detention of the money legally due to him—in the absence of any justification for non-payment of the same in time as it falls due, and cited *Khetra Mohan Poddar v. Nishi Kumar Saha*, (1917) 22 C. W. N. 488 and *Mohamaya Prosad Singh v. Ram Khelawan Singh*, (1911) 15 C. L. J. 684.

Held—That the lower Court was right in allowing interest by way of damages for the detention of money legally and justly due to the landlord Opposite Party on account of the arrears of house rent.

Babu Gopendra Nath Das for the Petitioner.

Dr. Jadunath Kanjilal and Babu Rishindra Nath Sarkar for the Opposite Party.

H. D. C.

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Respect for lawful authority and rule of law.

We publish below a very interesting account of how the rule of law and authority lawfully exercised is respected in England even by persons occupying the highest position and authority in the State and how their conduct is subjected to public condemnation if they try to take advantage of their position. We all know of instances where men of such high position as Lord Curzon and Mr. Asquith, when Prime Minister, were fined for breach of police regulations when driving in a motor car. This time it is Mr. Churchill, the Chancellor of the Exchequer, whose car on its way to the House of Commons was stopped by an ordinary policeman and ordered to proceed by a roundabout way. Mr. Churchill disobeyed the order and pleaded urgent Parliamentary business as an excuse for so doing. He was not prosecuted, very likely, because he might have claimed Parliamentary privilege owing to an urgent call of duty and in that case the chances of his being convicted would have been doubtful. But all the same he has had to offer an explanation for disobeying a common constable's order and we note that in the public press Mr. Churchill's conduct is being condemned. It is urged that since the traffic police is invested with discretionary power even a Cabinet Minister is not justified in disregarding the same. It is this high regard of the English people for the rule of law and the spirit of discipline that prevails amongst them from the highest to the lowest that has made English Parliamentary Govern-

ment such a unique success in the world. The above instance is not without its morals on the deplorable incidents and disregard of the President's lawful authority that occurred in the Bengal Council on Thursday last.

Our contemporary of the *English Law Journal* has the following editorial comments on the subject under the heading—An Imbrolio of Constitutional Law:—

The legal advisers of the police and of the Home Office are engaged at present in attempting to solve a knotty problem just raised by a casual act of the impulsive Mr. Winston Churchill. Driving in his official car, attended by a detective detailed to watch over the safety of Cabinet Ministers, Mr. Churchill was proceeding along Parliament Street when the policeman on point duty signed to his chauffeur that he must take a longer and very roundabout route. The car was in a hurry, and the detective showed the policeman his green disc, which is understood to confer a certain precedence in traffic movements to those who possess it, but the policeman ignored the disc, and still gave the signal requiring the car to change its route. The driver thereupon disregarded the direction and drove on. This, of course, is *prima facie* a breach of the police traffic regulations, and therefore, a summary offence unless otherwise excused in law. It is contended on behalf of Cabinet Ministers that they enjoy a certain precedence because of the urgency of their public business, and that, when armed with the green disc, they are entitled to disregard the normal traffic regulations. It is suggested that the policeman on point duty made a mistake in not recognising this, and that, therefore, the driver was entitled to disobey his directions. These contentions seem very difficult to accept. Equality before the law is one of our constitutional maxims, although, of course, in the public interest exceptions are created by statute, and sometimes by special regulations. No doubt the Police Commissioner may issue directions to policeman on duty to give a certain priority or other privilege to cars, the occupants of which display the "green disc," but the directions of the policeman must be based on the actual circumstances of each case, and must be discretionary; he cannot be under a general duty in all cases to let Cabinet Ministers disobey the Traffic Regulations. Such a general right of immunity, irrespective of the actual circumstances, would be equivalent to a "Dispensing Power" or "Suspending Power," overruling the regulations altogether in favour of a special class, and these forms of the Prerogative are expressly declared illegal by the Bill of Rights.

Amendment of sec. 123, cl. (b), Cr. P. C.

After a lively debate the Legislative Assembly has passed the bill introduced by Government to restore to the Courts the power to inflict

rigorous or simple imprisonment in their discretion on failure to furnish the security called for for being of good behaviour in the case of persons who have been found to have been disseminating seditious matter or to have been vagrants and suspected characters. After keeping the law on the subject intact for a long time the legislature when passing the Amending Act of 1923 enacted for the first time that imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under sec. 108 or sec. 109, be simple and where the proceedings have been taken under sec. 110, be rigorous or simple as the Court or Magistrate in each case directs (cl. 6, sec. 123).

When the Code of 1861 was passed the law was silent as regards the nature of the imprisonment to be undergone by a person failing to furnish security for being of good behaviour. The practice followed by the various Courts so far as could be gathered from the published rulings was not uniform. In Bengal, North-Western Provinces and Oudh the term "shall be committed to prison" implied "simple imprisonment." The Judicial Commissioner of the Punjab on the other hand ordered that the imprisonment should be "rigorous" but might be simple in the discretion of the Court concerned. In Madras, it appears, a curious state of things prevailed and it was left to the officer of the jail to use his discretion in the matter. Act X of 1872 put the matter at rest by enacting in the last clause of sec. 510 that imprisonment for failure to furnish security for good behaviour might be rigorous or simple as the Court or Magistrate in each case might direct.

It is noteworthy that up to this time there was no provision in the Code corresponding to sec. 108 which contemplates the binding over of persons who have been found to have been disseminating seditious matter. Sec. 504 of the Code of 1872 was the provision in that Code corresponding to sec. 109 which deals with vagrants and suspected persons, but the limit of time for which a bond could be demanded was only six months and not one year as now.

In the Code of 1882 no provision corresponding to sec. 108 was introduced and the power of the Court to direct the nature of the imprison-

ment according as it thought proper was left intact (sec. 123, last clause) as also the limit of six months in the case of vagrants.

In the Code of 1898, sec. 108 was enacted for the first time. It introduced a totally new principle into Part IV of the Code which is described in its heading as for the prevention of offences. In the case of vagrants and suspected persons the limit of six months was increased to one year. As before imprisonment for failure to give security for keeping the peace was to be simple and that for failure to give security for good behaviour could be rigorous or simple in the discretion of the Court. By the Amending Act of 1923 imprisonment for failure to furnish security demanded under secs. 108 and 109 was made simple in all cases and it was left to be rigorous or simple in the discretion of the Court in cases under sec. 110.

From the statement made by the Home Member in the Legislative Council it appears that the law as amended did not prove to be satisfactory in the opinion of most of the Local Governments and it was evidently thought that a strong case had been made out for amending the section and restoring to the Courts the discretion they had before.

Leaving aside exceptional cases it is difficult to think it proper that a person should be imprisoned with hard labour only for being without any ostensible means of livelihood which may be the lot of many an honest man in these hard times without any fault of their own but merely as a matter of ill-luck. The answer that the Courts in their discretion will make their orders appropriate to the circumstances of each case is hardly convincing, regard being had to the fact that no other provision in the Code is likely to be more abused as an engine of oppression by the police than those relating to bad livelihood.

THE CALCUTTA RENT (AMENDMENT No. II) BILL, 1925.

(Continued from p. lxiii.)

The extension of the Act to furnished premises in the way indicated would require extensive alteration in the Act. For example, the very definition of the standard rent would have to be altered as the hire of furniture could not be considered as rent. The case of *Wells*

v. Dickinson, 28 C. W. N. 774, does not decide what is suggested in the statement of objects and reasons. It decides that if the tenant pays Rs. 500 to the landlord and out of that Rs. 200 represents standard rent and Rs. 300 as hire of furniture, the tenant has got to pay the whole of Rs. 500 as there is no provision in the Act which limits the amount to be paid for hire of furniture. Under sec. 15 (3) (b) the Controller can *distinguish* the amount payable as rent from the amount payable as hire of furniture, but after such distinction has been made the amount payable as rent is restricted (i.e., not more than the standard rent) and non-payment may be a ground for ejectment; the amount payable for hire of furniture is subjected to no such limitation and non-payment of it is not followed by any of the consequences which follow from non-payment of rent. A proviso may be added to the said sub-section or to sec. 4 to the effect that in the case of hire of furniture only normal hire or 20 per cent. over the normal hire could be charged and normal hire may be defined as the hire which might reasonably be expected from similar letting on the 30th November 1918. In this connexion reference may be made to sec. 9 of the English Act of 1920, which provides—"Where any person lets . . . any dwelling-house . . . at a rent which includes payment in respect of the use of furniture, and it is proved to the satisfaction of the County Court that the rent charged is yielding or will yield to the lessor a profit more than 25 per cent. in excess of the normal profit as hereinafter defined, the Court may order that the rent, so far as it exceeds such sum as would yield such normal profit and 25 per cent., shall be irrecoverable, etc. And the normal profit means the profit which might reasonably have been expected from a similar letting in the year ending on the 3rd day of August 1914. The introduction of such a clause will not disturb the other provisions in the Act, though this may lead to long investigations before the Controller and the decision of the Controller can easily be evaded by changing some of the furniture. It is doubtful whether the extension of the Act to furnished premises is desired and the cases that have come up before the English Courts are not many.

The modification suggested in sec. 11, sub-sec. (1) is unnecessary in view of the recent decision of the Court of Ap-

peal in the case of *Avery v. Kessoram Podder*, 30 C. W. N. 152, which decides very much the same as is desired by the modification. The tenant can standardise his rent by adding 10 per cent. to the rent of 1918 provided the case does not come within any of the sub-sections of sec. 15 (3), or when the rent has not otherwise been standardised by the Rent Controller.

The addition of Explanation (1) to the same sub-section would be too hard on the landlords. This will prevent a landlord to remove to his own house from a tenanted house where he was living or carrying on business; a business man would be prevented from extending his business by acquiring more accommodation, etc.

The addition of Explanation (2) would also unduly interfere with the action of the landlord. There may be various reasons which may induce the landlord to build or re-build. Again it will necessitate a double proceeding, one before the Controller and another before the Civil Court where ejectment is sought and it will unnecessarily increase the Controller's work. As a matter of fact there have been very few cases where ejectment has been sought on the ground of building and re-building. The case of *R. N. Chatterjee v. D. O. C. Ryan* does not lay down any such general proposition as has been ascribed to it in the statement of objects and reasons. But at the same time it is not clear what is meant by building or re-building, and a great deal of uncertainty has arisen as the Act does not throw any light on the question.

The addition of proviso (iii) to sub-sec. (3) of sec. 15 is useful but unnecessary having regard to the decisions in *Kundamul Dalimia v. W. Dyer*, 29 C. W. N. 281 and *Harsukdas Thakurdas v. Gouri Charan Law* (reported in the Statesman, 6th January 1925). The proviso as framed does not make it clear to what premises it is made applicable having regard to the Act of 1924. The object apparently is to give the Controller right to decide the standard rent of a portion of the premises, though the rent of the whole premises in 1918 may exceed 250 per month. The enquiry would be what would have been the rent of the portion of the premises in November 1918 and if less than Rs. 250 the Controller would have jurisdiction. This is what has been decided in the cases cited.

The suggested proviso (iv) to sub-sec. (3) of

sec. 15 again is unnecessary having regard to the decision in *Saty Niranjan Shaw v. Karani Industrial Bank*, 30 C. W. N. 236. That case decides that the tenant can apply as long as he is a tenant but not after he has ceased to be one. The last portion of the said clause will bring in unnecessary complications.

The addition of sec. 27 will now cause more trouble and confusion than what has been caused by the absence of such a clause in the Act of 1924. It is too late now to introduce it and will serve no useful purpose.

Sec. 24 should be amended without further delay. The so-called revision results in a new trial and the delay and costs occasioned thereby is sufficient to frighten many from coming to Court. It may be provided that in cases where the rent paid is less than Rs. 100 there would be no revision from the decision of the Controller or a revision only on a point of law or some such thing. It is too hard for the tenant paying Rs. 50 a month to fight with his rich landlord before the Rent Controller, the President of the Tribunal and finally in the High Court.

The question whether the Calcutta Rent Act is to be further extended or not should be first determined before any amendment is considered. The Calcutta Corporation has banned it but it may be interesting to know how many of those who voted against its continuance live in tenanted houses. If there is any section of the people who have required most the protection of the Act they are the small tenants who will ever remain mute and will never find a spokesman. But attempts should be made to ascertain their views as far as possible before any final pronouncement is made, for more than 80 per cent. of the tenants of Calcutta houses pay rents below Rs. 150 per month. Again if the Act is altered in such a way as to give the landlords a fair return for the money they have invested, there could be no reasonable objection on their part. All legislation of this description interferes with freedom of action but that is no ground for refusing to interfere when such interference is necessary. Important information may be obtained from the number of cases before the Rent Controller and the ejectment cases in various Courts where the defence of Rent Act has been pleaded.

(Concluded.)

M. N. K.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before CUMING, J. CIVIL REV. CASE NO. 1280 OF 1925. KALI GOPAL MAJUMDAR, Petitioner *v.* JENABALI BISWAS, Opposite Party. The 9th February 1926. Decree, alteration of, if can be made by the lower Court after its affirmance in appeal.

The Petitioner brought a suit against the Opposite Party for recovery of khas possession of land upon declaration of his title. The trial Court dismissed the suit which was decreed by the Appellate Court with mesne profits on 5th February 1923. A second appeal from this Appellate decree was summarily dismissed under Or. 41, r. 11, on 25th June 1923. The Petitioner having applied for execution of the decree for mesne profits in the trial Court in accordance with the terms of the decree of the lower Appellate Court, dated the 5th February 1923, which was affirmed by the High Court by its decree, dated the 25th June 1923, the Opposite Party applied for amendment of the decree of the lower Appellate Court who by order, dated 26th August 1925, amended the decree by adding the words—"So much of the judgment and decree as allowed the Plaintiff mesne profits be deleted and expunged."

Pursuant to this order the executing Court dismissed the Petitioner's application for execution of the decree for mesne profits.

The question is whether the lower Appellate Court had jurisdiction to amend and alter its decree after the same had been affirmed by the High Court in second appeal by its order of summary dismissal of the appeal under Or. 41, r. 11, dated the 25th June 1923:

Held—That a Court has no jurisdiction to alter or amend its own decree after the same has been affirmed in appeal as the former becomes merged in that of the Appellate Court and ceases to exist after the passing of the decree of the Appellate Court.

Lala Brij Narain v. Kunwar Tejbal, (1910) 32 A. 295 (P. C.): s. c. 11 C. L. J. 560; 14 C. W. N. 667; 12 Bom. L. R. 444; 20 M. L. J. 187, followed.

Babu Suresh Chandra Talukdar for the Petitioner.

No one appeared for the Opposite Party.
H. D. C. Rule made absolute with costs.

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REPORTS (See Index.)

Mr. S. N. Mullik's appointment as member of the Council of the Secretary of State for India.

We offer our congratulations to Mr. S. N. Mullik on his appointment as one of the Indian Members of the Council of the Secretary of State for India. He has had a very successful career as a lawyer but he is better known for his public services. He was one of the leading members of the Bengal Legislative Council. He was the first non-official Indian Chairman of the Calcutta Corporation and as such he was a conspicuous success. He commands the respect and confidence of all communities and his appointment will give general satisfaction.

Motion for removal of the President of the Bengal Legislative Council.

The unfortunate incidents that took place in the Bengal Legislative Council on Thursday the 18th of February last and the motion for the removal of the President from his office under sec. 72C (4) of the Government of India Act that was brought before the Council by the aggrieved members on Wednesday last will have a great moral effect both on the members concerned as also on the President. We are of opinion that the tabling of a motion for the removal of the President for his having suspended some members for the day was ill-advised. But we must say at the same time that the conduct of the President to start with was hardly any better. After having taken an adverse view, he was certainly justified in waiving notice with regard to Sir Abdul Rahim's amendment when the latter resigned

reasons for it. It was certainly unparliamentary on the part of Mr. Nurul Huque Chaudhury to characterise the President's ruling as "arbitrary." But if the President did not hear it or affected not to hear it, he acted no less contrary to the dignity of his position and office in pressing Mr. Nurul Huque to repeat it. His reluctance to repeat it should have been taken by the President as amounting to withdrawal, even if he had heard it. The President has always to make allowances for improper or indiscreet utterances by members made under momentary impulse or excitement. The usual practice in such cases is to warn or reprimand a member for such indiscretion and not to goad him into committing some more.

We are reminded in this connection of an incident that occurred in the first Legislative Assembly at Delhi when a member from the Punjab, for not being called upon to speak every time he stood up, was very rude to Sir Fredrick Whyte and was getting unruly and boisterous when called to order. But the President smiled at the member's offended vanity and besides administering a mild and dignified warning he took no more serious notice of his conduct. But it must be said to the credit of the Assembly that whenever the President took exception to any unparliamentary expression he was backed by the whole House and the member had to withdraw his remark amidst shouts of "withdraw" "withdraw" from the whole Assembly. We are of opinion that although the President of the Bengal Council might have acted contrary to the best traditions of the chair, when he asked Mr. Nurul Huque to withdraw his offensive remarks, the whole House including his colleagues should have asked him in one voice to withdraw the offending expression. If they had done that, the dignity of the House would have been fully

maintained. It must be remembered that the Speaker or the President is the custodian of the honour and dignity of the whole House and to insult him is to insult the whole House.

As we have said, if Mr. Nurul Huque acted indiscreetly, the President did no less. But it is the duty of the members of the House on such occasions to maintain the dignity of the House. It is possible later on for the members to question the errors of commission and omission of the President in a decorous way. The ideal of a President, like that of the Speaker of the House of Commons, should always be to discard all bias and prejudice; if he is in error he should frankly admit it in words, conduct or by a reversal of his ruling before the whole House. But members who instead of showing patience and adopting the more decorous course joined the erring member in crying "shame" on the Chair and called him "childish" or "insane," did not surely maintain the honour or dignity of the House. Under such circumstances, the President would be quite justified in asking such offending members to withdraw. This is what the Speaker would do in the House of Commons when a number of members behaved in the way they did here. For the latter then to turn round and turn up to move a resolution for the removal of the President from his office was a step which could receive no sympathy or support from anyone familiar with parliamentary practice and procedure. We are, however, not sorry that the unpleasant issues involved in this unfortunate affair have been fought out on the floor of the Council Chamber. It will surely leave the present and the future President of the Council as also its members wiser men and would also prove helpful in conducting the Council proceedings on more parliamentary lines.

It was said in the course of the above debate that the President should not have suspended a member who had cried shame on him and left the House. Sir Hugh Stephenson's reply in this connection raised a laughter in the Council. We may cite in this connection a ruling of Sir Frederick Whyte which goes further and is very instructive. Capt. Sassoon after

having delivered a speech, in the course of the Salt Tax debate, in which he bitterly attacked Sir Basil Blackett, left the Assembly Chamber. When Sir Basil got up to reply, the President looked round for Capt. Sassoon but he was absent. Later on, on Capt. Sassoon's return, Sir Frederick Whyte observed that it was very improper on the part of the member, after having criticised the Finance Member and his policy severely and even indulged in some personal remarks, to have left the House and remained absent when the member so attacked got up to reply and addressed the House. This, he said, was a discourtesy to the House and that he would have taken serious notice of his conduct but for the fact that he was a first offender and as such he was prepared to pardon him. Capt. Sassoon got up immediately and apologised to the Chair (see Proceedings of the Assembly, 19th March 1923 at p. 3717). Parliamentary Code after all is not so very different from the code of honour that prevails amongst gentlemen.

Misconception of English Journalists with regard to the Native States in India.

Our London contemporary of the *Law Journal* referring to the rumour that Sir John Simon has been retained for defending H. H. the Maharaja of Indore narrates a very interesting incident with regard to Sergeant Ballantine, who came out about half a century ago to defend the Gaekwar of Baroda. Ballantine received a fee of ten thousand guineas with his brief before starting but gambled it all away on his journey through France and his journey out to India was delayed as he had to borrow money to reach India. In the same article our contemporary makes some curious blunders in giving the names and status of the Native States. It says that besides Gaekwar, the other Maharatta Sovereigns are "Peshwa," "Holkar," and "Sindhia." In the next line our contemporary suggests that there are other minor Maharatta States and "Indore" is one of them. We may state for our contemporary's information that the State of "Indore" and "Holkar" is one and the same, the former being the geographical designation of the State and "Holkar" the family name of the ruler. Further that the historical house of the "Peshwas" is now quite extinct.

Sec. 145 (2) of the Railways Act, scope and effect of.

The judgment of the Patna High Court in *Bengal Nagpur Railway Coy., Ltd. v. Sheikh Makbul*, reported in this issue of our Patna Supplement, deals with the scope and effect of sec. 145, sub-sec. (2) of the Indian Railways Act. Sec. 495 of the Code of Criminal Procedure lays down the general law as to the conduct of prosecutions in criminal cases and no person other than the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other officers generally or specially empowered by the Local Government in this behalf shall be entitled to conduct a prosecution without the permission of the trying Magistrate. Sub-sec. (2), sec. 145 of the Railways Act lays down that a person authorised by a manager or agent to conduct prosecutions on behalf of a Railway administration shall notwithstanding anything in sec. 495 be entitled to conduct such prosecutions without the permission of the Magistrate.

In the case in question there was a collision at the southern level crossing of the Cuttack Railway Station on the Bengal Nagpur Railway between the Madras Mail and a motor lorry driven by the accused which resulted in the death of two and severe injuries to one or more passengers of the motor lorry. Eventually the police sent up the accused Sheikh Makbul, the driver of the lorry, and the trial began in the Court of a Deputy Magistrate of Cuttack. The railway administration deputed a vakil from Howrah to conduct the prosecution. The Public Prosecutor conducted the prosecution and under his direction the representative of the railway took some part in examining witnesses in the absence of the Public Prosecutor. Exception was taken by the accused to the participation of the railway vakil on the ground of unfairness in his method. The Magistrate, however, framed a charge under sec. 304A against the accused and called upon him to cross-examine the witnesses for the prosecution. The accused thereupon moved the High Court and in ordering a transfer of the case to Balasore the High Court observed that the conduct of the prosecution should be in the hands of the Public Prosecutor. As appears from the judgment, when the trial began at Balasore the vakil for the railway administration presented a formal

authorisation under sec. 145 (2) of the Railways Act from the Agent of the Railway to conduct the prosecution but the Court refused to entertain his prayer to take the lead in view of the order of the High Court. The Public Prosecutor opposed a commitment to the Sessions and ultimately the Magistrate framed a charge under sec. 304A for trial in his own Court. He also declined to accede to a prayer on behalf of the railway administration to frame an additional charge under sec. 124 of the Railways Act. The High Court was moved by the Railway Company and amongst others it was contended that the trying Magistrate acted illegally in withholding permission to conduct the prosecution from the vakil appointed under sec. 145 (2) of the Railways Act.

Macpherson, J., before whom the matter was heard did not definitely decide this point, as in his opinion it did not arise in the present case in view of the order of the High Court on the application for transfer made by the accused, but his Lordship expressed himself as follows:—"I am unable to accept the view that there is no force in the argument advanced by the learned Government Advocate that sec. 145 (2) of the Railways Act contemplated mainly, if not exclusively, prosecution for offences under that enactment, that is to say, private prosecutions undertaken by the railway administration in which the Public Prosecutor does not appear as distinguished from public prosecution undertaken or taken over by the state and in particular prosecutions such as the present under the Indian Penal Code."

The point is not free from difficulty but we think this is the proper view to take. The Railways Act is not the law of the land for offences generally but it creates special offences and lays down provisions relating thereto. It is nowhere laid down that the general law of the land contained in the Indian Penal Code is to be kept in abeyance in cases which may involve both a minor offence created under the special statute and a graver offence under the Penal Code. It follows therefore that in such cases the ordinary procedure regulating the conduct of prosecutions remains unaffected by sec. 145 (2) of the Railways Act which must be limited to prosecutions under that Act.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Hilary sittings of the Judicial Committee commenced on Monday, January 18th, 1926. The LORD CHANCELLOR, LORD DUNEDIN and LORD PARMOOR heard the first appeal that has come to the Privy Council from Palestine.

In the Board room VISCOUNT FINLAY, LORD PHILLIMORE, LORD BLANESBURGH, SIR JOHN EDGE and LORD SALVESEN re-heard the appeal which was argued *ex parte* before the Judicial Committee about a year ago. The Respondent was not then represented owing to the default of his agent and leave was given for the appeal to be re-argued. *Secretary of State v. Raja Jyoti Prasad Singh Deo*. The appeal arose out of an action brought by the Raja of Pachete for a declaration of his right to certain villages in the Asansol District. These villages had been held in *digwari* tenure and the *digwars* had granted leases to the New Birbhum Coal Co. and the Bengal Iron Co. The companies had worked the minerals on the premises and injunctions and damages were sought against them. The Defendants contended that the lands in suit had never belonged to the Raja, that they were not included in his lands at the Permanent Settlement and that in any event no minerals passed to the zemindars at the time of the Permanent Settlement.

Messrs. Dunne, K. C. and Kenworthy Brown for the Secretary of State.

Sir G. Lowndes, K. C., Messrs. E. B. Raikes and Douglas McNair for the Companies.

Messrs. Upjohn, K. C., DeGruyther, K. C. and Parikh for the Raja of Pachete.

The appeal is now (January 21st) part-heard.

Judgment was delivered on January 18th in *Krishnam Chari v. Secretary of State* (Madras) and the appeal dismissed.

G. D. M.

Review.

SNELL'S PRINCIPLES OF EQUITY. NINETEENTH EDITION. By H. Gibson Rivington, M.A. and A. Clifford Fountaine. London: Sweet and Maxwell, Limited. Calcutta and Madras: R. Cambray & Co.

Snell's Principles of Equity was the standard treatise on equity for students a quarter of a century ago. Law schools and colleges now favour other text-books, chiefly because the latter are specially designed for students, whilst Snell's Equity is intended to serve the requirements of students and practitioners at the same time. This means that the contents of Snell's book are fuller than those of the general run of students' text-books. Maitland's masterly lectures, indispensable as they have made themselves to students, are thus more in the nature of a running commentary on the law of equity than a self-contained text-book and are undoubtedly better appreciated and understood by those who have first wrestled with Snell's compact statement of the law than by those who have not. We are distinctly of opinion that Snell's Equity has not outrun its usefulness; far from it. This new edition will be greatly appreciated by those who were familiar with its predecessors in their younger days and is strongly recommended to the students and practitioners of the present generation who desire acquaintance with an up-to-date treatise on the English law of equity which will explain to them not merely the basic principles of the law but also the details thereof in a compact form, and will prove efficient for purposes of ready reference because of the excellent arrangement and clear enunciation of a great deal of detailed information not to be found in mere students' text-books. The present editors have performed their work so well that the book will undoubtedly hold its own amongst its competitors as well as it did in the previous editions.

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Bicentenary of Howard, the philanthropist and prison-reformer.

It is hard to draw a line between politics proper and social service. Politics of the present day is chiefly concerned with improving the lot of the citizens, removing their wants and sufferings and defending them from aggression or violence of individuals or communities from within the state or outside. When we exclude the foreign relationship and country's defence, the rest of the functions of the state is chiefly confined to social work. Even the administration of law and justice falls within this category. The angle of vision with regard to the administration of criminal law in which a spirit of revenge and retaliation was the dominating element at one time has materially changed in recent times. Persons charged with crime are no longer regarded as wild animals fit only to be hunted down, tortured and kept in confinement under conditions which were a disgrace to civilization. When politicians believed that their only function in life was to exercise the authority and the power of the state, it is the philanthropists and idealists who took upon themselves constructive social work and devoted their lives to the cause of the humanity. As Wilberforce abolished slavery from this world so Howard, two centuries ago, made it a mission of his life to do away with the barbarous treatment of convicts in prison and prepared public opinion for the humane treatment of criminals. It is only proper that the bicentenary of such a man should be fittingly celebrated in the churches and public places throughout England.

It is with pleasure therefore that we publish the following extract from the *Law Times*, which will give our readers an idea of the state of the prison-life in England at the time of Howard.

The bicentenary of the birth of John Howard, the prison reformer, was fittingly celebrated last week by a memorial service in St. Paul's Cathedral and very many commemorations throughout the country of one of the greatest benefactors of mankind. It should, however, be remembered that the task that Howard and his generation of reformers set before them was chiefly to remedy great positive abuses. The still more magnificent conception of the reformation of criminals, which has been so successfully developed, must be associated with a band of reformers, among whom is numbered a great ornament of the Bar, the Judicial Bench, and Literature—for the Commentaries are regarded as almost perfect English—Sir William Blackstone, who was a pioneer in the efforts for the reclamation of the criminal. Mr. Lecky lays stress on this all-but forgotten episode in Blackstone's career. "The success," he writes, "with which the reformation of criminals was pursued in Holland gave rise to an Act (19 Geo. 3 c 74) for the erection of penitentiaries in England which was carried in 1779, chiefly by the influence of Blackstone. There was, however, much delay in carrying it out, although Pitt clearly saw and stated the importance of discriminating between the different kinds and degrees of criminal character, and averting the contagion of vice produced by the existing prison system. It was not till some years after the death of Howard that English philanthropy made the reclamation of criminals one of its great objects." The English Judiciary was, however, far from indifferent to the state of prisons and the sufferings of the prisoners. Indeed, many judges were killed by jail-fever when attending assizes. In 1750 the disease raged to such an extent at Newgate that, at the Old Bailey Assizes, two judges were its victims. From that time sweet-smelling herbs were always placed in the prisoners' deck to counteract the contagion. When Ozlethorpe, in 1759, three years after the birth of Howard, succeeded in obtaining a parliamentary inquiry into the condition of the Fleet and Marshalsea, it was stated in evidence that, when Lord King was Chief Justice of the Common Pleas, an office

which he held from 1714 till 1725, a complaint had been preferred to him from prisoners in the Fleet that they were immured in close and unwholesome confinement within the prison walls. The warden urged, in answer to this, that from the insecurity of the prison there would be continual danger of the prisoners escaping if they were allowed to exercise. "Then," said the Chief Justice, "you may raise the walls higher, but there shall be no prison within a prison."

How Criminals are reclaimed in the London Police Courts.

We have noticed in these columns before what progress has been made in America and England for the reclamation of criminals. We have also said that the state can do little in this direction unless the public are prepared to co-operate with it in such constructive work. The provision of the English First Offenders' Act was introduced in the Code of Criminal Procedure of 1898 by Sir M. D. Chalmers, the then Law Member of the Viceroy's Council, in pursuance of suggestions made in these columns. But no organised effort has been made, so far, in this country either by the public or the magistracy for the reclamation of persons, who, if not cared for, may degenerate into criminals. The following extract from the *Law Journal* will give us an idea how the system is worked in the London Police Courts.

Those members of the legal profession who have occasion, from time to time, to visit Courts of Summary Jurisdiction, are well aware of the important part played in the administration of justice in these Courts by the Police Court Missionary. At any London Police Court, on any morning, the complete confidence placed in these officers by the magistrate, and the valuable nature of the services they render both to the State and to the individual, may be observed. In case after case prisoners come up charged, let us say, with offences against the social order, and, with hardly a word said in public which can add to the sense of shame of the accused, he or she is, after a consultation between the magistrate and the missionary, bound over, or discharged on probation. The prisoner leaves the dock, the missionary accompanies him, and the result, happily, is that that prisoner is rarely seen in the dock again. We are reminded, by an article in Tuesday's *Times*, that this method, the beneficence of which is now universally recognised, of dealing with prisoners likely to be influenced for good by wise and kindly advice and assistance, owes its inception to the appointment, fifty years ago, by the Church of England Temperance Society, of a missionary to attend the sittings of the Southwark Police Court. For thirty years thereafter the

Police Court missionary was not officially recognised, though in practice offenders released under the First Offenders Act of 1887 were advised and assisted by the missionary with the full knowledge and approval of the magistrate, who would not indeed, in many cases, have felt justified in binding an offender over unless he had known that the good offices of the missionary would be employed to assist the reformation of the prisoner. Under the Probation of Offenders Act of 1907 the missionary, who was in the vast majority of cases the probation officer appointed thereunder, found his duties not only officially recognised, but largely increased, and the Criminal Justice Act of last year set the final seal of legislative approval on the efforts of missionaries and probation officers, by providing for the establishment of probation areas throughout the country, for the appointment of probation officers for every such area, and for the payment to such officers of salaries and superannuation allowances. "Great oaks from little acorns grow," and the wisdom and foresight of those who, half a century ago, appointed the first Police Court missionary, has resulted in the establishment, over the whole country, of a system which is, and will undoubtedly continue to be, of altogether incalculable benefit to the community.

Use of illustration in a statute.

The Indian Penal Code may indeed be characterised as a remarkable piece of legislation. It has triumphantly stood the test of experience for over sixty years and though occasionally supplemented and sometimes even amended as regards a few isolated matters of detail it still remains substantially the same as it was first enacted. The chief excellence of the Code is in its formal aspect. The several offences are attempted to be carefully and exhaustively defined and though the attempt has not in all cases been equally successful and the definition of some of the offences are capable of great improvement, yet in the case of most offences they appear to be complete and at the same time clear and unambiguous. This was an extremely difficult task for several reasons, the chief of which was that the authors of the Code had hardly any model which they could follow or even start with.

To facilitate the understanding of the definitions the authors of the Code adopted the novel practice of illustrating most of them by a number of concrete cases. These illustrations not being law are evidently out of place in a Code and their use, though possibly likely

to facilitate the understanding of some provisions of the Code, not seldom adds to the difficulty of interpreting and applying other provisions of it.

The late Sir Lawrence Peel after speaking of their use as "the first and most prominent defect in the Code" explained that they would not, taken as a whole, assist the interpreters of the law; and "that many are useless, offering light in light day, that some darken whilst they attempt to give light; that some do not throw the light where the darkness prevails; that some are *ignes fatui* to mislead; that some are trivial and bordering even on the ludicrous and a very few are open to more serious objections." Sir Mordaunt Wells from his place in the Legislative Council observed that he was strongly opposed to that sort of legislation and decidedly of opinion that the system of introducing legal illustrations was not only a most objectionable but an entirely novel one and that the illustrations would throw doubt upon the text. The Select Committee in 1856 had doubts as to retaining the illustrations and decided to retain them only because they came to the conclusion that "the illustrations will tend greatly to elucidate the definitions and to render the Code more intelligible." Sir Barnes Peacock as Vice-President of the Council attempted to justify this decision but the attempt was a mere apology for confessed weakness and he expressly admitted that their use was wrong on principle and tolerated only as a necessary evil. He said: "The Select Committee were most anxious to avoid introducing too many illustrations and had in several cases moulded and remoulded a section with the view of making it as clear as possible. The Committee had introduced illustrations only in those cases where it was thought that difficulty might still arise." He did not add why the sections could not be worded so as to provide against even foreseen difficulties and if that were impossible whether they could not be avoided by the addition of further suitable explanations.

Sir Bartle Frere who alone supported Sir Barnes Peacock observed that perhaps Sir Mordaunt Wells "would not object to them if instead of calling them illustrations they were to be called extracts from case-books for

they were in fact nothing more than cases really decided with the additional advantage that they were cases so framed as exactly to fit the point to be illustrated." But he did not add why extracts from case-books should be incorporated in the Code itself by the legislature instead of being left to commentators of the Code. Surely a formal and an authoritative Act of the legislature is not to have incorporated into it by the legislature everything that will go to make the Act more intelligible as, if so, even the speeches of the Hon'ble Members about an Act and the opinions of persons consulted in connection with it or at least select extracts from them ought to be put in the Act as likely to make the Act more intelligible.

While the Code was under consideration the Royal Commissioners on the Criminal Law of England condemned the practice and said: "There is no doubt that if an example falls clearly within the terms of a definition it is useless as an illustration because the definition is explicit without it; and if on the other hand, the example borders upon the verge of the definition or does not fall clearly within its terms it either renders the rule doubtful or the illustration itself constitutes the law. Besides an illustration cannot be of any use as a law except to remove some doubt which would otherwise occur as to the proper application of the law to the case proposed or to that and others of a similar kind. But this very necessity would prove the law to be imperfect and show the framer of the law to have been aware of an imperfection which ought to have been remedied by using words which either plainly excluded or included the proposed predicament. It must indeed argue gross negligence not to use words which should clearly comprehend a case not only within the knowledge of the law-maker but even actually suggested by him."

The considerations thus urged appear to be conclusive but so prone is the human mind to save the trouble involved in proper drafting, perfection in which is perhaps an impossibility, that the use of illustrations has since received a considerable extension in Indian Acts and has not remained absolutely unknown to the English statute law.

THE DEFENCE OF CONTRIBUTORY NEGLIGENCE.

In an action for damages, if the Defendant can establish that the injury complained of was directly brought about by the Plaintiff's negligence, the suit fails and the plea of the Defendant is known as the defence of contributory negligence. The rule sounds simple enough and in fact it has been pronounced by the Judicial Committee of the Privy Council in the case of *British Columbia Railway Co. v. Loach*, (1916) A. C. 719 at p. 727, that the whole law of negligence in accident cases is now very well-settled and beyond the difficulty of explaining it to a jury in terms of the decided cases, its application is plain enough. On the other hand, Sir John Salmond observes at p. 45 in his *Law of Torts*, 6th edition (1924), "In a matter such as this, in which juries have to be directed as to the law, it is much to be regretted that the law should be so obscure and difficult." Again, the same learned author says in his preface to the aforesaid treatise at p. viii, "Another fundamental question which is still unsettled is that of the true nature of the rule as to contributory negligence. No more baffling and elusive problem exists in the law of torts. . . . An endeavour to solve the difficulties inherent in this problem leads to the conclusion that the common law rule of contributory negligence is essentially unsound." In view of such weighty opinions it cannot be said that an attempt to ascertain upon what legal principle the doctrine of contributory negligence is based is an effort *ex-post facto* to explain and account for a result already reached apparently unconsciously. The propriety of the suggestion that the defence of contributory negligence is a pure anomaly, justified by its utility under the peculiar facts under which it arises, is worth investigation. The chief object of this essay is to determine the existence of any fundamental principle of legal thought to which the doctrine under discussion can be ascribed. It must be confessed at the outset that eminent Judges in their attempt to locate the immediate and effective cause of the accident in hand have used so many various significant epithets that one is forced to confer upon all of them put together the term of legal labyrinth.

"Efficient cause or effective cause, real cause, proximate cause, direct cause, decisive cause, immediate cause, *causa causans*, *causa*

sine quâ non, occasional cause, remote cause, contributory cause, inducing cause," are some of the expressions current in forensic usages. Certain text-writers have devoted their attention to the discussion of the comparative significance and relative comprehension of these nomenclatures, but it may be safely submitted that the discussion is fruitless and that none of these expressions furnishes a true guide to the problems involving the question of contributory negligence. These expressions are useful no doubt in conjunction with the particular facts of those cases wherein they have been used but they can hardly be said to be illuminative or suggestive of any legal principle when they stand by themselves. They are really no true guide and cannot be invoked universally.

Now, let us proceed to deal with and examine the theories that are generally advanced as the basis of the doctrine in hand. The oft-quoted theory is known as the theory of Proximity of Legal Causation. That is, the Plaintiff's negligence in order to be contributory must be a proximate cause of the damage concurrent in effect with the proximate cause for which the Defendant is responsible. The Plaintiff may have been negligent and careless at an earlier stage and his negligence may have indirectly contributed to the happening of the accident, but if the Defendant's act or omission be the proximate or direct cause of misfortune, the Plaintiff is entitled to redress. The chain of causes may have been intervened by the Plaintiff's default in the initial stage or at an earlier stage but if the Defendant's negligence can be spotted to be the proximate cause of the accident or if it be clear that the accident would not have been brought about but for the recklessness of the Defendant, he becomes liable for the accident.

The conception of legal proximity of causation, like all other juristic conceptions, has undergone a series of evolution, and it is an undertaking of some delicacy and at least temerity for the present writer to attempt to present its history in a lucid form. But it does not need any extended discussion to say that the primitive conception was founded in the intention of the wrong-doer, and the question upon which the determination of the legal liability turned was whether the Defendant intended or contemplated to bring about the catastrophe. In those days, the Defendant was absolved if he could establish that he did

not intend or at any rate foresee the consequences of his default (*cf.* 2 Pollock and Maitland, History of the Common Law, 469-471). But with the advance of civilisation, there was an increase in the conception of right and accordingly the scope of liability for the infringement of the same widened. Society began to demand protection against such consequences as can be foreseen to follow from a tortious act by a man of average foresight independently of the fact that the author of the tortious act did not intend or contemplate to bring about these consequences. This was at once met by the Common Law at perennial youth and it thus came to be said that every man must be presumed to intend the natural and probable consequences of his act. The Defendant was fixed with liability if the consequences were such that would naturally and probably ensue from the wrong committed by him. The test to be applied was the well-known course of human events and natural phenomena. Therefore the conception of cause and effect was guided by the standard whether a particular consequence was likely to follow from a particular wrong in accordance with the common experience of human beings of actual affairs.

The classical case of *Davies v. Manu*, 10 M. & W. 546, better known as the donkey case is worth quotation at this stage. The Plaintiff chained the forefeet of his ass and turned it into a thoroughfare. The Defendants' wagon with a team of horses coming down a slight descent at what a witness termed "a smartish pace" ran against the ass, knocked it down, inflicting injuries from which it died soon. In the action for damages, the question was whether the Defendant was liable for damages. Surely, the Plaintiff was not justified in letting his donkey graze on the high-road and as a man of average foresight, he ought to have foreseen the untoward consequences and therefore he ought to have been held guilty of contributory negligence. But Baron Parke says in the case referred to: "Although the ass may have been wrongfully there, still the Defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." Accordingly this case can be explained on

the theory of the Last Clear Chance. The Defendant could have saved the donkey by taking care and driving the ponies at a reasonable speed and as breach of duty on his part was the proximate cause of the donkey's death, he was held liable for damages.

Another case of equally commanding importance is *Butterfield v. Forrester*, (1809) 11 East. 60, wherein the Defendant obstructed a street by placing a pole across it and the Plaintiff rode along the street in the evening, when it was getting dusk but while still there was sufficient light to notice the obstruction, and coming into collision with the pole, he was thrown from his horse. It was held that he had no cause of action as he could, notwithstanding the Defendant's negligence, have avoided the accident by the use of due care. Lord Ellenborough says, "One person, being in fault, will not dispense with another's using ordinary care for himself. Two things must concur to support the action, an obstruction in the road by the fault of the Defendant and no want of ordinary care to avoid it on the part of the Plaintiff."

It will be obvious from this case that it is not only the legal proximity of causation which will determine the centre of legal liability. The determination of proximate causation is only a step towards the solution. In addition to the Defendant's default being the proximate cause of the misfortune, it is obligatory on the Plaintiff to establish that he could not have averted the consequences of the Defendant's misfeasance by use of ordinary care and vigilance. The Plaintiff fails, if the Defendant can show that notwithstanding his default, the Plaintiff could have warded off the calamity if he had risen to the occasion. These cases are therefore an illustration of the limitation which has been introduced into the theory under discussion. The proximity of legal causation by itself is not sufficient to explain the *ratio decidendi* of these cases but has to be supplemented by the theory of Last Clear Chance.

Further the theory has no application to a case of simultaneous misconducts, *e.g.*, two motors running in opposite directions without light in a dark night dash against each other. In a case like this, the collision is the result of the combined and simultaneous negligence of the Plaintiff and the Defendant. It has been held in a series of cases of this type that

the parties must remain in *status quo*. Neither can recover against the other.

It is patent from what has been said above that the first theory fails to account for the plea of contributory negligence in all its phases and therefore lacks the essence of fundamental principle underlying any juristic conception.

The second legal principle generally put forward as the basis of the doctrine under discussion is the rule which declines contribution or indemnity between joint tort-feasors. But this theory can be dismissed without any elaborate discussion. The rule of law declining contribution between joint tort-feasors is quite foreign to the plea of contributory negligence.

Now, the third theory upon which the doctrine of contributory negligence is sought to be based is *volenti non fit injuria*, i.e., one who voluntarily encounters a known risk can blame no one but himself for the ensuing harm. True it is that in earlier cases there was little, if any, attempt made to distinguish between voluntary assumption of risk and contributory negligence. But of late years the distinction between the two has been maintained and it may be safely submitted that a precise boundary line has been marked between the two closely adjacent and almost identical fields which they occupy. A few points of distinction between the two are noted below.

In the case of voluntary assumption of risk, there is not the faintest idea of even a *prima facie* liability. If the Plaintiff has no legal right to associate with the Defendant, nevertheless he comes upon his premises and uses his assets, the Defendant has no duty to warn him and is not liable at all if the Plaintiff suffers any harm. It has been held in some cases that if the danger be not apparent and obvious, the only obligation legally cast on the Defendant is that he ought to notify to the Plaintiff the danger which he was courting. However, the subject is a bit involved and it is proposed to deal with it in a separate essay under the heading of "Owner's duty to trespassers." On the other hand, contributory negligence is an affirmative defence and the Defendant has to substantiate it in order to dislodge the *prima facie* liability proved by the Plaintiff.

Secondly, in the case of *volenti non fit injuria*, the Plaintiff must voluntarily and knowingly encounter the risk. There can be no volition

if there is no knowledge of the risk. No one can be said to voluntarily run a risk if he is unaware of the existence of the risk. It may be that the risk may not be known in the initial stage but if after the risk has been discovered or become known and if the Plaintiff persists in courting the same, he is said to run the risk voluntarily. On the other hand, in the case of contributory negligence, there is no deliberation. It is the failure on the part of the Plaintiff to be alert and vigilant and to conform to the standard of self-protective measures in this age of civilisation. For instance, to run a car in a dark night without light is not the result of a feeling of deliberation to court risks but may be imputed to a feeling of carelessness to adopt the protective measures against dangers. It is an essential requisite of contributory negligence that the Plaintiff is guilty of having committed something which he, as a man of average prudence and foresight, ought not to have done, or he is guilty of having omitted to do something which ought to have been done.

It is clear therefore that this theory also like its two predecessors does not account for the defence of contributory negligence. The doctrine under discussion throws on the individual the pecuniary burden of protecting his own interests. The Courts are the last resort of him who not merely does not, but cannot, protect himself. This is the peculiar characteristic of the English common law and seems to be the symbol of national independence and self-reliance. The common law expects every individual to conform to a particular standard in the domain of self-protection and intervenes when such a standard fails to prove effective. Similar is the principle underlying the maxim, "Caveat Emptor," as has been felicitously said by Lord Kenyon, "when common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence."

To conclude, it is apparent that the defence of contributory negligence cannot be attributed exclusively to the theory of legal proximity of causation, or the rule declining contribution or indemnity between joint tort-feasors, or the voluntary assumption of a known risk. One is forced to say, on examination of the case-law, that the doctrine is a distinct manifestation of the individualism of the English common law, and it is not feasible to advance any particular theory which will account for it in all its phases.

Sir John Salmond is right in his observation and it is a very fit subject for the legislature to deal with. Certainty of law is the element to inspire confidence and the sooner this phase of the law of torts is classified, the better it is in the interests of the administration of justice.

A. P. PANDEY, M.SC., LL. B.,
Vakil, High Court,
Allahabad.

Reviews.

CONQUEST OF TERRITORY AND SUBJECT RACES IN HISTORY AND INTERNATIONAL LAW. By Bama Prasanna Sen Gupta, M.A. Calcutta, 1925.

Art. XXII of the Covenants of the League of Nations which furnishes the text of the author's thesis says: "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the states formerly governing them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this covenant. The best method of giving practical effect to this principle is that the tutelage of such people should be entrusted to advanced nations who by reason of their resources, their experience, of their geographical position, can best undertake this responsibility and who are willing to accept it and that this tutelage should be exercised by them as mandatories on behalf of the League." The writer belongs to the school of optimists who believe that this creates a new Magna Carta for the weak, backward and undeveloped peoples of the world. And he finds justification for this belief in the fact that this notion is not a freak of accident—a hobby of the late President Wilson—but a necessary stage in the progress of humanistic ideas. He does not discover in the insistence by writers like Rudyard Kipling on the "White Man's Burden" the imperialist's creed of exploitation of coloured races and he points to two anticipatory instances, *viz.*, the placing respectively of Bosnia-Herzegovina and Egypt under Austro-Hungarian and British tutelage as instances of pre-War mandates of the nature expressly

recognised after the Great War in Art. XXII of the Covenants of the League of Nations. He delves into history, ancient, medieval and modern, to show that there has been a progressive amelioration of the lots of slaves, serfs and conquered people and that, however doubtful the motives in which these institutions originated, the original idea of exploitation has inevitably made room for responsibility. The main object of his thesis however is to demonstrate that the idea of trusteeship involved in the mandate on behalf of the League of Nations for territories transferred to the mandatories from the defeated belligerent nations, as expressed in the article, cannot be kept within the limits of the express language of the article and its extension to territories which have already been integral portions of governing nations as conquered countries, to India for instance, is a question of time only. The representation in the League given to Egypt and India is also according to him not an accident, and though it may at the present moment have very much the savour of a means to enable England to increase her voting strength in the League (the representation so far as India and Egypt are concerned being wholly unreal) and although he is himself under no illusions as to the unsatisfactory and dissatisfying manner in which the principles of the League Covenants are being worked in the mandated and other territories, he has the stubborn faith of youth in the increasing purpose which is bound in the long run to establish a Parliament of Nations and a Federation of the World, in which India will have her legitimate place. The author in fine believes with socialistic writers in the dynamics of history as some others pin their faith on the arrival of the Mahatma in putting to right the affairs of a disordered world. Meanwhile in Italy the first Socialistic Government has given place to a Fascistic autocracy of suppression and violence and the latter idea is catching on even in England, amongst other lands of freedom and self-determination, whilst all the while Soviet Russia broods over the dreams of old-world politicians like a grim nightmare. It is good to have faith in the dynamics of moral ideas, if they lead to just and reasoned efforts on the part of both the ruling and the ruled, and we congratulate the author on his interesting contribution to the rational consideration of the problem of the proper discharge of the respon-

sibility for the ruling towards the conquered races.

We have not been able in this review to do more than outline the leading ideas of the author. For his treatment of the historical matter, we must refer the reader to the book itself, which is not very long, is well got up and easy of perusal. The literature upon which he relies for his material is of the best. We cannot help noticing, however, that the proof-reading has been very inadequate. This defect should be removed in the next edition. The book deals with a new subject, and the thesis as presented stands in need of further elaboration for which fresh material must be constantly forthcoming, and the author we expect will not rest on his oars but continue the researches, for which in our estimation he has established his competence by this first contribution.

COMPANY LAW. By K. J. Rustomji, *Bar-
rister-at-Law.* Lahore Empire Law Publish-
ing Society. 1926.

A book on Company Law in a handy form had been a long-felt need and Mr. Rustomji's book comes in an opportune moment. The set-back given by the European war to the formation of companies in this country can only be of a temporary nature and the revival of trade and industry must inevitably lead to the formation of companies with limited liabilities for financing undertakings. Mr. Rustomji has given a practical turn to his book by dealing with the useful subjects of auditors and balance-sheets of companies. This would appeal to a wider public than mere lawyers. A growing knowledge of the Company Law is a desideratum in this country. Lawyers would appreciate the references in the margin to the sections of the English Company Law. In the next edition we hope will be added a table of English cases referred to in the book.

Notes of Cases

CALCUTTA HIGH COURT

Recent decisions not yet reported

The important cases to be fully reported hereafter :

CRIMINAL REVISIONAL JURISDICTION. Before
SUHRAWARDY AND MUKERJI, JJ. Cr.
REV. (Mis.) No. 94 of 1924. SUREN-
DRA NATH BISWAS, Accused, Peti-
tioner *v.* ABDUL HAMID BOHARA,
Opposite Party. The 7th November 1924.

*Criminal Procedure Code (Act V of 1898),
sec. 526—Transfer although bias really non-
existent in the mind of the trying Magistrate.*

This was a Rule granted on an application made by the accused.

Their LORDSHIPS delivered the following judgment in this case :—

We have read the explanation submitted by the learned Magistrate. We are perfectly satisfied that there is not the slightest bias in his mind against the Petitioner and we have not the least doubt in our mind that if the case is tried by the learned Magistrate it will be dealt with by him otherwise than fairly and impartially. But at the same time this is not the real issue which arises in the case. The question is whether the Petitioner before us can reasonably apprehend that he will not get a fair and impartial trial and also whether it is not expedient for the ends of justice that the case should be transferred. Having perused the explanation and considered the allegations made on behalf of the Petitioner and also having heard the vakils appearing on behalf of the Petitioner and the Crown, we think that on the whole it is desirable that the case should be dealt with by a fresh mind. We accordingly order that the case be tried by some Magistrate other than Mr. S. N. Mukherjee in whose file the case at present is.

In making this order we should like to make it clear that this order does not suggest any imputation of bias or prejudice in the mind of the learned Deputy Magistrate Mr. S. N. Mukherjee.

*Babus Suresh Chandra Taluqdar and
Radhika Ranjan Guha for the Petitioner.*

*Babu Satindra Nath Mukherji for the Oppo-
site Party.*

S. C. M.

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President's power of adjournment of the Assembly.

After some constitutional struggles it has become a settled practice in the House of Commons that the House itself is the supreme authority in the matter of adjournment of the House. There are statutory provisions for adjournment of the House on some particular days, hours and occasion such as the demise of the Sovereign or his Coronation. But as regards adjournment of the proceedings of the House, the Speaker is only the spokesman or the mouthpiece of the House. When he adjourns the House he does so at the tacit or express wishes of its members. It is only when the House gets boisterous, rowdy and unmanageable that the Speaker can adjourn the House of his own motion. Except on such occasions the authority of the House in the matter of adjournment is so supreme that the House has ignored on many occasions the request of the Crown for the adjournment of its sittings and asserted that the Crown may dissolve or prorogue the Parliament but cannot order its adjournment. Since 1814 the Crown has ceased making any request in this behalf.

Now let us see what are the powers of the President of the Assembly under the Government of India Act and the Rules thereunder. Under sec. 63D (3) it is provided that "any meeting of either Chamber of the Indian Legislature may be adjourned by the person presiding." So it is not only the President but also the Deputy President or any member of the panel of Chairman who may be presiding at the time who may adjourn the meeting. But the general power of the person presiding has to be

interpreted by reference to the other provisions of the Act and the Rules and Standing Orders framed thereunder. R. 17 (3) provides that here, as in the House of Commons, the President can "suspend the sitting for a time to be named by him" in case of grave disorder which implies that he cannot do it *sine die*. Under sec. 63D (2) and Standing Order 3 (1) the Governor-General is to appoint the place and time for the holding of the session of the Legislative Assembly. Under Standing Order 3 (3), after the commencement of the session the Assembly is to sit on such days as the President may from time to time direct having regard to the state of business of the Assembly. But this has got to be read with R. 6 under which the Governor-General is invested with the power of allotting the days to be set apart for Government business and the days for the disposal of non-official business, with reference to the amount of business to be so disposed of. It is further provided in this Rule that on the days allotted for Government business no other business is to be transacted except with the Governor-General's consent. In practice non-official business has been brought up in the Assembly from time to time on such days, but with the previous sanction of the Governor-General but the President has no power or discretion to order or take up such business without the previous sanction of the Governor-General. In the House of Commons the same practice is followed with regard to Government business in the interest of the carrying on of the general administration. So it is evident that President Patel, like the Speaker of the House of Commons, has no authority or discretion in the matter.

Further it must be remembered that on Monday the 8th of March last when some of the members of the Assembly walked out, that day and the following days of the week had been allotted under r. 47 by the Governor-General for the discussion of the Demands of the

Governor-General in Council for Budget grants. We fail to find any provision in the Government of India Act or the Rules and Standing Orders under which President Patel could direct or order any other business, contentious or non-contentious, to be brought before the Assembly during this period. R. 47 (3) provides that on the last day of the days so allotted at 5 P.M., "the President shall forthwith put every question necessary to dispose of all the outstanding matters in connection with the demands for grant." So here as in the House of Commons the guillotine is applied by the President at the specified day and hour for disposing of the remaining demands.

The absence of some members is no bar to the transaction of business in the Assembly. R. 13 provides for the quorum and it is not uncommon that when the proceedings are dull and uninteresting, the legislature goes on transacting business with a bare quorum. Even if the absent members resigned, the business transacted during such vacancies are quite regular and lawful under sec. 63D (5).

We may mention in this connection that in previous years during the discussion of the demand for grants sometimes the sittings of the Assembly used to be continued after night-fall and when members got tired they used to get up and request Sir Frederick Whyte to adjourn the proceedings for the day. On such occasions Sir Frederick invariably used to put to the House a motion for adjournment and on its being passed he used to adjourn the sittings. He was an experienced Parliamentarian and was keen on establishing the same conventions here as prevailed in the House of Commons. Till his recent lapse, President Patel has endeavoured to follow the same traditions. We were, therefore, not a little surprised at President Patel's pronouncement that he proposed to adjourn the House *sine die* if the Government did not accede to his request. He did not see that this would have amounted to a prorogation of the House, in respect of which power is vested under sec. 63D (2) in the Governor-General as representing the Crown. This is also the law and practice in the House of Commons. It may be that when the Assembly is not actually prorogued and there is interruption in the business of the Assembly owing to

some legislative measure or other important matter having been referred to a committee and the date on which the report may be received being uncertain, the sittings of the House may be suspended or adjourned *sine die*. But this is so done with a view to facilitate the transaction of business and not for the purpose of bringing the legislative machinery to a standstill. Sec. 63D provides that even after dissolution the Governor-General is to arrange for the Assembly to meet within six months and even with the sanction of the Secretary of State he cannot extend the time of the next meeting beyond nine months. It follows, therefore, the President cannot indefinitely postpone the sittings of the House.

Sec. 360 of the Code of Criminal Procedure.

Sec. 360 of the Code of Criminal Procedure has of late come into great prominence and the series of cases in which the section has been interpreted by the Calcutta High Court show that the rule laid down by the legislature is seldom followed in the lower Courts. Quite recently in *Kuppu Mondal*, 49 Mad. 71, the Madras High Court has accepted the view of the law taken by the Calcutta High Court. In the case in question the Magistrate concerned described the practice prevailing in his Court as follows:—"In cases where the depositions are long and would take a considerable time of the Court if they were then and there read over and interpreted to the witnesses, what is done is to keep all the witnesses aside as soon as each of them is examined so as not to give them an opportunity to mingle with those that are not examined and the place so allotted is within the view of the accused and their pleader. The depositions of these witnesses are read over and interpreted to them after the work in connection with the case for the day is over." This we believe is the practice followed in many Courts and is resorted to as a matter of convenience but in view of the recent rulings on the subject it is wholly illegal. Strict compliance with the section no doubt involves much time and inconvenience but the law must be strictly followed and cannot be given the go-by for the sake of convenience. The reasons given by Devadoss, J., for condemning the practice are very cogent. His Lordship observes: "By having recourse to this practice the witness whose evidence was taken, say at 11 o'clock or who closed his evidence at

12 o'clock and whose evidence is being read over to him at 5 o'clock after the day's work is over, might be able to improve upon his evidence and try to get his evidence altered. * It is not also fair to an honest witness not to have his deposition read over soon after he made it, for, if the Magistrate has incorrectly recorded the deposition and if it is read over to the witness some hours after the question would arise whether the witness is correct in his statement that he did not make such a statement but some other statement and whether the correction should be accepted or not. It is, I think, fair both to the witness as well as to the Magistrate who takes down the deposition as well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid any conflict between the recollection of the accused's pleader, the recollection of the prosecuting counsel and the recollection of the Court as well as the recollection of the witness. Seeing there are four different persons to be considered in this connection, I think the provision of sec. 360 (1) is not only a salutary provision but is a provision intended for furtherance of justice. That being so, the procedure adopted by the Magistrate is an illegal procedure." Sec. 360 will in the near future be construed by the Judicial Committee in connection with an appeal which has been admitted and their Lordships' judgment will set the matter at rest.

LANDOWNERS' DUTY TOWARDS TRESPASSERS.

(By A. P. PANDEY, M.A., LL.B.)

"A trespasses upon B's premises and sustains injuries. Is B liable to A for damages?"

Obviously some assumptions will have to be introduced before the question will admit of a definite and precise answer; but before launching upon them let us inquire if there is any rule defining the scope and the nature of the obligation under which the landowner has to conduct himself.

It does not need any extended discussion to say that the rule of reasonable conduct and ordinary care is a wholesome one. It conduces to the stability and contributes to the happiness of the society. Every owner of his premises is expected to behave with reasonable, rational care and ordinary precaution towards others. True it is, that the adjectives "reasonable" and "ordinary" do not admit of any

specific and concise formulation and consequently the rule, enunciated, lacks the essential requisite of clear statement and comprehension—an essential requisite for a place of permanence in jurisprudence. None-the-less, the expressions have got the sanctity of long usage and serve the purpose of conveying a well-defined and settled notion. The test to be applied is the known course of human events and natural phenomena. What a man of average common sense and foresight is likely to do under the circumstances of a particular case is taken to be the standard of reasonable care and precaution. The law does not concern itself with one's conscience. The law works only within the sphere of the senses. If external phenomena and the manifest acts and omissions are such as it requires, it is wholly indifferent to the internal phenomena of conscience. (Holmes' Common Law, p. 110.)

Now, in the question formulated above, assume that B is unaware of the presence of A. Is B then liable to respond in damages? As a matter of logic, the answer seems to be "no;" but to divine the rationale of the answer is a task of some delicacy. A layman would say and perhaps correctly, that reasonable conduct and ordinary precaution are to be exercised in connection with a known individual and if the individual is unknown, there is no occasion for the display of any care; and therefore the case is an exception to the rule of reasonable conduct and ordinary caution. But to a lawyer, the case seems to be governed by the rule. Conduct and care are not independent of circumstances. It is circumstances which dictate one's conduct. As has been truly observed by Burke: "The situation of a man is the preceptor of his duty." A man has to shape his conduct according to the circumstances in which he is placed. Caution has to be exercised against apprehended dangers. If there is no apprehension of any danger, no care has to be exercised. If B is unaware of A's presence, he is not called upon to exercise any care or precaution. His attitude of carelessness is one which will commend itself to a man of average common sense and prudence. In other terms, the fact that B is unaware of A's presence reduces the rule of reasonable conduct and ordinary care to one of neutral carelessness and unintentional negligence. It cannot be urged that B should always look ahead and act with reasonable care whether there be any apprehension of danger or not.

This argument involves, on the face of it, a perplexing inquiry as to how far is B to take heed. This is calculated to introduce the element of uncertainty in law which is the detestable element. Therefore the conclusion of non-liability to an unseen trespasser for damages is based upon the rule of reasonable conduct and ordinary care.

Let us illustrate our meaning. Suppose B is trying to explode an inflammable substance and he selects a secluded place in his compound for the scene of his experiment. He, as a man of average common sense and foresight, has not the slightest reason to apprehend the presence of A in the vicinity. Suppose A, at the very psychological moment, when the substance bursts out, trespasses upon his premises and locates himself, unnoticed by B, within an area of danger and receives injuries. Obviously B is not responsible according to the rule of reasonable conduct and ordinary care.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The hearing of the appeal by the *Secretary of State* against *Raja Jyoti Prasad Singh* relating to coal mines in Pergunnah Shergarh was continued on 21st, 22nd, 23rd, 25th, 26th, 28th and 29th January when the Board intimated that they would consider the question which had been argued before them and would communicate with the parties if they desired to hear arguments on the questions of limitation and mineral rights.

In the Board room, before LORD DUNEDIN, MR. AMEER ALI and SIR ARTHUR CHANNELL, an appeal was heard on January 26th from Mysore, *Shipp v. Kelly*, in which the Defendant in an action for breach of promise of marriage appealed from a decision of the Resident's Court. The Appellant had proposed marriage to the Respondent and had financed her in obtaining a divorce. The Courts in India had found in favour of the Plaintiff and had awarded substantial damages. The appeal was dismissed.

Mr. E. Labouchere Thornton for the Appellant.

Mr. R. P. Yule for the Respondent.

Maung Kyi Chay v. Ma Thet Pon (Rangoon) was heard on January 25th and 26th. This

was a suit by the Respondent in which she claimed as her own, certain land in the possession of the Appellants, the administrators of the estate of her father and stepmother. The Appellants' main contention in the appeal was that the High Court should not have allowed a claim against the estate of deceased persons on oral evidence which the trial Judge had disbelieved. The appeal was dismissed.

Mr. E. B. Raikes for the Appellants.

Mr. G. S. Saunders for the Respondent.

Shukoor Gani v. Sabapathy Pillai (Madras) was heard on January 28th by the same Board and the appeal was allowed. The question raised was as to the justice of a claim by a purchaser for a reduction of the purchase price on the tariff value being decreased. The same point was dealt with in the recent appeal from Calcutta in *Probhudas v. Ganidada* (30 C. W. N. 73).

Sir G. R. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant.

Mr. E. Labouchere Thornton for the Respondent.

Chandar Baksh Singh v. Mt. Raj Kunwar, an appeal from Allahabad which was part heard last term was now brought before the Board again in order that the question of custom, relating to the exclusion from inheritance of females, might be argued and heard on February 1st, 4th, 5th and 8th. Judgment was reserved.

Messrs. L. DeGruyther, K. C. and W. Wallach for the Appellants.

Sir Geo. Lowndes, K. C. and Mr. B. Dubé for the Respondent.

Md. Khaleel Shirazi v. Les Tanneries Lyanaises. Judgment was delivered and the appeal allowed on February 4th.

In *Gujadhar Prasad v. Mahadeo Prasad* (Patna), heard on February 5th, questions were raised as to the construction of a decree. The District Judge held that the questions ought to be decided by a fresh suit, the High Court, however, remanded the proceeding for the questions to be decided in execution.

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Appellant.

Messrs. L. DeGruyther, K. C. and B. Dubé for the Respondent.

G. D. M.

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REPORTS (See Index.)

What is Criminal Law?

Mr. Glover Alexander's article on "Modern Egyptian Criminal Law" in the *Journal of Society of Comparative Legislation* is an interesting contribution on criminal jurisprudence. His article is a review of a remarkable work by Mr. Frederick M. Goadley, M.A., B.C.L., on Egyptian Criminal Law. Part I, Vol. I, of this work is a commentary on criminal law in general and deals with its general principles such as Criminal Law as distinguished from Civil Law, Criminal Law and Moral Law, Right of State to Punish, Purpose of Punishment, etc. As much of what is said under these heads agree with the views we have lately expressed in these columns, we give below some very suggestive extracts from the article. The following definition of criminal law is both concise and precise.

He defines Criminal Law as "that part of the law of a country which relates to the definition and punishment of acts which the State intervenes to suppress." Criminal Law, he says, "is primarily penal." By this he means that "punishment is the dominant feature of the Criminal Law as compared with the Civil Law," the object of which is rather the recovery of damages or reparation. Hence, he points out:

"The line of separation between Civil and Criminal Law has become more and more distinct in modern times. The growth of Criminal Law has coincided with the increase of the power of State."

The above definition applies to criminal law as administered by the British Courts. It may however be noted that although punishment is the primary feature of criminal law and reparation that of civil law, in France and Egypt where the penal law is more akin to the French the Court can also award civil damages for injuries caused by a criminal act.

Criminal Law and Moral Law.

The following distinction drawn between criminal and moral law will be found interesting:—

Without pausing to consider exactly what is meant by Moral Law, but assuming it to be the same thing as morality, it may be conceded that the Moral Law is wider and broader than Criminal Law. The old distinction of English Law into *mala in se* and *mala prohibita* is not now of much importance; both classes of cases fall equally within the scope of the Criminal Law. The distinction between a sin, a vice and a crime is a subject of General Jurisprudence. But Mr. Goadby rightly insists on the objective character of Criminal Law as contrasted with morality. As a rule Criminal Law deals only with overt acts. The only exception to this rule in English Criminal Law is the Law of Treason, and even treason must be proved by overt acts. The reasons for this are purely historical. At the same time, it is generally necessary to prove *mens rea*, and in some cases a specific intent. Such a state of mind, however, is mostly inferred from a man's acts. Moreover, he points out that "what is condemned by law tends to be regarded as morally wrong," and mentions, as an instance of this, the suppression of the practice of *suttee* in India. Another instance of this "law of association," as it has been called, between what is morally and criminally wrong, is to be found in the suppression of smuggling. That offence is no longer regarded as venial because of the spice of adventure, as well as profit, that accompanied it. The truth appears to be that as a rule the Criminal Law lags a little behind the moral sense of the community; but sometimes, and in some respects, it goes in front of it.

The Right of the State to Punish.

Only recently we observed in these columns that the functions of State are day by day taking the form of social work and that even the administration of justice may be said to fall within the category of social defence. We are glad to find the author advocating the same view as opposed to Austinian notions.

Under this heading, which has a somewhat peculiar sound to one nurtured on Austinianism, Mr. Goadby observes that "the object of modern criminal law is the repression of acts or omissions which the State regards as injurious to society." In this we venture to think he has struck the true note. The real justification of the power and duty to inflict punishment is "social defence." The State as an organization exists principally for the purpose of protecting its law-abiding members or citizens, and therefore it inflicts pain, restraint, imprisonment and even death upon its subjects who are guilty of anti-social acts as a deterrent to others

who may be inclined to commit such acts. But this is not the only object of the Criminal Law. Early Criminal Law, in winning its way to the approval of the community, has to take account of, and restrain the natural feelings of revenge on the part of the individual wronged.

"This feeling of vengeance still lies at the basis of our approval of the punishment inflicted by the Criminal Law."

We also observed recently that the spirit of retaliation though not yet extinct is surely on the decline.

The Purpose of Punishment.

In reviewing Lord Lytton's views on crime and punishment we observed that the purpose of punishment as a deterrent cannot altogether be ignored although it is one of the prime duties of a modern State to reclaim the criminals. The learned writer also takes the same view.

All this leads on to the purposes of punishment, which are not only deterrent, in the sense of putting fear into the minds of intending wrongdoers, and vindictory in providing a regulated means of satisfying the natural desire for vengeance, but are, or ought to be, preventive and reformatory, and this last object, as Mr. Goadby well says:

"Tends to become more and more prominent in modern penal arrangements. To prevent crime by reforming the criminal is a noble aim."

Reformation of Criminals and Decline in Crime.

The following facts will go to show how with the humanitarian work carried on by some men and women in the West and the humane treatment of criminals, crime has declined. The observations of the author are very instructive:—

Crime indeed is a hydra-headed monster, and its causes are as numerous and complex as the elements of society and civilization itself. They vary from country to country and age to age, and are constantly re-appearing in new forms under changed circumstances. Yet we believe that, as the result of the humane and persistent efforts of many devoted men and women, there is on the whole in England, at all events, a decided decline in criminality. Our prisons contain about only half the numbers of prisoners they used to contain, in spite of the growth of the population. The system of putting most first offenders and some other suitable cases upon probation seems to be bearing fruit both economically and morally. Borstal Institutions may not have accomplished all that was prophesied for them, but on the whole it may be claimed that they have been a success. Suppose that such institutions had never existed, and all the young people, of both sexes, who have been sent to them had been sent to prison in the old way, how many confirmed jail-birds and criminals would have been manufactured and periodically turned loose upon society, to say nothing of the cost of their maintenance in prison! We are amongst those who look forward with hope and confidence to the beneficial effects of education, intellectual and moral, better housing and sanitary conditions, better economic conditions, greater temperance in the use of alcoholic liquor, and an increase in the civic spirit, the full effects of which have not yet been seen. As Mr. Goadby very truly observes:

"The weapons by which crime must be fought are as numerous as its causes," and "all crime is a falling-off from a social idea."

Right of private defence of property.

Under sec. 105 of the Indian Penal Code there is right of private defence of property against theft, robbery, criminal trespass, mischief and house-breaking by night. In every case the right commences when a reasonable apprehension of danger to the property commences and in all other cases except theft the right continues so long as there is risk of any of the offences mentioned in the section being committed, but the case of theft stands on a different footing. Here the right continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained or the property has been recovered. Taking a concrete case if A runs away with B's watch, B may chase him until he effects his escape, but does the right of self-defence end with the escape? If B sees A in the street the next day wearing the stolen watch, may he not forthwith seize A and recover his watch using for the purpose as much force as the case allows? If a policeman should be at hand, B's proper course would be to hand A over to him and let him recover the watch. But is B bound to put off the capture of A until he can find assistance from public authority? Again supposing that on a day after the theft thereof B sees his watch lying on a table in a house or garden, if he can get the assistance of a policeman without losing sight of it he would be bound to do so. But would he be under any legal obligation to risk a further loss or removal of the stolen property for the purpose of having recourse to the public authorities? The matter does not seem to be covered by authority. The Law Commissioners in the first report observed—"We are not aware of the meaning intended by the expression 'till the offender has effected his retreat with the property.' We know not certainly when he is to be considered as having effected his retreat, probably it is when he has once got off having escaped immediate pursuit or pursuit not having been made. We presume that the protection of parties pursuing robbers for the recovery of property which they have succeeded in carrying off or for bringing them to justice was thought not to be within the scope of the provisions touching the right of private defence."

The questions are answered by Mr. Ratanlal in his learned treatise on the Law of Crimes in the negative. Mayne is of opinion that "resistance within justifiable limits may be continued as long as the wrongful act is going on. But when the robber for instance has made his escape the principle of self-defence would not extend to killing him if met on a subsequent day. If, however, the property were found in his possession the right of defence would revive for the purpose of the recovery." The question was argued before the Lahore High Court in a recent case. Certain buffaloes were stolen. Next morning a tracking party was organised which followed the tracks of the stolen cattle up to a particular village, on reaching which the tracking party halted and their leader went off to the local thana to secure police aid. For some reason or other police assistance could not be supplied till after two hours after the police received information. When the leader of the tracking party came back accompanied by the police men he found that his followers had gone on for some distance and ultimately when he joined his followers his progress was obstructed and a fight ensued with the result that one man of the opposite party was killed. The learned Judges disallowed the plea of private defence. Le Rossignol, J., observed as follows:—"In order to avoid the conclusion that the successful retreat of the thief with the property puts an end to the right of private defence in respect of such property it has been suggested that that right of defence may be revived and that the stolen property, wherever seen again in the possession of anybody, may be taken by the owner from that person by the use of all the violence not extending to the causing of death which may be found necessary. This theory, to my mind, receives no support from the statute law and if true it constitutes a very serious derogation from the principle that no man shall be his own justicer. I take it that the reason why a person is permitted to take the law into his own hands during the retreat of a thief with stolen property is that there is no doubt regarding the identity of the thief and the right to the property; also because the owner of the property is entitled to maintain his possession and to prevent the completion of the removal of the property from his possession. A very different state of things, however, arises if the owner of a stolen watch be permitted to take the law into

his own hands at any subsequent time and to use violence against any person who may or may not be an innocent holder in order to retrieve from his possession what may or may not be the stolen watch. If serious disorders are to be avoided, the right of private defence must be strictly confined within the limits fixed by statute."

Reviews.

INDIAN COMPANY MANUAL. By Nares Chandra Sen-Gupta, M.A., D.L. and H. C. Sen-Gupta. M. C. Sarkar & Sons, 90-2A, Harrison Road, Calcutta, 1926. Price Rs. 12.

The manual will supply a demand long felt by persons interested in the flotation and working of companies in British India, and as the number of persons so interested is constantly on the increase, the manual has not come too soon into the field. The special value of the present work lies in its realisation of the fact that the Indian Companies Act though based on the English statute differs from the latter on so many points, that the English Company manuals must often prove in practice rather dangerous guides. But in the absence of an Indian manual which takes special note of these differences, it is but inevitable that those who have not specialised in Indian Company law, be they lawyers or laymen, would turn to the English manuals for guidance and be led into pitfalls, for which they or the institutions for which they are working will in the long run have to pay the cost. In the present treatise they will find a hand-book which should help them in avoiding these pitfalls.

The book is not intended or expected to enable persons interested in the working of Indian companies to dispense with expert legal assistance. As the authors happily put it, the chief use of the work will lie in affording assistance in the nature of first aid when called upon to deal with emergencies, and to tell the person who consults it when to go to the expert. No more and no less is demanded from a Company manual.

Such a book must, in the very nature of things be neither a complete commentary on Company law for the lawyer's use, nor merely a popular introduction to the business of company management. It must be less than the former and a great deal more than the latter. We have examined the work with care and are

satisfied that the book does hit the happy mean between the two extremes indicated. The fact that the work is the result of collaboration between a lawyer of Dr. Sen-Gupta's standing and attainments and a person of Mr. Sen-Gupta's official experience in the management of companies has not been without its effect in producing this result. The scheme of the work will be apparent from a glance at the table of contents which come under the following subject headings: formation and flotation of a company limited by shares; registration, memorandum of association, articles of association; preliminary clauses of the articles; capital; shares; meetings; notice; directors and promoters; secretary, manager, managing agent or managing director; common seal; books and accounts; auditor, borrowing power; winding up and reconstruction; prospectus; private company; miscellaneous matters; Income Tax Act. These are followed by two appendices containing the text of the Companies Act and Additional Forms. The treatment of each of these topics is lucid and workman-like. As very few lawyers are really in a position to specialise in Company law, the book will appeal to lawyers as a class equally with secretaries, directors, promoters and other people interested in companies, as a book of ready reference upon which they will be able to depend for aid and guidance. The book is very well got-up and considering its matter and make-up cheap for its price.

PLEADINGS IN INDIA WITH PRECEDENTS. By Cecil Walsh, K.C., M.A. and J. C. Weir, B.A., LL.D., Allahabad: Ramnarain Lal, Law Publisher, 1925. Price Rs. 5.

The drawing-up of pleadings has been a neglected art in India. It was neglected not merely by the profession, but even by the legislature, before the Code of 1908, as a natural re-action against the extreme rigidity which marked the English practice previous to the reforms introduced therein in the last half of the last century. It used to be thought that substantial justice would be better attained if the maximum amount of freedom was left to the Indian Courts in the matter of dealing with the parties' cases. The Select Committee which drafted the revised Code of 1908, however, felt the necessity for putting a curb upon this freedom and they

took care to enact in the Code all the rules of pleadings adopted in England under the Judicature Acts. But it is one thing to make rules and another to put them into practice. The Civil Justice Committee has recently drawn pointed attention to the prolixity, argumentativeness, disclosure of immaterial facts and suppression of material facts which mark pleadings all over India and which embarrass and delay trials and not infrequently lead to a failure of justice. It is being realised that a mere enunciation of the abstract rules embodying only the principles which should guide the framing of pleadings without training in the practice of drawing up pleadings will be of little avail in bringing out the desired change. "The first requisite," the Report of the Civil Justice Committee justly points out, "is to train pleaders to draft and this training will be assisted appreciably by the preparation of a work on pleadings in India on the lines of Bullen and Leake."

The book under notice does not pretend to supply the whole of this want, but takes a substantial step in that direction. It devotes relatively more space to the principles of pleadings than to precedents, but does also furnish a number of precedents to supplement and adapt to Indian conditions the skeleton forms contained in the appendix to the Civil Procedure Code. It will serve excellently the purpose of affording that preliminary training which beginners in the art of drafting pleadings require. It needs being supplemented by a completer book on the lines of Bullen and Leake, which when it comes will not however necessarily displace it as a useful introductory to the larger work.

We heartily commend this book to the profession—its handy size being an additional recommendation. The authors have set an example in what is really pioneer work in the reform of civil practice in British India. We should greatly like to see others following in their footsteps in other branches of the subject—discovery, for instance, which is even more neglected in the Indian practice than the drafting of pleadings.

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MONDAY, MARCH 29, 1926.

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REPORTS (See Index.)

Reformation of juvenile delinquents.

We have often in these columns invited attention to what is being done throughout the civilized world for the reclamation of criminals. The most fruitful results have been obtained by the modern methods of reformation of juvenile and first offenders. We have got a Children's Act but it has practically remained a dead letter because we have no philanthropic body of probation officers, rescue homes, Borstal or other institutions where reformation of young offenders is effected through education, instruction or training which serve to mould their character, enable them to earn their livelihood by useful occupation and become good citizens. We are glad therefore that H. E. the Governor of Bengal announced on Wednesday last that he proposes taking an initiative in this direction in Calcutta. We may observe that it is in big cities that such institutions are badly needed. There is very little crime amongst children in the Mofussil and, for the matter of that, amongst the rural population. It is in big towns and in industrial and commercial centres, with a mixed and miscellaneous population, that young people, who are not sufficiently taken care of, go astray. It is in such localities that the growth of modern vices have got to be met by modern preventives, so that the contagion may not spread far and wide. It is the duty of the citizens no less than of the Government to take the necessary steps, both in their own interest and in the interest of humanity, on the lines suggested for the prevention of young delinquents developing into hardened criminals.

Presiding at the annual meeting of the Society for the Protection of Children in India, on Wednesday last, His Excellency the Governor of Bengal dwelt on the need for organizations to deal with the rescue of children in Bengal and suggested the establishment of a Reformatory, an Industrial School and a Borstal Institution. He also informed the meeting that proposals in this direction were now under the consideration of His Excellency's Government and would be placed before the Legislative Council in the July session.

His Excellency said :—

"At present, about 1,800 children pass through the hands of the police every year as the result of some offence against the law. We have no satisfactory means of dealing with these little vagabonds; if we had, the number would probably be greater. The bulk of them are returned almost immediately to the streets or to the bad homes, from which they have come. In order to bring our Children Act into real operation, it will be necessary to provide a Reformatory, an Industrial School and a Borstal Institution. We are contemplating measures which will provide with such institutions in the near future and I hope that proposals may be submitted to the Legislative Council with this object in the July session. Finally, I hope that we may be able to introduce the system of probation, about which I spoke recently at the Rotary Club. This cannot be done, however, until voluntary probation officers are forthcoming and so far as child offenders at any rate are concerned, I hope that this Society may in time be able to meet the demand."

Punishments past and present.

It is only during the nineteenth century that the barbarous punishments that prevailed before in England were abolished. It is hardly conceivable now that in the course of a single century the world has made such a phenomenal progress in its intellectual and moral ideals. We give below from a legal contemporary an account of the punishment that used to be meted out to persons convicted of treason before the last century.

"During the nineteenth century most of the barbarous elements which survived in the punishment of treason were swept away. Originally the traitor was drawn on hurdle over the rough roads to the place of execution. There he

was hanged. While yet alive he was cut down and disembowelled. Finally his body was quartered and the head and quarters were at the disposal of the Crown. Until 1790 a woman was drawn to the execution ground and there burned, but in that year hanging was substituted for burning. In 1814 the hanging and disembowelling were altered to hanging till death supervened, and in 1870 drawing and quartering were abolished, as were attainder and forfeiture for treason, except when the offender had been outlawed or in cases of misprison for treason."

Dependent relative revocation of Will.

In *Adams v. Southerden*, 133 L. T. R. 505, the testator destroyed his Will which devised all his realty to his wife because of a mistaken belief that the object of his Will would be fully realised if he died intestate. This was resisted by the testator's father who claimed as heir at law under an intestacy, but the lower Court allowed probate. In appeal the decision of the trial Court was upheld and it was held that the revocation of the Will was dependent upon the truth of the testator's belief and therefore had no effect. In noticing this case the learned commentator in the *Harvard Law Review* observes as follows:—Physical destruction of a Will is inoperative unless accompanied by *animus revocandi*. If the testator conditions his revocation on the existence of an actually non-existent state of fact or law there is no intent to revoke: clearly distinguishable however are the cases of destruction induced by mistaken belief as to facts or legal consequences. Here the necessary act has been coupled with an intent to revoke. If effect is to be denied to such a revocation it must be by virtue of an inherent equitable power of the probate Court to set aside acts on the ground of mistake which should be exercised only if it appears that the testator, had he known the true situation, would have preferred the old Will to none at all. In the present case such preference appears. On its face the decision seems analogous to a line of English holdings that destruction of a Will is inoperative if induced by mistaken belief in its uselessness. In those cases, however, the uselessness was attributed to invalidity, so that it can be argued that the testator intended merely to destroy paper not to "kill a living Will." Remedying the testator's mistake in the present case seems clearly proper, but the Court's reasoning on the basis of conditional revocation is unfortunate.

Riparian rights.

In the same journal a recent American case on riparian rights in connection with natural watercourses is noticed (*Melbourne Harbour Trust Commissioners v. Colonial Sugar Refining Co., Ltd.*). In 1872 the Plaintiff's predecessors, owners of land on the bank of a navigable tidal river, in accordance with permission from the port authorities built a wharf in front of their land and filled in the space between this wharf and the shore front. From 1872 until 1919 the Plaintiff or his predecessors used the wharf and reclaimed land but under such circumstances that in 1919 the Plaintiff had only a revocable license to use and occupy them, title to both being in the Defendant Harbour Commissioners. In that year the Defendant desiring to build a roadway over the reclaimed land revoked the license and demanded possession. The Plaintiff brought an action to secure a declaration of his rights in the land. It was held that the Plaintiff still retained his original riparian rights and that as the wharf and reclaimed land under the maintenance of the Defendant would obstruct the Plaintiff's access to the river, the Plaintiff could cross the premises for that purpose as long as they were maintained subject to the general regulatory powers of the Defendant.

The case is commented on in the following manner:—That the Plaintiff should retain his rights as a riparian owner even though land owned and maintained by another now intervenes between his land and the water seems at first a little surprising. But had the land and wharf been put there by a stranger justice would require that the Plaintiff keep his riparian rights. On the other hand, if the Plaintiff himself has reclaimed without right it might be argued that he has forfeited his standing as a riparian, yet even here the rule seems to be the other way. In the principal case where the reclamation was not wrongful but gave no title this argument might be again urged on the ground that the Plaintiff took the risk of revocation of the license, but it is probably fairer to allow retention of riparian rights. The Courts in these cases have apparently considered overwhelming the public interest in having the banks used for commerce. In the United States by statute or otherwise riparian ownership of itself would almost universally have given a right to wharf out.

LANDOWNERS' DUTY TOWARDS TRESPASSERS.

(By A. P. PANDEY, M.A., LL.B.)

(Continued from p. lxxxiv.)

Secondly, assume B knows of A's presence. This knowledge on his part is sufficient in law to cast an obligation on him to conduct himself with reasonable care and caution. But this proposition seems open to three objections, and it is proposed to examine those at length.

(1) How can the trespasser by his own wrong impose an obligation upon B toward him? To hold misfeasance as the origin of a right recognised by law is an insult to the fundamental principles of jurisprudence. No wrong-doer can be permitted to base an action upon his own wrong. Then again it has been held in a series of cases that the Plaintiff's wrong, better known as contributory negligence, is a sufficient answer to an action for damages. But this proposition can be explained on the principle that the Plaintiff's wrong was the direct and effective cause of his misfortune and therefore he cannot blame the Defendant. Surely it does not lead to the conclusion that the Plaintiff's negligence completely absolves the Defendant from the legal obligation of reasonable conduct and ordinary precaution towards him. The Plaintiff and the Defendant being joint tortfeasors of precisely equal degree, the Plaintiff is precluded from recovering any damages from the Defendant. On the other hand, if the Plaintiff's wrong be not concurrent with that of the Defendant in bringing about the misfortune, if the Defendant could by reasonable vigilance and ordinary precaution have averted the catastrophe, the Plaintiff succeeds. The classical cases of *Davies v. Mann* and *Butterfield v. Forrester* enunciate this proposition. It is clear therefore, that A's negligence and wrong does not justify B in infringing upon the rule of reasonable conduct and ordinary precaution. It may be useful here to recall the dictum of Lord Ellenborough in the latter case cited above: "One person being in fault will not dispense with another's using ordinary care for himself." A's negligence can be said to be the mere occasion for the misfortune while that of B is said to be the inducing cause. In a narrow sense it may be true to observe that A's wrong casts an obligation toward him upon the innocent landowner, but it is not true in a broad sense.

By way of illustration, suppose A is walking

along a railroad. The driver of an on-coming train sees A from a distance and whistles, but A does not mind. The driver does not stop the train and A does not desist from walking along with the result that A is knocked over. The driver could have if he wished stopped the train in time to save the accident. In this case the driver will be responsible for the damages. A's presence as submitted above was the mere occasion for the accident while the driver's negligence was the immediate cause.

(2) The second objection to the rule under discussion is that the rule places a trespasser upon the footing of an individual who has a right to go upon the premises. But this objection can be dismissed by the observation that the Plaintiff's wrong in an action for damages is the ruling factor in the determination of the standard of reasonable conduct and normal caution.

The third objection to fixing liability upon the landowner is that the tramp trespasser enjoys the same privileges as a guest or an invitee to the premises. True it is that the landowner is held to the care of an average man in each case but as has been shown above, A's wrong reduces the standard of reasonable conduct and normal precaution on the part of the landowner.

To conclude, it is obvious, therefore, that the trespasser does not enjoy the same privileges as a guest or an invitee or a licensee or an individual who has a right to go upon the premises. But he constitutes a distinct class by himself and has to establish in an action for damages that he was noticed by the landowner who could have averted the misfortune by rising to the occasion and behaving like a man of average common sense and foresight, and that it was beyond his (trespasser's) powers to save himself.

In the light of what has been submitted above, let us now examine the recent and instructive decision in the case of *The Madras and Southern Mahratta Railway Company Limited v. Jayammal* to be found in I. L. R. 48 Mad. 417. In analysing and scrutinising the decision, one has to guard oneself against any sentiment of sympathy for the Plaintiff getting the better of one's reason and thereby infringing upon the dictum of Lord Farwell, viz., "We must be careful not to allow our sympathy with the infant Plaintiff to affect our judgment. Sentiment is a dangerous will-o-the-wisp to take as a guide in the search for

the legal principles" (1913, 2 K. B. 308 at 408).

In very brief, the facts of the case are that the Plaintiff, a little girl of seven years of age, passed through a wicket gate and stepped on the loop-line when she was knocked down by an engine which was backing towards the shed to water, and lost her right leg and right arm. Mr. Justice Coutts Trotter, as he then was, decreed the Plaintiff's action and awarded Rs. 3,500 as damages. In appeal their Lordships Mr. Justice Spencer and Mr. Justice Srinivasa Ayyangar dismissed the Plaintiff's suit on the finding that the Plaintiff's negligence was the proximate cause or *causa causans* of the accident.

Obviously the decision is correct on the above finding but the reasoning upon which the finding is based seems to be vitiated by certain fallacies. The case no doubt belongs to the class of border-line cases which scarcely test the rule and have been giving rise to dissentient judgments and copious litigation. His Lordship Mr. Justice S. Ayyangar very lucidly defines the term negligence at p. 435: "It is once over again the apotheosis of the law, the ideal man of ordinary prudence. What this ideal man of ordinary prudence would have done or omitted at the particular time and place and in the circumstances is the standard and measure of proper care, and whenever and wherever the act or omission of the Defendant falls short of this standard or measure then and there is negligence." Then again with respect to the question whether the Plaintiff was a licensee or a tramp trespasser, the said learned Judge very rightly says that the classification of the injured into trespassers, bare licensees, invitees *et cetera* has no more fundamental basis than the repeated application of this standard or measure to the varying circumstances. Then again, the learned Judge finds that the Company was guilty of negligence on the occasion as no special look-out was kept by any person on the engine. Still the learned Judge says that the Plaintiff, possessed as she was of the faculty of circumspection, could have by exercise of ordinary care desisted from crossing the lines and thus saved herself. Accordingly she was responsible solely for the accident. But one may venture to reason as follows.

Under the circumstances of the case, the engine driver, as an ideal man of average prudence, ought to have kept a special look-out

and more so firstly because he was driving the engine along the loop line and, secondly, because he knew that as a short cut neighbours crossed the line at or about the shed. If the driver had done so, he would have noticed the Plaintiff emerging from the wicket gate and walking along the line and further again ought to have foreseen that the girl would cross the road in front of the engine. That being so the driver ought to have whistled repeatedly to put the girl on her guard and finding that she did not mind the alarm, he ought to have stopped the engine. After all the Plaintiff by stepping on the loop line had precluded herself from averting the accident and the engine driver could have warded off the evil if he had conformed to the rule of reasonable conduct and ordinary care.

(Concluded.)

LONDON NOTES

(FROM OUR CORRESPONDENT.)

On Feb. 8th.—The Board, consisting of LORDS DUNEDIN and BLANESBORGH, SIR JOHN EDGE and MR. AMER ALI, dismissed the appeal in *Gujadhar Prosad v. Mahadeo Prosad* (Patna), but slightly varied the order of the High Court.

Rameswar Bazaz v. Shyama Sundari Debi (Bengal) was heard on February 8th and 9th. The suit was brought to recover damages for breach of a contract to grant a prospecting licence and mining lease. The lower Courts had differed in their assessment of the damages. Judgment was reserved.

Sir Geo. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellant.

Messrs. L. DeGruyther, K. C. and *Kenworthy Brown* for the Respondent.

Mr. Parikh applied on February 9th for special leave to appeal to the Privy Council in *Bagri v. King-Emperor* (Lahore). Leave was refused.

In *Tyaballi Kamruddin v. Meghji Moorji*, *Mr. M. R. Jardine* applied for special leave to appeal *in forma pauperis*. The leave was refused but the petition was ordered to stand over in case the applicant could obtain funds to prosecute his application and appeal *not in forma pauperis*.

Mr. E. B. Raikes appeared for the Respondent.

G. D. M.

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REPORTS (See Index.)

**The late Mr. Ram Charan Mitter, C.I.E.,
Rai Yatindra Nath Chowdhury, M.A.,
B.L. and Mr. Jyotish Chandra Mitter.**

During the short interval of two weeks which have elapsed since the publication of our last issue, death has removed from our midst two members of the profession who each in his way filled a large place in the public life of Bengal. It seems only the other day that Mr. Ram Charan Mitter, C.I.E., one of the oldest graduates of the Calcutta University, senior Government pleader on the Appellate Side of the High Court and President of the Vakils' Association, retired from public life full of years and honours, and carrying with him the respect and good wishes of his colleagues and associates in the profession and well-merited tributes of esteem and appreciation from the Bench. He passed away on Monday last, the 5th instant, after a brief illness, which brought to a close a career of quiet success and singularly deserved placid contentment. Rai Yatindra Chowdhury, who passed away on Wednesday last, was a scion of a well-known aristocratic family of Bengal. He never took to the profession seriously, but his deep culture and wide sympathies coupled with his sterling independence of character brought him into the forefront of all public movements in the province, political, social and literary. He was still in the prime of life, and his sudden death will leave a void in the public life of the province which will not be easily filled up. As we are going to press, we are grieved to learn of the sudden death of Mr. Jyotish Chandra Mitter, Deputy Registrar on the Original Side, who was a popular officer and greatly esteemed by all who came into contact with him. We offer our sincere condolences to the bereaved families of the deceased.

The Riots.

During the interval also happened an occurrence which reflects little credit on the rank and file of the two communities concerned. It is true that the outbreak was confined to the lowest classes and latterly within the rowdy elements of both the Hindu and the Mahomedan sections of the population of the City. But the so-called leaders of opinion who from behind the security of their writing tables fan the embers of communal hatred can hardly acquit themselves of moral responsibility for the results even when they are found to have exceeded beyond measure their very worst anticipations. The only redeeming feature of the whole situation is the impulse towards mutual aid and succour which the very violence of the riot brought into active operation amongst the respectable classes of both communities. It is in the steady growth and consolidation of this spirit that the hope of establishing intercommunal good relations on a stable basis lies. That in both communities there is a great deal of religious fanaticism lying beneath the surface, ready to be exploited for collateral purposes, is unfortunately only too true. It is this element that invariably starts the mischief and it is this element too that suffers as its worst victims in the long run. This fanaticism can ultimately yield only to education and spread of culture which surely is the work of the advanced guards of both communities. If they or any of them cannot help in this work, the least that they can do is to refrain from further aggravating the situation by written or spoken appeals to communal passions which are bound to culminate off and on in bloody riots, murders, mutilations and loot.

Pleaders, Advocates and Attorneys—Propriety of testifying for client.

In a case noted in the *Minnesota Law Review* of December last the Plaintiff was allowed to prove a compromise of a disputed claim made with the Defendant through his two

attorneys by citing the latter as his witnesses. The Defendant appealing appears to have contended that the Plaintiff's attorneys were not competent witnesses, and that the judgment of the trial Court in the Plaintiff's favour based upon this evidence should therefore be vacated. The Court by a divided opinion overruled the objection. Commenting on this case, the writer observes: "In general an attorney is competent to testify on behalf of his client no matter how gross the violation of professional ethics, but Bench and Bar are practically unanimous in denouncing the practice of an attorney testifying for his client in other than formal matters." On the Original Side of the Calcutta High Court, attorneys frequently testify in their clients' cases, but in America, attorneys both act and plead; and the point of the objection to the practice of both appearing and testifying for a client lies in this that "it is unseemly for a member of the Bar voluntarily to place himself in a position where his duty to his client requires him to address Court or jury on the question of what degree of credibility should be given to his own sworn testimony." The objection, a perfectly intelligible one applies in India to counsel and advocates as also to pleaders who as in America both act and appear for their clients (in the Mofussil and on the Appellate Side of the High Court) and not to attorneys as such so long as they are acting and not appearing in the case. The practical conclusion to be drawn from the above is that in all such cases, counsel, advocate or pleader should withdraw from the active management of the case and not that he should secure exemption from appearance as a witness by remaining on as counsel, advocate or pleader. In some American cases the embarrassment to Court arising from the difficulty of distinguishing between the zeal of an advocate and the fairness and impartiality of a disinterested witness is alluded to, and some Courts even go so far as to hold that little or no weight should be attached to such evidence. These, however, are properly considerations affecting the weight to be attached to testimony which is admissible in law and bear upon the special facts of each case and should not be allowed indirectly to operate to exclude such testimony in all cases. The question, so far as we are aware, called for judicial consideration here in one case only, viz., *The Midnapur Damage Suit*. It appears

from the note in our contemporary, however, that it has been frequently passed upon by the Courts in America where there is a large body of precedents to guide and control the practice.

Insanity as a defence.

The answers given by the Judges in *McNaghen's* case have always been taken to be an authoritative statement of the law of England on the subject of insanity as a bar to criminal responsibility. The rule that is founded on the answers given by the learned Judges is as follows:—

The jury ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing or if he did know it that he did not know he was doing what was wrong.

An extension of the rule has at different times been suggested and the strongest criticism levelled against it is that it does not cover the difficult question of loss of control caused by unsoundness of mind.

The following extract from Mr. Justice M'Cardie's charge to the jury in the trial of Ronald True is interesting and instructive and will show what the law is at present taken to be.

"The law assumes that a man is *primâ facie* sane; he must satisfy you otherwise if he desires to escape the consequences of a serious crime. The English law is complex, both in civil and criminal cases, with regard to insanity. About eight different tests apply in civil cases such as to wills, contracts, assignments, and other matters, for example, matters which arise in criminal law in this country. The foreign codes are simpler. The language there used is broader, wider discretion is given to tribunals. Here we are concerned with the criminal law of England by which you and I are bound. It is plain in my opinion that insanity from a medical point of view is one thing; insanity from the point of view of criminal law is a different thing. Doctors exist to

cure physical and mental ills. Juries and Judges exist to guard the life and property and the welfare of society. There are some things which plainly are not insanity. A deep instinct for revenge is not of itself insanity; strong sexual instinct is not of itself insanity; mere greed of money is not of itself insanity; mere love of bloodshed is not of itself insanity; nor is boastfulness, nor is recklessness either of them insanity; and it is to be remembered both by you and by myself when we have to administer with firmness the criminal law of this country mere eccentricity is not of itself insanity. The criminal law requires more than those things and there must be mental disease before there can be insanity from the point of view of the criminal law. At one time in the history of the criminal law of this country insanity was no defence. Five hundred years ago as I said to-day it was no defence; later on it gradually became recognised as a defence provided it was absolutely clear and about two hundred years ago a Judge of those days, Mr. Justice Tracy, said: "A person is not entitled to be acquitted unless he is totally deprived of his understanding and memory and does not know what he is doing any more than an infant, a brute or a wild beast. The law, I am glad to think, has progressed since then, for all law must progress or it must perish in the esteem of man. We have now to ascertain the law as it stands to-day and that law was considered rightly years ago by a great body of Judges in 1843 in a case which has so often been mentioned before you in this Court. I myself feel that the rules which were stated in 1843 are not clear and are not exhaustive; much difference of opinion existed in Judges of great experience and learning as to the true effect of the rules that were then stated and the law as I shall put it to you is in some ways in advance of the law as it was stated in *McNaghten's* case; but I believe it to represent views which have been taken not once but often both by the Court of Appeal and by many experienced colleagues of mine upon the bench both now and in former days. Before I state them I want to put this question to you for consideration. Was there mental disease? Unless there was mental disease there cannot be insanity within the meaning of the English criminal law.

Even if the prisoner knows the physical

nature of the act and that it was morally wrong and punishable by law, yet was he through mental disease deprived of the power of controlling his actions at the same time? If yes, then in my view of the law the verdict should be guilty but insane. . . . This particular head of exemption is one which should be applied by the jury with great care; it would never do to diminish unduly the doctrine of responsibility for criminal acts. It would be unwise to allow any man to think that he was saved from the need of controlling his actions because he will be able to say to the jury 'from mental disease I could not control myself.' I am referring to his inability to control from disease."

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

Feb. 9th.—*Rameshwar Bazaz v. Shyama Sundari Debi* (Bengal). This appeal arose out of a suit for breach of contract to grant a prospecting licence and a mining lease. Judgment was reserved.

Sir G. Lowndes, K. C. and *Mr. E. B. Raikes* for the Appellants.

Messrs. DeGruyther, K. C. and *Kemworthy Brown* for the Respondents.

Feb. 9th, 11th and 12th.—In *Ganesh Lal Pandit v. Khetramohan Mahapatra, Messrs. DeGruyther, K. C.* and *B. Dubé* appeared *ex parte* for the Appellants. The appeal was from a judgment of the High Court at Patna. The Appellants were purchasers from a Hindu widow. Both Courts below had found that there was necessity for the alienations but were of opinion that she had not an intelligent knowledge of the nature of the transactions. Judgment was reserved.

Feb. 12th and 15th.—*Ram Charan Lania v. Bhagwan Das Mahashri*, an appeal from Allahabad, also raised the question of legal necessity, but, in this case, of alienations by a father, and *karta* of the joint family *zemdari*, the main contest in the present appeal was as to the rate of interest—8½ per cent. per annum compound interest with six monthly rests—*viz.*, whether it was incumbent on the *karta* originally to borrow on such onerous terms. Judgment was reserved.

Messrs. L. DeGruyther, K. C., B. Dubé and *Fateh Singh of Lunhdi* for the Appellants.

Mr. Ramsay for the Respondents.

Feb. 15th and 16th.—*Seth Lakhmi Chand v. Must. Anandi* (Allahabad). Two brothers executed a document in which they recited that they were joint in estate, and declared that if either of them died without male issue his widow should succeed him, and that if the survivor had male issue then after the death of the widows that issue should succeed to the entire estate. On the death of his brother the Appellant brought the suit to have this document set aside. It was contended that it was invalid as a Will or as a family arrangement inasmuch as it purported to create a devolution of the estate not in accordance with Hindu law.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellant.

Messrs. Dunne, K. C. and Dubé for the Respondents.

Feb. 16th.—*Saurendra Mohan Sinha v. Hari Prosad Sinha*. An application was made in this matter to vary the Order in Council.

The order had provided that the decretal amount should be paid into the High Court within 8 months of the order being lodged in that Court. The Appellant who had succeeded in the appeal, inasmuch as he had obtained a decrease in the sum payable, had neglected to lodge the order in the High Court and the Petitioner prayed for the Order in Council to be varied by ordering it to be lodged within six weeks. The application was dismissed, the Board holding that under Or. 45, r. 15, C. P. C., 1908, it was open to either party to lodge a copy of the Order in Council with a view to obtaining execution.

Mr. Hyam for the Petitioner.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Opposite Party.

The following members of the Judicial Committee have heard all the above appeals :—
VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE and MR. AMÉR ALI.

G. D. M.

Review.

THE TRIAL OF RONALD TRUE. *British Notable Trial Series. Published by Butterworth & Co.*

This is a notable addition to the British Notable Trial Series. Besides being the narrative of a sensational trial which took place quite recently the book is of special interest to the lawyer inasmuch as it is a useful compilation

on the law of insanity as a bar to criminal responsibility. The law on the subject which is complex to the extreme is perplexing to all and intelligible to few. The person who is excused from criminal responsibility on the ground of unsoundness of mind is not the same as the lunatic of ordinary parlance. A person may be of unsound mind and yet be criminally responsible.

Ronald True was an eccentric character. The darling of his child mother he grew up to be an easy-going man, reckless of consequences, for whom it was impossible to cast the mind back to the past and learn to be careful in future. He became terribly addicted to morphia and it was this drug habit which brought about his ruin and which was the foundation of his defence of insanity in a case of a cruel cold-blooded diabolical murder, the victim of which was a beautiful woman with whom True was familiar. True was not in affluence but certainly not in dire distress and the murder was committed for purloining the woman's cash and jewellery. The plea of insanity failed and a conviction was had which was affirmed by the Court of criminal appeal but the Home Secretary granted a reprieve. Public opinion was very much excited and the matter was debated in the House of Commons where the Home Secretary made a long statement justifying the action taken by him. The Lord Chancellor, the Earl of Birkenhead, in consequence of this case appointed a committee on insanity and crime to consider whether the old McNaghten rules which have stood the test of more than eighty years should be modified. The case created a sensation almost similar to that of 1843 when the McNaghten case came before the Court in which the victim was the Private Secretary of Sir Robert Peel, the then Prime Minister, and the accused a young Glasgow merchant of the name of McNaghten who was found to be not guilty on the ground of insanity. The matter was debated in the House of Lords and Her Majesty's Judges were asked to declare to what extent the law of England allowed unsoundness of mind as an answer to a criminal charge and to this end their Lordships formulated a series of hypothetical questions to which the Judges gave the answers that have come to be known as the Rule in McNaghten's case.

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Death sentence on pregnant women.

The retributive theory of punishment has now been discarded by the jurists and the only object of punishment is now taken to be the preservation of law and order. Brutal punishments were very common in ancient times all over the world; instances of such punishments are to be found in the Institutes of the Great Hindu law-giver Manu. Barbarous punishments were common in Europe even in the middle ages. Death sentences used to be inflicted in cases in which imprisonment is now-a-days considered to be sufficient. A study of the history of criminal law for Flanders, for example, shows that the death penalty was inflicted for lese-majestie, killing, rape, sodomy, public violence, theft from dead bodies or grave yards, arson, theft and the like. The crime of lese-majestie included a number of offences which would scarcely be classified together to-day. Blasphemy was linked with prevarication under this head and both were offences against Divine Majesty, since for blasphemy Lucifer was thrust out of Heaven and for prevarication Adam was banished from paradise. The very thought of treason was treason itself and women suffered a more dreadful punishment, death by fire, since it is far more reprehensible for a woman to commit the offence than for a man. The history of the criminal law of Flanders discloses some gruesome facts in connection with the investigation of criminal cases. Torture was resorted to in practically all cases except simple offences. In order to ensure a frank and easy confession a son, if possible, used to be tortured in the presence of his father and a wife in the presence of her husband, for if the victim still

remained obdurate the on-looker might thereby be persuaded to declare the truth. The greatest torture that could be inflicted without wounding the body was to fasten the body in a frame so that it could not move and then to tie it by the great toes, for then by winding the body is raised and stretched, all which caused intolerable suffering to the patient which ceased immediately when the winding stopped.

The rigours of the criminal law have now disappeared and reformation of criminals more than the inflicting of punishment on them is now engaging the attention of the great thinkers of every country.

Amongst the jurists of the modern times opinion is divided as to the desirability of keeping the sentence of death as a legal punishment. Those who wish to abolish it maintain that every murder is committed in a state of temporary insanity and life for life is a relic of the barbarous times. Those of the other school are of opinion that deterrent punishments are necessary and prevention of offences will not be secured merely by soft methods, however commendable they may be from the humanitarian point of view.

Whatever may be the correct view the sentence of death is not going to be abolished in the near future but there are cases in which the legislature should provide that the capital sentence shall not be passed. Sec. 382 of the Code of Criminal Procedure lays down that where the accused sentenced to death is a woman who is pregnant the High Court shall postpone the execution of the sentence and may commute the sentence of death to one of transportation for life. This provision of law is very defective and should be altered.

Under the section the High Court is bound only to postpone the execution of the sentence and evidently the intention of the legislature is that the sentence may be carried out after the condemned woman is delivered of a child. Now it is inhuman that a pregnant woman should be hanged, for it means the taking away of two lives for the loss of one; but is she to be sent to the gallows when the child born is a mere suckling? Would it be human to do it? Or, would it be at all human to remove her from this world when the little one has grown a little? One shudders to think of a mother being delivered of a child with death staring her in the face. Death is the common lot of mankind and it may come at any time, but it is human nature that life becomes unbearable if it is known that the inevitable will happen on a certain date. In such cases the law should ordain that no capital sentence shall be passed but one of transportation for life.

THE LATE MR. RAM CHARAN MITTER, C.I.E.

On Monday last, the 12th instant, tributes to the memory of the late Mr. Ram Charan Mitter were paid before a full Court which met in the Court-room of the Chief Justice, which was crowded with members of all branches of the legal profession.

Dr. Dwarka Nath Mitter, President, Vakils' Association, said, Mr. Mitter was born in 1847 and was educated at the Presidency College. After taking his M.A. degree in 1866, he joined the High Court Bar in 1869. He was appointed Senior Government Pleader in 1899 and he held this office for 22 years. He enjoyed in an immense degree the confidence of the Bench, the Bar and the public alike. The confidence reposed in him by the Bench found eloquent expression when, on his retirement in 1921, the Chief Justice made reference to his fairness, great learning and legal acumen. In recognition of his services the Government conferred on him the distinction of the Companionship of the Indian Empire. He was the President of the Vakils' Association for 22 years. He had departed from life with all that which, according to Shakespeare, should accompany age—"honour, love, troops of friends."

Mr. B. L. Mitter, Advocate-General, on behalf of the Calcutta Bar joined in the expres-

sion of sorrow and said that the very fact that Mr. Ram Charan Mitter had for half a century occupied the prominent place in the profession was a sufficient testimony to his worth and character. He had learning without ostentation, he had wisdom without flourish. He knew him intimately in private as well as public life. What distinguished Mr. Mitter most was his high character, combined with sweetness of temper and warmth of heart. He belonged to the old order of cultured Bengali gentlemen who did not regard good manners as servility. His life was rich in service to the Crown, devotion to duty and in charity to all. In him they had lost one of the dwindling links with the past.

Mr. J. C. Dutt, on behalf of the Incorporated Law Society, associated himself with the expression of sorrow.

The Chief Justice said it was not only because of his great knowledge of the law, in some branches of which he was a veritable expert, but because of his character and attractive personality that they had such a high opinion of Mr. Mitter. He was particularly careful to maintain the best traditions of the profession to which he belonged; so scrupulously fair in presenting his argument to the Court that he could not fail to attain the highest reputation.

"Men come and go; and others take their place," and it was only by preserving the traditions of the profession of which Mr. Mitter was such an ardent supporter that the high standard of administration of justice, to which they were accustomed in this Court, could be maintained.

Mr. Mitter was no ordinary man. "He has played his part in this world's stage, and he played it very well." His Lordship hoped that the influence of Mr. Mitter's life would be felt and the example which he set would be followed for many years to come.

Their Lordships expressed their sincere sympathy with the members of Mr. Mitter's family in their bereavement.

LONDON NOTES

(FROM OUR CORRESPONDENT.)

Feb. 17th.—VISCOUNT DUNEDIN, LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE and MR. AMBER ALI dismissed a petition to re-call the Order in Council in *Neki v. Chajju Ram*.

The appeal was heard by the Board in 1922

(26 C. W. N. 698) when the decision was chiefly concerned with the procedure adopted by the High Court in review. The Petitioner was not present at the hearing and the Judicial Committee found that the procedure adopted was wrong and dismissed the Petitioner's suit. The Petitioner in 1921 having obtained leave in India appealed to the Board for the suit to be heard on the merits, which concerned his claim to pre-emption. The Board dismissed that appeal on the ground that no appeal lay, the suit having been dismissed as non-existent. The Petitioner now brought a substantive application to have the former Order in Council recalled and the suit heard by the Board on the pre-emption claim. The petition was dismissed.

Mr. Wallach for the Petitioner.

Sir G. Lowndes, K. C. and *Mr. Douglas McNair* for the Opposite Party.

Feb. 16th and 18th.—VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN EDGE and MR. AMER ALI again constituted the Board of the Judicial Committee for the hearing of Indian appeals.

Arguments were heard in *Balbhaddar Singh v. Badri Shah* (Oudh). The Plaintiffs who are Appellants before the Judicial Committee brought a suit for damages for malicious prosecution against the Respondents alleging that the latter had caused proceedings to be instituted against them for murder. The trial Court decreed the suit and awarded Rs. 10,000 damages. The Judicial Commissioners set aside this decree and awarded the Plaintiffs only out-of-pocket expenses by way of damages. Judgment was reserved.

Messrs. DeGruyther, K. C. and *Dubé* for the Appellants.

Messrs. Dunne, K. C. and *Ramsay* for the Respondents.

Feb. 18th, 19th and 22nd.—*Pratap Chandra Deo v. Jagadish Ch. Deo*. This was an appeal from Bengal in which the question for determination is whether succession to the Dhalbhum Raj according to lineal primogeniture can be evaded by a testamentary alienation effected by the last holder.

Mr. A. M. Dunne, K. C., *Sir Geo. Lowndes, K. C.* and *Mr. S. Hyam* for the claimant contended that he was entitled to succeed according to the family custom of lineal primogeniture

and that the Will of the late Raja was inoperative. They urged that the Indian Courts had found that the family was joint and governed by the Mitakshara and they claimed a decision under the Hindu law, whereby, once co-ownership is established there must be survivorship.

The decision of the Privy Council in *Bajnath Prasad v. Tej Bali* (48 I. A. 192) had laid the foundation for a review of the decisions in *Surtaj Kuari v. Deoraj Kuari* (15 I. A. 51) and the *Pittapur* case (26 I. A. 83), and they maintained that those cases had been wrongly decided.

The further hearing was adjourned in order that the question might be re-argued before a Full Board.

The Respondent is represented by *Messrs. Upjohn, K. C.*, *DeGruyther, K. C.* and *B. Dubé*.

Feb. 22nd and 23rd.—*Hanafi Shah v. Sheikh PANDA Khan*, an appeal from Baluchistan, refers to the alleged wrongful seizure of camels for the Eastern Persian Cordon in 1919-1920. Questions of jurisdiction and limitation arise.

The Board consists of VISCOUNT HALDANE, LORD PHILLIMORE and MR. AMER ALI.

Sir G. Lowndes, K. C. and *Mr. A. Majid* for the Appellants.

Sir W. Schrabbe, K. C. and *Mr. Houn Collins* for the Respondents.

The arguments have not been concluded.

G. D. M.

Reviews.

NEGLECTANCE FOUNDED ON RIGHTS, with a Theory of the Law of Torts, based on a conflict of rights. By *P. S. Vaz, B.A., B.Sc., LL.B.* Calcutta, Butterworth & Co. (India), Ltd., 6, Hastings Street. 1925.

This is not the first and is not likely to be the last attempt to formulate a general theory of the Law of Torts. Sir Frederic Pollock's solution now possesses little more than historical interest, and Mr. Bigelow's carried matters not much further. The difficulties which confront all such attempts are by no means merely accidental, depending, so to speak, upon the individuality which must find expression in each judicial pronouncement and which has only to be passed through the crucible of scholastic analysis to crystallise into a coherent body of doctrines which will

be good for all cases. In the field of torts, the clash of interests between individual and individual takes such Protean forms that what appeared in a given case to furnish a satisfactory ground of decision fails to yield just results when applied to an even apparently slightly differing set of circumstances. Empiricism runs riot in the law of torts, and such generalisations as are attempted by Judges with a penchant for analysis and text-book writers who aim at furnishing practitioners with categories of thought prove only slightly less empirical than the general run of judicial decisions. In recent years a new movement for which credit is due chiefly to the American Law School has been manifesting itself, and solution is being increasingly sought from an analysis of the very nature of rights and duties as disclosing the foundations of rights and liabilities—not indeed *a priori*, which would be barren and useless, but from an extensive and comparative study of the judicial decisions themselves in relation to the facts.

It is chiefly cases of negligence that have furnished the acid test for all general theories of liability propounded by Judges and text-book writers, and it is no doubt his dependence for the bulk of his material on these cases that has led the present author, in naming his book, to give greater importance to his material than to the main end of his thesis which is to propound a general theory of the law of torts. This he does, reversing the order in his title in the first book, whilst he makes "Negligence founded on Rights" the subject of his second book. The theory which he seeks to establish is that right consists in freedom of action so far as it is permitted or protected by law—a theory which is strongly controverted by Mr. Korkunov in his "Theory of Law." Whatever may be the rights or otherwise of these opposing views—and it would be rash to make definite pronouncements thereon in a book review—it is only due to the author to say that he has brought to bear industry, insight and a keen analytical faculty in expounding his own views. His presentation of these views is provocative of thought and enquiry and so scholarly that it is bound to interest all lawyers who are not mere practitioners of law. Even these latter will profit from the help that the book will lend them in the study of the leading cases dealt with under several captions in the second book, some of which may be mentioned :

(a) degrees of negligence, (b) remoteness of damage, (c) master and servant, (d) contributory negligence, (e) conflict between negligence and fraud.

The book—one of great merit—unquestionably is one of the most important contributions made in recent times to a study of the theory of the law of torts and its application in concrete cases, and should be widely studied.

THE SUCCESSION ACT, 1925 (ACT XXXIX OF 1925). By P. Hari Rao, B.A., B.L. The Law Printing House, Mount Road, Madras, December 1925. Price Rs. 2.

THE CASE-NOTED INDIAN SUCCESSION ACT (XXXIX OF 1925). The Madras Law Journal Office, Mylapore, Madras, 1925. Price Rs. 2.

INDIAN SUCCESSION ACT (ACT XXXIX OF 1925). By A. C. Ghose, M.A., B.L. Calcutta, M. C. Sarkar & Sons, 90/21, Harrison Road, 1926. Price Rs. 6.

There is not much to choose between the first mentioned two publications. They are mainly reprints of the new Consolidated Act, bearing references to the provisions of the Acts which have been superseded by it, with brief case-notes at the foot of each page. They are of the same size and equally priced, and handy for ordinary use.

More ambitious is Mr. Ghose's book. The texts of the sections are followed by explanatory case-notes, well-arranged under distinct heads. We have tested the references and found them full, up-to-date and helpful. It is enough to say that purchasers of the book will find quite good value for the price, which by itself would hardly suggest that it covers over 700 pages. The get-up of the book reflects credit on the printers and publishers.

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Communalism is irreconcilable with Swaraj.

We have all along maintained the view in these columns that to promote communal feelings and accentuate communal differences on the score of religious and social prejudices is to retard national progress towards the attainment of a democratic *swaraj* or responsible Government. Those who differ from us in this respect will do well to read an article in the March number of the *Nineteenth Century and After*, on New Turkey by the Rev. A. M. Chirgwin and note the policy that is being pursued there by Mustapha Kemal Pasha, who is one of the greatest soldiers and statesmen of modern times. He and his progressive colleagues have deliberately come to the conclusion that for the oriental people to attain the status, position and eminence of a self-governing nation a sharp line of demarcation must be drawn between the affairs of the Government or the State which are chiefly secular and those of religion which relate to the spiritual ideals of man, individually or collectively, and have little concerns with the duties of a citizen to the State. It is after centuries of bitter experience that the western people have evolved a system of self-government in which the religion of individuals or of communities play little or no part. Matters of faith or religion enjoy protection and toleration of the State so long as they do not offend against public morals or the laws of the land. Every self-governing State seeks to conduct the affairs of the Government on such principles of religious toleration. Turkey is pursuing a more go-ahead policy and is abolishing by legislation all institutions that have in the past or heretofore stood in her way to the attainment by her of a nationhood in the western sense of

the term and with that end she is discarding all her religious and social prejudices. In this respect she furnishes a lesson to India which we, both Hindus and Moslems, will do well to emulate.

We give below some extracts from the article referred to which will indicate the policy of bold reforms that this eminent soldier and statesman is pursuing. The writer after giving a brief sketch of his career quotes the portion of his speech delivered as the President of the Turkish Republic in August last laying down the line of policy he is following as its accredited head.

A statesman, a soldier and a born leader of men, he is one of the most forceful personalities in contemporary politics. Born in Salonica forty-four years ago and trained as a soldier, Kemal became aide-de-camp to the brilliant but brutal Enver Bey. He fought with distinction in the revolution against the Sultan, in the Tripoli and Balkan wars, while in the Great War he won fame by capturing the British force under General Townshend at Kut and by rolling back the British offensive at Gallipoli. Probably no general on the side of the Central Powers had a more consistently distinguished record. Previously the Turks were tamely accepting defeat after defeat and growing accustomed to the notion that they could not hope to stand up to the Allied Armies. Then Mustapha Kemal suddenly emerged, and, like a new Washington, he carried everything before him, and was even able to dictate terms to the Lausanne Conference. He assumed up his position as President of the Turkish Republic in an address delivered in August last:

"The object of the revolution, which we have already set on a secure footing and which we are still carrying on, is that of giving to the citizens of the republic a social organisation completely modern and progressive in every sense. It is imperative for us to discard every thought which does not fall in line with this true principle. All absurd superstitions and prejudices must be rooted out of our minds and customs. . . . It is shameful for a civilised nation to expect help from the dead. I can never tolerate the existence in the bosom of the civilised Turkish society of those primitive minds which seek their material and moral well-being under the cloak of some sheik who may act contrary to the clear light of modern science and art.

"Fellow-countrymen, you know that Turkey can never be a country of dervishes and sheiks and their disciples. The only true congregation is that of the great international confraternity of civilisation.

"It is said that we Turks have a national costume. I have here before my eyes in this crowd a person who is wearing a fez wound round with a green turban. He has on a vest with sleeves and over that a coat like mine. How can a

civilised man consent to render himself ridiculous in the eyes of everyone by decking himself out in such outlandish rigging? The employees of the Government and all our fellow-citizens will have to reform such anachronisms of their dress.

"By her great accomplishments the Turkish nation has proved that she is a nation essentially revolutionary and new."

The following shows how at one stroke he has brought about a complete separation between the functions of the State and that of religion. One does not know whether to admire him more for his courage as a statesman or a soldier.

Of all the changes in Turkey perhaps none will prove to be further reaching or to have more widely felt repercussions than the new attitude to religion. In her determination to be politically up to date she abandoned imperialism, and in her resolve to be scientifically up to date she is severing her connexion with Islam. It was of her own free will that the new Turkish Republic ended the Caliphate and expelled the Caliph. By a series of steps Islam as the official religion of Turkey was disestablished and disendowed. Probably the Islamic faith has suffered no more staggering blow since the Crusades. The Grand National Assembly, feeling that the Caliphate might constitute a drag upon the wheels of progress, or even form a rallying point for reactionaries, repudiated both it and the whole religious system for which it stood.

The following will show how he has brought about the emancipation of women and have abolished such baneful institutions as early marriages by legislation.

Socially the upheaval has been much more marked. Perhaps no change is more obvious to the casual observer than the changed position of women. The veiled woman, the dominance of the harem, the practice of polygamy and concubinage are fast disappearing. Unveiled faces were rarely if ever seen in Angora before the war; to-day in that city the wives of the members of the Grand National Assembly, headed by Latife Hanoum, the accomplished and enlightened wife of Mustapha Kemal Pasha, dress in European garb, go to the cinema with their husbands, and have their 'at homes' where men and women freely mingle. In Stamboul more than three-quarters of the Moslem women are now going unveiled through the streets. School girls move about unchaperoned without comment. Husbands and wives, young men and young women, go for outings together in a way unknown before. The partitions and window curtains that previously screened the women's portion of the trams have been removed, and women may now be found sitting in any part of the cars. The women, revelling in their new-found liberty, are protesting against polygamy, and before long it will have disappeared, though the farcical divorce laws still remain. The younger men, with Western notions, are beginning to look upon the Moslem practices of polygamy and divorce as hopelessly out of date. The women themselves are demanding and securing larger opportunities. They are entering the universities, the legal, medical and teaching professions; they may even be seen driving motor cars. The Turkish feminist movement finds expression in such papers as the *Women's World*, which wages unrelenting warfare on all the discriminations against women in social life. The Turkish Women's Association has applied for permission to give weekly lec-

tures in the mosques on such subjects as the position of women and the management of the household, while the minimum age for marriage was fixed by law four years ago as sixteen for girls and eighteen for boys. This represents a revolution in itself, for boy and girl marriages have been the custom in Islamic lands from the days of the Prophet and the whole system is deeply embedded in Moslem tradition and practice.

The rationalistic policy that Turkey has been pursuing does not leave out of account even the outward attire of the nation. The political outlook of modern Turkey under its epoch-making leader Kemal is, as he says, to bring the Turkish people under "the great international confraternity of civilization." In the matter of dress also he enjoins the removal of all signs of communalism, which, we know to our bitter experience in India, leads to death and devastation. European costume may not be suitable for India but the extension of rationalism in the matter of dress and the discarding of all signs of communalism is by no means to be regarded as insignificant.

The New Turkey is determined to be up to date. One change, seemingly insignificant, is characteristic of the whole movement, the new Turk has doffed his Oriental, religious fez and donned a European hat. Only a few years ago the hat was the symbol of the despised and conquered Christian infidel, while the fez was the badge of Mahammad's chosen people. As one of their most brilliant leaders in the Cabinet said:

"Ten years ago if a Turk wore a hat on his head, his head would have been cut off. But see what we are doing to-day. . . . Turkey as a nation is being born in a day. She is not facing toward the East as Persia. Rather has she turned to the West. It is from foreign influences that we have gotten the ideas that inspire our present effort. Our faces are toward the West."

Cognizance and Jurisdiction.

The judgment of Page and Mukerji, JJ., in the case of *Subal Chandra Namadas v. Ahadullah Sheikh* reported at page 546 of this issue deserves notice. Their Lordships point out that under the Code of Criminal Procedure a wide discretion is given to Magistrates with respect to the grant or refusal of process and that in the interest of the community generally it is essential that Magistrates should be vested with an ample discretion in this matter. There is no doubt as to the law on the subject and the observations of their Lordships are quite in accord with the view which has been taken in judicial decisions for very many years.

The facts out of which the case in question arose are that on a complaint two persons were placed upon their trial before a Magistrate

under sec. 426, I. P. C. The charge against them was that they and a number of other persons who were named in the petition of complaint caused mischief to the crops of the complainant. These persons were duly tried and acquitted. The Magistrate found that the land was in the possession of the accused and the crops were grown by them. A few days after the acquittal of these persons the complainant filed another petition of complaint against the Petitioners and others not named on the same facts before another Magistrate omitting the names of the two persons who had been acquitted but mentioning the fact that a complaint against two of the accused in the case had been tried and the trial ended in an acquittal. The Magistrate summoned the Petitioners to answer a charge under sec. 426, I. P. C. Their Lordships point out that the plea of *autre fois acquit* was not available to the accused and this is quite clear, for the principle is that no person is liable to be tried twice for the same offence and the doctrine can have no application when the accused are different.

Their Lordships, however, quashed the summons on the ground that the fact that other persons accused upon the same facts of having been implicated in the same offence has been acquitted may properly be taken into consideration by the Magistrate in determining whether upon the materials before him there is sufficient ground for issuing process and the Magistrate acts improperly in summoning the accused without paying any regard to what had taken place in the earlier proceedings. Their Lordships, we regret to point out, have entirely overlooked a very important aspect of the case and omitted to notice that the Magistrate before whom the second complaint was laid had no jurisdiction at all to deal with the matter and it is all the more regrettable because the point is raised by the learned Sessions Judge in the concluding part of his letter of reference. It appears from the letter of reference that the first complaint was filed before a Magistrate other than the officer who tried and acquitted the accused. Now under the Code of Criminal Procedure a complaint means an allegation made to a Magistrate that some persons known or unknown have committed an offence. Whenever a Magistrate takes cognizance of a complaint,* he takes cognizance of the whole case arising out of the complaint and not

merely of the accused who are named before him. The case against those who are not named is also taken seisin of by the Magistrate taking cognizance and it is he alone who can summon any person whose name transpires in the course of the trial or subsequent thereto as having been implicated in the case.

Under sec. 192 any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate or a Magistrate of the first class duly empowered by the District Magistrate in this behalf may transfer any case of which he has taken cognizance to any subordinate to him. The effect of such an order under sec. 192 is to transfer the whole case of which cognizance has been taken and therefore subsequent to the transfer under sec. 192 the Magistrate to whom it is transferred is alone competent to deal with the whole case including the case of the persons not named in the complaint and not summoned by the Magistrate who took cognizance. It is thus abundantly clear that in the case in question the only Magistrate who could legally dispose of this second complaint was the Magistrate who had tried the first complaint and acquitted the accused. The complainant knowing perfectly well that he had no chance of success before that officer whose opinion as to the possession of the land and the growing of the crops was against him adopted the illegal procedure of filing a fresh complaint before another Magistrate who quite contrary to law assumed jurisdiction in the matter and issued process. This should have been pointed out in the judgment, for, as it is, it is likely to be misconstrued as impliedly sanctioning the view that the second Magistrate had jurisdiction to deal with the matter.

It is much to be regretted that in a case involving such an important point of law neither side was represented by lawyer. We have pointed out in these columns before and we repeat again that in all important cases which are undefended there should be provision for the accused being represented by a lawyer. Instead of leaving it to the Hon'ble Judges to request a member of the profession to argue the case as *amicus curiæ* the Crown should provide for counsel in all such cases in the High Court at the suggestion of the Hon'ble Judge before whom the case is pending.

THE MANNER IN WHICH POLICE-MEN SHOULD TESTIFY.

Addressing the cadets of the Police Academy, Mr. Alfred J. Talley, formerly Judge of General Sessions, New York, specified fourteen "points to testify" for the benefit of the would-be policemen of New York. We are informed by the *New York Times* that the points were accepted for the curriculum of the academy by its Director at the close of Mr. Talley's remarks.

The first point contained this admonition: "Tell the truth. No case is important enough to the Police Department, to the city of New York or its people, or to you as an individual, to justify deviation from the truth. Your own self-respect, peace of mind and manhood are of more worth to you than the comment of another police officer, an Assistant District Attorney or anybody else."

"Tell your story in your own way," was another bit of advice. "Don't try to tell it as a college professor might lecture to a class on psychology or as a minister might tell it in a pulpit," said ex-Judge Talley. "Avoid stilted language. Speak clearly and loud enough to be heard. Jurors become irritated because policemen do not speak distinctly. You are speaking for the jury to determine the Defendant's guilt or innocence."

"Don't hesitate to correct mistakes or errors. Policemen sometimes make the serious mistake of trying to defend a slight slip as to time or place. They get the impression that because they inadvertently misstated a fact they must stick to it. It matters not what the defence or the District Attorney think about you. What counts is the impression the jury gets as to whether you are telling the truth."

"Be respectful to both sides of the case. The police witness who makes a 'hit,' whether he is the Commissioner or a rookie patrolman, is the witness who can say: 'Yes, sir,' or 'No, sir,' to the Defendant's attorney, to the Judge, or to the District Attorney, when he is asked a question. No man is too big to be respectful."

"Don't regard the Defendant's lawyer as your enemy. You are an unprejudiced police officer and you are there to state the facts and tell the truth. You are not the District Attorney's witness, and you are not the Defendant's witness. There is no reason for you to go back at the Defendant's lawyer when he asks

you a provoking question. The best way is to stick to the facts, keep cool and control your temper. If you lose your temper, the Defendant's lawyer has accomplished his purpose. He then has you off your balance and is likely to twist you around his fingers.

"Don't be too anxious to convict. Once a jury gets an impression that the policeman is there to convict they are going to acquit."

"There is no hurry about giving your testimony. They are anxious to hear what you have to say. If you don't understand the question, ask the District Attorney or the Counsel for the defence to repeat it."

"Don't volunteer additional information; an officer who has a black-jack in his pocket which is to be used as evidence against a Defendant is perfectly justified in keeping that black-jack in his pocket until he is asked about it, some of the twelve men in the jury box might use that as an excuse to hold that the policeman is too anxious to make out a case against the Defendant."

"You are responsible only for answers to questions asked. Confine your answers only to those questions. No one can complain that you volunteered additional information or added to your answers."

"No conviction is important enough to justify either concealment or distortion of the facts."

"If you know anything favourable to the Defendant that is competent as evidence and you are asked about it, do not hesitate or be afraid to say it. There is nothing that makes a better impression on the jury than the feeling that a policeman is not anxious to conceal something in the case that might be helpful to the Defendant. As a police officer, you are assuming judicial functions to a certain extent, and you should testify with as much impartiality as possible."

"For the sake of the New York Police Department, for your own self-respect, and because it is right, once you have sworn before the living God to tell the truth, tell it."

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Lessons of the riot.

The campaign of lawlessness that has prevailed in Calcutta during the better part of last month seems to have abated since the latter half of last week. Still panic prevails all over the town. Shops and markets in the disturbed areas have not been all opened and the situation in these localities is far from normal. Workmen who would not leave their homes during the earlier part of the week have been resuming work during the latter part. Trade, commerce and banking business which remained suspended are also being resumed but they will not be in full swing till confidence in the peace and security of the city is fully restored. The poorer section of the community, both Hindus and Mahomedans, are undergoing greater hardship than richer people. Prices of food-stuff have gone up because of supplies having fallen short through scare and panic. We express our deep sympathy for the people at large, many unoffending members of whom have suffered death and severe bodily injuries and loss of property at the hands of the lawless elements amongst them. Even at our office business in some departments had to be suspended owing to the absence of workmen. We hope, we have come to the end of insane mob frenzy, during which the lawless and criminal classes acted like beasts of prey and benefited at the cost of the peaceful citizens. Of course there were some perverse brains behind them who seemed to think that such disorder, discord and violence would in some way further their selfish ends. But in the end the misguided

people find that they were deluded and that they in common with the general public are the worse off for it. It is thus through the sufferings of their dupes that wisdom will dawn upon them. It is an infallible lesson of history that a community or a nation can only prosper or progress when they are at peace with their fellow beings.

Criminal Statistics, 1924.

The Criminal Statistics for 1924 for England and Wales which have been just published and are being reviewed by our English legal contemporaries are very interesting in many respects. The general conclusion that the editor has arrived at is that "crime was increasing before War, was less after the return to peace, and now does not yet show any definite tendency to increase or decrease." Crimes of violence have not increased during the last fifty years, although the population in England and Wales has during the period increased from 24 to 39 millions. Murders known to the police have remained annually almost stationary at 150 and out of these 50 have been cases of infanticide. Homicides during the last five years have stood at an average figure of 268. In Germany in 1921 only 167 capital sentences were passed for murder. In Italy with a population of about 38½ millions there were 1983 homicides or attempts in 1918. In France 855 persons were tried for homicide in 1913. In the United States the figures are appalling. With a population of 110 millions, in the registered area of 93 millions there were 7788 homicides in 1922 out of which 5714 were committed with firearms. Adventurers from all parts of the world flock there and although the police there are armed with drastic powers, yet violent crimes are more common there than in any other part of the world.

Reformation of Criminal.

The following extract from the introductory note of the editor of the English Criminal Statistics for 1924 will show how the angle of

vision has changed in the course of a century with regard to those unfortunate persons who commit crime. In earlier times they were put to death for the supposed well-being of society. Later on with the progress of more humane ideas they were all shut up in prison for keeping them out of harm's way. It is only recently that the idea of reformation of criminals has been regarded as a duty of the state.

"At the opening of the nineteenth century persons accused of crimes were triable only at assizes and quarter sessions. The punishment prescribed for most crimes was death, but some other punishment was usually substituted, i.e., transportation for life or for long terms of years, or, at a later date, penal servitude. Mere imprisonment was not a usual punishment for crimes. At this time the powers of justices out of sessions (i.e., out of quarter sessions) were mainly confined to the preliminary examination of persons accused of crimes, and to punishing poachers, vagrants, and drunkards. In the course of the first half of the century, however, powers were conferred on justices to try some crimes summarily under certain circumstances, and many minor offences created by statute were placed within the summary jurisdiction of justices. In 1857, the first year for which regular returns of summary proceedings were collected, 34,398 persons charged with crimes and 327,287 persons charged with minor offences were tried by courts of summary jurisdiction. In the same year 20,269 persons were tried for crimes before courts of assizes and quarter sessions. (In 1807 the whole number of persons tried for crimes was only 4446.)

"One result of the change in criminal procedure was that imprisonment became the ordinary punishment for all crimes, and for all minor offences too serious to be met by the imposition of a fine. So long ago as 1857 the number of convicted persons received into prison was about 100,000. By 1904 the total had increased to 198,386, including 107,625 persons imprisoned in default of payment of fines. In 1924, however, the number of convicted persons imprisoned had been reduced to 44,237, chiefly through the operation of two statutes, the Probation of Offenders Act, 1907, and the Criminal Justice Administration Act, 1914."

"The way the Probation Act is worked in England has relieved the prison population by more than half without any appreciable increase in crime. The note referred to above goes on to state:—

"The other factor in reducing the number of persons unnecessarily confined in prison is the application of the provisions of the Probation of Offenders Act, 1907, which enables the courts to release on probation persons who are found guilty of crimes and offences. . . .

"The total of guilty persons released from all Courts without punishment under the Probation of Offenders Act was 79,853.

"It should be noted that a much larger use of the Probation Act is made by courts of summary jurisdiction in dealing with the more serious indictable offences than with the much larger number of non-indictable offences. Thus, of 44,264 persons found guilty of indictable offences, no less than 22,141, or more than half, were released without punishment; whereas of 534,308 persons found guilty of other offences tried summarily, only 56,259, or about a ninth, were released under the Probation Act. The reason of course is that the great bulk of the latter class of offences can satisfactorily and properly be dealt with by fine, and in any consideration of statistics with regard to the total number of persons convicted in the courts, it should always be remem-

bered that no less than 470,066 are convictions that result merely in a fine, and that only 3 per cent. of the persons fined are imprisoned in default of payment."

Uncertainty in matters of procedure and practice.

In *Basaratulla v. Reazuddin* reported at p. 570 of this issue, the question arose, not for the first time, whether an application under Or. 21, r. 90 of the Civil Procedure Code is an application in the suit or a miscellaneous proceeding in the nature of a suit within sec. 111 of the Code. The decisions of the High Court are conflicting, and though in view of the special circumstances of the case the Court did not feel justified in referring the question for decision to a Full Bench, the following observations of Page, J., are so pertinent that we make no apology for quoting it in full in order to draw pointed attention to the matter, as his Lordship no doubt desired should be done:—

"Having regard to the admitted divergence of opinion in the Court as to the meaning and effect of sec. 141, I should have been disposed to refer the question in issue to the Full Bench for final determination. It is, I think, a matter both for surprise and regret that so many questions of practice and procedure have been allowed—in some instances for decades—to remain, and still are unsettled. Uncertainty as to procedure must needs militate against the due administration of justice. It is, of course, inevitable that differences of opinion should arise as to the substantive rights of a prospective litigant, but there should be no ground for doubt or perplexity as to the mode in which his rights are to be determined. It is of the utmost importance that the practice and procedure of the Courts should be well-defined and clearly understood, and that in the Mofussil Judges should not be compelled to waste their energy in endeavouring to ascertain the practice they are to follow from a number of apparently diverse decisions which can only be rendered consistent (if at all) by the exercise of the most subtle reasoning. Upon these grounds, and because I feel strongly that the rules and regulations relating to practice should be the handmaid and not the mistress of the law, I should have been inclined to refer the question in issue in this case to the Full Bench."

RIGHT TO CONDUCT RELIGIOUS PROCESSIONS WITH MUSIC PAST PLACES OF WORSHIP OF ANOTHER SECT.

The recent unfortunate communal riots in Calcutta have brought into prominence the question of the right of one community to conduct religious processions with music and other appropriate observances along a high way past a place of worship belonging to the members of another community. It is a commonplace of law that every citizen has a right to pass along a highway so long as he does not interfere with the right of other persons. What one citizen can do, a number of citizens can do, provided they do not break the peace. Can the members of one community insist, as a matter of right, that a procession of the members of some other community should cease music when passing in front of their place of worship? In a country like India inhabited by people of various religious persuasions it would have been disastrous if the law said otherwise. It is a very sensible legal maxim: "*Lex non facit vota delicatorum*"—the law makes no allowance for the susceptibilities of the hypersensitive. Whatever doubts might be said to have existed in regard to the law on this subject have however been set at rest by a very recent decision of the highest Court of Appeal. The Privy Council in the case of *Manzur Hasan v. Muhammad Zaman* reported in 29 C. W. N., page 486, has finally decided the point. The law previous to this was in a state of flux. The earliest Indian decision is reported in 2 Bom. 457 which was a case between two sects of the Mahomedans, one sect contesting the right of the other to carry *Tabuts* in procession along a certain road to the sea during Mohurram. The common law right of passing and re-passing a public high way peaceably and properly was conceded, but Westropp, C. J., after an elaborate discussion of English law held that in the absence of special damage to the Plaintiffs, they could not maintain a civil action. This decision was naturally followed by the same High Court in 18 Bom. 698. But a later decision of Bombay refused to follow these earlier decisions. Madras, however, consistently maintained the position that persons of whatever sect were entitled to conduct religious processions through public streets so as not to interfere with the ordinary use of such streets by the public and subject to the Magistrate's directions to prevent breaches of the peace. As the 2 Bombay

case was a case between rival sects of the Mahomedan faith, so the earliest Madras case (6 Mad. 304) was one between two branches of the Vaishnavite (Hindu) sect. It is noticeable that the High Court in recognising the right ignored the Pundit's opinion to the contrary. The next case (6 Mad. 203) is a Full Bench case and the Chief Justice's judgment is very instructive reading. There was a Government order that all music must cease playing when the procession was passing any recognised place of public worship. The Hindus brought a suit contesting the validity of the order and sought a declaration that they were entitled to pass the mosque playing music freely. The High Court held that the said Government order had not the force of law and made the declaration asked for subject only to the right of a congregation engaged *bond fide* in public worship to be protected from disturbance and to the authority of the Magistrate to regulate the exercise of that right for the preservation of the peace. The Mahomedans in that case put forward the extreme case that prayer continued in the mosque throughout the day. The Court brushed it aside and required of them to inform the Magistrate at what hours they assembled for worship in order that the right of the Hindu processionists might not be unduly curtailed. The Chief Justice observed that "the prejudices of particular sects ought not to influence the law" and his Lordship referred to a subsequent Government resolution that "the public high streets in all towns are the properties not of any particular caste, but of the whole community; and every man, be his caste or religion what it may, has a right to the full use of them, provided he does not obstruct or molest others in the use of them and *must be supported in the exercise of that right*." The right being established, his Lordship went on to point out that "the authority of the Magistrate should be exerted in the defence of right rather than in their suspension, in the repression of illegal rather than in interference with lawful acts." If the Magistrate was of opinion that the exercise of a right was likely to cause a riot, it was his duty to take from possible disturbers security to keep the peace under the Criminal Procedure Code. In a subsequent Madras case the same view was upheld and Calcutta followed Madras. The matter has now been finally settled by the Privy Council in the case reported in 29 C. W. N. 486 previously mentioned. That was a case between Sunni and Shia Mahomedans.

The Mohurram had for years been celebrated by the Shia community by taking in procession *Taziahs*, etc., through the streets and performing *Matam*, i.e., wailing, beating of the breast, etc. This was obnoxious to the Sunnis who regarded it as sinful and they objected to the passage of the procession past their mosque. The District Magistrate made an order that *Matam* was not to be performed within a certain distance of the Sunni mosque. The Sunnis then brought a civil action asking for a declaration of their right to go in procession and perform *Matam*. The Privy Council after an elaborate discussion of the decisions of the various High Courts has laid down that persons of whatever sect are entitled to conduct a religious procession with its appropriate observances along a high way subject to the Magistrate's order regulating the traffic and the rights of the public and that persons of different sects or religions cannot, as of right, claim that the functions of the procession should cease as it passes places of worship belonging to the former. In the special circumstances of a case, it has been held it would be open to the Magistrate to order that the observances should cease within a certain distance of a place of worship. The law as authoritatively laid down is now quite clear. The primary duty of Government is to protect people in the exercise of their right and to secure them against interference by force or show of force. Secs. 107 and 144 of the Criminal Procedure Code provide an easy machinery for checking the activities of the offending party. The people in the right have a right to count upon the protection of law and the help of the police in the reasonable exercise of their rights.

TARAK NATH BASU.

Correspondence.

KNOWLEDGE OF SURVEYING OF JUDICIAL OFFICERS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

It is regrettable that many of the Judicial Officers have no knowledge of surveying and of maps. In my long practice I have scarcely come across Judicial Officers who fully understand all intricate questions of maps and surveys. Almost all the Judicial Officers including Sub-Judges and Judges generally make it a point to avoid intricate questions of survey when these are at issue and they place themselves entirely in the hands of the Commis-

sioners and thereby do immense harm to the litigant public in the name of justice. I think much of this difficulty may be avoided if these officers during their probationary period be trained in surveying without exception like the Deputy Magistrates who are required to undergo training in settlement surveys.

A VAKIL.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before SUHRAWARDY AND PAGE, JJ. APPEAL FROM ORDER NO. 191 OF 1925. BHUTNATH DEB and others, Decree-holders, Appellants v. SASHIMUKHI BRAMHANI, Respondent. The 5th March 1926.

Civil Procedure Code (Act V of 1908), sec. 47—Or. 41, rr. 4 and 33—Appellate Court, is competent to set aside the decree appealed from in favour of a person who is no party to the appeal.

The Appellants' application for execution was dismissed by the lower Appellate Court as time-barred, upon appeal by the judgment-debtor Sashimukhi alone, in respect of her own share of the debt payable under the decree.

The point in the 2nd appeal was whether the Court of Appeal below was right in dismissing the entire application for execution upon appeal by the judgment-debtor S alone, without impleading her co-judgment-debtor M as a party to the appeal:

Held—In acting under Or. 41, r. 33 the lower Appellate Court was justified in setting aside the whole decree appealed from by passing an order even in favour of a party who was no Respondent to the appeal before it, notwithstanding that the appeal was not directed against the whole decree, provided it was necessary to decide the point in order to give relief to the decree-holder Appellant.

Haridas Dey v. Kailash Chandra Bose, (1916) 44 I. C. 480, *dissented from*.

Ambika Charan Chakrabarti v. Sasitara Debi, (1915) 22 C. L. J. 61 and *Gangadhar Murati v. Banabashi Podihari*, (1914) 22 C. L. J. 390, *relied on*.

Babu Gopendra Nath Das for the Appellants. Mr. S. C. Maity (with Babus Apurba Charan Mukherjee and Durga Charan Roy Chowdhury) for the Respondent.

H. D. C.

Appeal dismissed.

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Prevention of riots.

An examination of the law under which the police in Calcutta derive their power to preserve law and order shows that under sec. 127 of the Code of Criminal Procedure which applies to the police in the town of Calcutta any Magistrate or officer in charge of a police station may command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace to disperse and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

If upon being so commanded any such assembly does not disperse or if without being so commanded it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police station, whether within or without the Presidency Towns, may proceed to disperse such assembly *by force* and may require the assistance of any private individual (sec. 128).

If any such assembly cannot be otherwise dispersed and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank, who is present, may cause it to be dispersed by military force (sec. 129). When the public security is manifestly endangered by any such assembly and where no Magistrate can be communicated with, any commissioned officer of His Majesty's army may disperse such assembly by military force.

Under sec. 62A of the Calcutta Police Act and sec. 39A of the Suburban Police Act, the

Commissioner of police and subject to the orders of the Commissioner of police every police officer of a rank not inferior to that of Sub-Inspector may, with a view to securing the public safety or convenience, either orally or in writing, give all such directions as he may consider necessary to secure the orderly conduct of persons constituting processions and assemblies in streets, prescribe the routes by which and the times at which any such procession may or may not pass, prevent obstruction on the occasion of all processions and assemblies and in the neighbourhood of all places of worship during the time of public worship and in all cases where any street or public place or place of public resort may be thronged or liable to be obstructed, keep order on and in all streets, quays, wharves and landing places and all other public places or places of public resort, or regulate and control music, the beating of drums, tom-toms, and other instruments and the blowing or sounding of horns or other instruments in any street or any public place other than public buildings and the precincts thereof.

The Commissioner of police may also prohibit the carrying of swords, spears, bludgeons, guns or other offensive weapons in any public place, the carrying, collection and preparation of stones or other articles intended to be used as missiles or of instruments or means of casting or impelling missiles, the exhibition of persons' corpses, figures or effigies in any public place. The Commissioner of police may also prohibit the delivery of public harangues, the use of gestures or mimetic representations and the preparation, exhibition or dissemination of pictures, symbols, placards or any other object or thing which may be of a nature to outrage morality or decency or are likely to inflame religious animosity or hostility between different classes or to incite to the commission of an offence, to a disturbance of the public peace or to resistance to or contempt of the law or lawful authority.

Under sec. 149 of the Code of Criminal Procedure every police officer may interpose for the purpose of preventing and shall to the best of his ability prevent the commission of any cognizable offence, and rioting being a cognizable offence it is the bounden duty of any police officer from the highest to the lowest to interfere for the purpose of preventing a riot. It is regrettable that this wholesome provision of law has not been made applicable to the police in the towns of Calcutta and Bombay.

Appointment of special constables in Calcutta.

Under the Calcutta Police Act and the Suburban Police Act the administration of the police in the town of Calcutta and the suburbs thereof is vested in the Commissioner of police and the police force in these areas is under the exclusive direction and control of the Commissioner of police. The Local Government may appoint one or more deputies to the Commissioner of police who shall be competent to perform any of the duties assigned to that officer under his orders. Under sec. 18 of the Calcutta Police Act the Commissioner of police may of his own authority appoint special police constables to assist the police force in any temporary emergency and under sec. 19 every special constable so appointed shall have the same powers, privileges and protection and shall be liable to perform the same duties and be amenable to the same penalties and be subordinate to the same authorities as the ordinary officers of police. Sec. 12 of the Suburban Police Act gives the corresponding powers to the Commissioner of police in respect of the suburban areas and sec. 13 thereof places such special officers in the same category as ordinary police officers. Under sec. 20 of the Calcutta Police Act if any person being appointed a special constable shall without sufficient cause neglect or refuse to serve as such or to obey such lawful order or direction as may be given to him for the performance of his duties, he shall be liable upon conviction before a Magistrate to a fine not exceeding fifty rupees for every such neglect, refusal or disobedience.

Neither the Calcutta nor the Suburban Police Act provided for an additional police force being employed at the cost of the inhabitants of the locality in which the emergency arose and to supply this omission Bengal Act I of

1898 was passed whereby secs. 15, 15A and 16 of the Police Act (V of 1861) were extended to the town and suburbs of Calcutta with the verbal modifications necessary to make them applicable to Calcutta.

The effect of Act I of 1898 was to extend sec. 15 of the Police Act V of 1861 to the town and suburbs of Calcutta in the following form:—

(1) It shall be lawful for the Local Government by proclamation to be notified in the official gazette and in such other manner as the Local Government shall direct to declare that any area subject to its authority has been found to be in a disturbed or dangerous state or that from the conduct of the inhabitants of such area or of any class or section of them or of any persons resorting to such area it is expedient to increase the number of police.

(2) It shall thereupon be lawful for the Commissioner of police with the sanction of the Local Government to employ any police officer in addition to the ordinary fixed complement to be quartered in the area specified in such proclamation as aforesaid.

(3) Subject to the provisions of sub-sec. (5) of this section the cost of such additional police force shall be borne by the inhabitants of such area described in the proclamation.

(4) Such officer as the Local Government may appoint in this behalf or in the suburbs the Magistrate of the 24-Pergannas after such enquiry as he may deem necessary shall apportion such cost among the inhabitants who are, as aforesaid, liable to bear the same and also shall not have been exempted under the next succeeding sub-section. Such apportionment shall be made according to such officer's or Magistrate's judgment of the respective means within such area of such inhabitants.

(5) It shall be lawful for the Local Government by orders to exempt any person or class or section of such inhabitants from liability to bear any portion of such costs.

(6) Every proclamation issued under sub-sec. (1) of this section shall state the period for which it is to remain in force, but it may be withdrawn at any time or continued from time to time for a further period or periods as the Local Government may in each case think fit to direct."

Explanation.—For the purposes of this section "inhabitants" shall include persons who themselves or by their agents or servants

occupy or hold land or other immoveable property within such area and landlords who themselves or by their agents or servants collect rents direct from raiyats or occupiers in such area notwithstanding that they do not actually reside there.

Sec. 15A provides for the award of compensation to sufferers from misconduct of the inhabitants or persons interested in land.

So far as the employment of additional police force is concerned the Commissioner of police can act under sec. 15 referred to above only on the necessary declaration having been made by the Local Government.

It is noteworthy that it is only in secs. 18 and 19 of the Calcutta Police Act that the expression "special constables" is used, whereas in the corresponding sections of the Suburban Police Act as also in the Police Act V of 1861 the expression used is "special police officers."

Sec. 17 of the Police Act V of 1861 which provides for the appointment of the residents of a particular place as special police officers by a Magistrate on the application of the police has no application in Calcutta and in this section the expression used is "special police officer," although all such appointments in the Mofussil which have always been resented by the public as derogatory to the position of a respectable citizen have been described as appointments of special constables.

There being no power for the appointment of special police officers in Calcutta by a Magistrate as can be made in the Mofussil under sec. 17 of the Police Act on the grounds that an unlawful assembly or riot or disturbance of the peace has taken place or may be reasonably apprehended and that the police force ordinarily employed for preserving the peace is not sufficient for its preservation and for the protection of the inhabitants, the only way in which it can be done is under sec. 18 of the Calcutta Police Act and sec. 12 of the Suburban Police Act which however are different in many respects from the provisions of the Police Act V of 1861.

Under sec. 18 of the Calcutta Police Act the Commissioner of police may of his own authority appoint special constables to assist the police at any time for any emergency and under sec. 12 of the Suburban Police Act may on his own authority appoint special police officers to assist in any temporary emergency.

The difference in language between the two statutes passed in the same year by the same Legislative Council almost one after the other and dealing with the same subject is beyond comprehension.

These sections give wider powers to the Commissioner of police than are given to a Magistrate under sec. 17 of Act V of 1861 under which, as has been laid down in several cases, it must be proved that the ordinary police force is insufficient for preservation of law and order; whereas under sec. 18 of the Calcutta Police Act no Magisterial proceedings and enquiry are necessary and the Commissioner's power is unfettered by the control of any higher authority. In the famous *Rungpur Special Constables* case in which a number of respectable men were appointed special constables in the days of the *Swadeshi* movement the matter came up to the High Court and the then Chief Justice Sir Francis Maclean expressed his opinion as to the undesirability of the proceedings and on the advice of the then Advocate-General Mr. O'Kinealy the Government of Eastern Bengal and Assam withdrew the case.

These special constables under the Calcutta Police Act need not be recruited from the residents of the locality but any one may be appointed and refusal to serve may be punished with a fine up to fifty rupees for every refusal.

The only circumstance which gives the Commissioner of police power to employ an additional police force or punitive police force, as it is called, at the cost of the inhabitants is a declaration by the Local Government that a particular area has been found to be in a disturbed or dangerous state or that from the conduct of the inhabitants of such area or any class, or section of them it is expedient to increase the number of police.

No doubt the Local Government has power to make the declaration only on the ground that a particular area has been found to be in a disturbed or dangerous state and the costs of the additional police force may have to be borne by the inhabitants of the locality, but sub-sec. (5) of sec. 15 clearly indicates that it is not the intention of the legislature that innocent persons should be mulcted with the burden of bearing the costs of the additional police. Sub-secs. (1) and (5) read together clearly show that the costs are to be borne by the inhabitants of the affected area only where the declaration by the Local Government is to the effect that it is expedient to increase the number of police from the conduct of the inhabitants of the area in question, and where the circumstances making the area disturbed or dangerous are such that the inhabitants of the locality have no control over them they are entitled to be exempted under sub-sec. (5) from payment of costs.

The appointment of an additional police force may be made by the Commissioner of police on the application of private individuals. Sec. 21 of the Calcutta Police Act lays down :—" The Commissioner of police may also, if he shall think fit, on the application of any person showing the necessity of it appoint any additional number of constables to keep the peace at any place within his jurisdiction at the charge of the person applying but subject to the orders of the said Commissioner and for such time as he shall think fit and every such constable shall receive a certificate by virtue of which he shall be vested with all the powers, privileges and duties of the constable belonging to the police force : Provided that the person upon whose application such appointment shall have been made may upon giving one month's notice in writing to the Commissioner of police require that the constables so appointed at his expense shall be discontinued and thereupon the said Commissioner shall discontinue such additional constables and all moneys received by the Commissioner for the payment of any such additional constables shall be accounted for by him." It is a notorious fact that the public, especially the Indian section, do not like the idea of being appointed as special constables. This aversion made itself manifest in the days of the *Swadeshi* agitation when respectable people were appointed special constables in some

places. The reason is not that the people of this country are averse to rendering assistance to the police in times of emergency for the preservation of law and order but that they dislike the idea of being paraded with the ordinary constables and made to drill and salute. These things they may be compelled to do, the law having provided that these special constables will be bound to do the duties of the ordinary policeman. Nor is there any reason to suppose that the members of the European community like the idea of being subjected to disciplinary measures like those mentioned above along with the ordinary constable.

It goes without saying that these special constables or officers whatever designation may be given to them should be under the supervision and control of the ordinary police officers and no one can reasonably object to it.

We think also that it is necessary to enroll these new recruits formally as police officers before giving them police powers but at the same time we think that men will not come forward voluntarily in sufficient numbers unless a scheme is made consistent with the Police Act under which these new recruits will not be subjected to what is regarded rightly or wrongly as indignities. We are confident that the matter can be managed smoothly with a little tact on the part of the Commissioner of police on the one side and the popular leaders on the other.

Review.

YEARLY DIGEST, 1925. By R. Narayana Swami Iyer and V. V. Chitale. Published by the Madras Law Journal Office. Price Rs. 5.

It is a digest of Indian and select English cases reported in all the important Legal Journals during the year 1925. The cases have been collected and arranged under appropriate headings with care. The printing and general get-up of the book are excellent and leaves nothing to be desired. It is a useful publication.

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The late Sir William Teunon.

We regret to have to record the death of Sir William Teunon who had but recently retired from the Bench of the Calcutta High Court. When he retired, he was the senior-most civilian Judge of that Court. But his claim upon the remembrance of the members of the legal profession and the litigant public rests on more solid foundations. He was painstaking, conscientious, independent and no respecter of persons and dealt out even-handed justice without regard for creed or colour. He would always try to go to the root of the matter in every case in regard to the facts, look carefully into the law, and then in the end bring to bear, on the decision thereof, his sturdy common sense which made short work of mere technicalities—a combination of qualities which won for him the respect and confidence of the bar, his colleagues and of the general public.

The Emergency Bill.

The last thing, in our opinion, that the Government should do to-day in the matter of the above Bill is to try to rush it through the Council with the threat of certification pointed at the heads of the Councillors. A Government which refused to be hustled into proclaiming martial law during the worst period of the riots will add to its reputation by giving the members of the Legislative Council and the country time to weigh and measure the extremely drastic powers which it seeks to take under this Bill. The members of the Coun-

cil for their part would be perfectly justified in demanding that the Government should satisfy it that its powers under the existing law to deal with such emergencies as arose during the recent riots were inadequate in the sense that the riots could not have been quickly controlled if these powers—which are large and drastic enough—had been promptly brought into action, for, obviously, the failure or incompetence on the part of its agents to use the powers they had would be about the poorest justification for asking for new and larger powers. Assuming however that the Government needs to be armed with larger powers to deal with emergencies of the character which arose during the recent riots—and they certainly possessed features which marked them out from ordinary riots and tumults—the next question for the Council's serious consideration would be whether the powers to be given to Government should be as drastic as the Bill wants them to be. We confess we cannot view without serious misgivings the *carte blanche* given to the Commissioner or other heads of the police (subject though it may be to the control of the Local Government) to extern people by executive order which cannot be challenged or reviewed on evidence in any Court of law and at any time whatsoever. To tide over extreme emergencies of the character recently experienced, Government may perhaps need power summarily to eject dangerous characters relying solely on confidential reports supplied by the police, and, it may be, even for a maximum period of two years. But why should not the person so externed have the right *after the emergency is over* to clear his character in a Court of law? We cannot conceive that even the Government believes in the absolute trustworthiness of every member of the police force in the subordinate ranks or in the infallibility of those in the superior. Private spite, jealousy, excess of zeal, error of judgment, even a temperament which discovers mischief where there is none are forces which the Government must be aware come into play

now and again and induce harsh and unjust conclusions. It must not be overlooked that to be branded a *goonda* by executive order is a more serious matter than being dealt with under the Deportation Regulations and Ordinances. The subjects of the latter are not discredited in the public eye. But to be declared a bad character without any possibility on the part of the person so declared to publicly clear his character is a very serious matter indeed. An open judicial enquiry, however belated, is the only possible and the one indispensable remedy against wrong or mistaken executive orders of this character.

Another matter for serious consideration has regard to the destination of the externees. If they are real bad characters, is it right or fair to the people outside the City and the Presidency area to throw them in their hands—now made more desperate by being deprived of their accustomed occupation. It would be more merciful to them and less inconsiderate to their unwilling hosts, if they were put on their trial even summarily and sent to jail for a term. We should be very sorry indeed if the panic created by the occurrences of the last month should lead the Government and the Council to shirk these and other very material considerations, and place on the statute book a law which may be unjust in some of its essential features.

The British General Strike.

The British General Strike is really a fight between the Trade Union Congress and the Parliamentary Government in England as to who should rule. It will be remembered that the Prime Minister was engaged in negotiations with the miners' representatives as to how the recommendations of the Coal Commissioners' Report might be given effect to. On many points, agreement was reached between them. The bone of contention, however, was whether the present wages and hours were to continue pending the re-organisation of the coal industry. The Trade Union Congress gave an ultimatum to Government up to midnight that failing a settlement of the question a general strike will be ordered. Even before that the printers struck for preventing an article against general strike being published in the *Daily Mail*. The Prime Minister considered this an undue interference with the

freedom of expression of opinion and the freedom of the press. The Prime Minister, after this, considered it useless to carry on negotiations with regard to the question at issue as the ultimatum removed the question from the region of discussion and amounted to forcing decision by coercion. So the Government took up the challenge of a general strike both for its own protection as also for the protection of the community at large. The Trade Union Congress decided that the miners, the railwaymen, the transport workers including those engaged in shipping and the printers should cease work. This amounted to a resolution to starve out the community and through them the Government into submission and in the meantime to keep the people in darkness as to the means adopted by Government for the upkeep of food-supply and the views, opinions and arguments against the action of the Trade Union Congress. The Trade Unionists are only 4 millions of people out of a population of over 40 millions. On the face of it, it would appear to be unjust and iniquitous that a powerful minority should coerce the people of a country to submit to their dictation for the payment of subsidies to any particular industry out of the taxpayers' pocket not for providing the necessities of life to the miners but for providing comforts and maintaining the standard of living to which they had got accustomed under more favourable conditions of the trade and industry.

The question before the British people and in fact of people all over the world who believe in constitutional Government is not one of wages and hours of any particular industry but a far more momentous one as to whether labour organisations like the Trade Union Congress should be allowed to take up the position of dictators to any country's Government. Mr. Baldwin characterised the action of the Trade Union Congress in attempting to make the Government and the people at large bend to their will as amounting to a subversion of the constitution. That Mr. Baldwin is right will be admitted by all who can take an unbiassed view of the tendencies that prevail amongst the Trade Union organisations in England. The English Trade Unionists are no longer followers of Karl Marx, who advocated the nationalization of all industries and the setting up of a socialist state.

The Government of all countries are giving effect to state socialisation by legislation and otherwise. But the process is considered very slow and, further, not sufficient for getting rid of capitalist interest and making the producers the masters of the situation. The brynicalists of France would divide mankind into two classes only, the producers and the consumers. They would get rid of Government, as they believe that the functions of Governments can be better discharged by an organisation of producers. The English Trade Unionists do not wish to get rid of Government but propose to control it by "Guild Socialism." This school of socialists would set up autonomous Trade Guilds for each and every industry, under which the management and control of the same will rest with the producers and their representatives alone. The different Trade Guilds would be grouped into Trade Unions and a central representative body of them all will be the Trade Union Congress, vested with executive powers. The idea of the Guild socialists is that the Trade Union Congress would be part of the State and would control the Government. It is evident from the present strike that the object of the Trade Union Congress in ordering a general strike and thereby paralysing the Government is to make the present system of Parliamentary Government subservient to the Trade Union Congress or their Guild Congress. So the idea behind the general strike is not merely industrial, as is being alleged by some of the labour leaders, but is essentially political with a view to give the British Guild socialists the upper hand in the Government. Mr. Bertrand Russel is a warm advocate of socialist movements in Europe. But he too does not look upon any such change in the British constitution with equanimity. In his well-known work on "Roads to Freedom" he says:—

"But if in spite of the safeguards proposed by the Guild Socialists, the Guild Congress becomes all powerful in such questions of production, I fear that the evil now connected with the omnipotence of the State would re-appear. Trade Union Officers, as soon as they become part of the governing forces in the country, tend to become autocratic and conservative; they lose touch with their constituents, and gravitate, by a psychological sympathy, into co-operation with the power that be. Their formal installation to authority through the Guild Congress will accentuate this process."

Such strikes for paralysing the Government and coercing the people would have been suppressed in Republican France by military force,

as was done by Millerand and Briand earlier in the century and in Republican America in 1914. It is only in a constitutional country like Britain that the Government is found using its legal powers and lawful resources for supplying food and the essential services to the people and with their co-operation trying peacefully to combat the forces of coercion and oppression. Force is only being used where it is absolutely necessary for repelling force. The leaders of all political parties are now making common cause and the crisis is being sought to be met by appeal to reason and even by legal argument as advanced by Sir John Simon. This is surely a lesson worthy of emulation by other countries in the world.

Although exceptions may be taken to the aims, objects and policy of the British Trade Unions, we must express our admiration for the power of organisation and unity and the spirit of discipline and self-control that has been displayed by them in the attainment of their objects by a programme of non-violent non-co-operation. But for the sportsmanlike spirit of fair-play, patience and self-control that prevail amongst the leaders of public opinion and the British public generally, this struggle between the Government and labour in any other country would have resulted in serious bloodshed and civil war. Whatever settlement may be finally arrived at in this momentous struggle, we expect it will be in accordance with the prevailing public opinion of the British people.

Correspondence.

THE LAW AS TO PUBLIC PROCESSIONS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES." SIR,

In the last issue of the C. W. N., p. cvii, Mr. Tarak Nath Basu has contributed a learned article on the right to conduct religious processions with music past places of worship of another sect. The inherent right to conduct a procession through public streets being recognised by the judicial tribunal of the highest authority, two important questions arise: How far the knowledge of a possible opposition by a rival faction would affect this right, and what are the rights of the members

of the procession against unlawful interference?

The first question specifically arose in the English case, *Beatty v. Gillbanks*, 9 Q. B. D. 308. In that case there were two rival organisations and both used to parade the same streets. One of the organisations called the Salvation Army persisted in marching out in disregard of the notices of the police previously served upon their leaders, and with the full knowledge that they would be opposed by their rival organisation. As they marched out, the two factions had some fight. The leaders of the Salvation Army were then prosecuted for being members of an unlawful assembly and it was contended against them that they had collected a mob of persons to enforce their right when they fully knew that it would cause a disturbance of the public peace as their opponents were equally determined to vindicate their right by use of force. But Field, J., rejected the contention with the remark, "a man cannot be convicted for doing a lawful act merely because he knew that his doing it may cause some one else to do an unlawful act." Mention may be made of *Reg. v. Justices of Londonderry*, 28 L. R. Ir. 440, in which Holmes, J., explained the above case and said: "An act innocent in itself, done with innocent intent, and reasonably incidental to the performance of a duty, to the carrying on of business, to the enjoyment of legitimate recreation, or generally to the exercise of a legal right, does not become criminal because it may provoke persons to break the peace, or otherwise to conduct themselves in an illegal way."

The case of *Beatty v. Gillbanks* was followed in a case of the Madras High Court, *Mukka Muthian*, 31 I. C. 343. But Simpson, A. C. J., while reiterating the principle that the mere knowledge that a religious procession is going to be opposed by force is not in all cases sufficient to constitute the members of the procession an unlawful assembly, also held that each case must be decided on its own facts, and that when the object of a party was not so much to conduct a religious procession as to have a fight with the opposite party, the conviction of the former under sec. 147, I. P. C., was right. In this case it appeared that the Hindus tried to take a religious procession in full force and armed with *lathis* through the Mahammadan quarter, and that the Mahammadans were resolved to prevent them and bar

the way, and so a riot took place. The Court found that the object of the Hindus was not so much to conduct a religious procession as to have a fight with the Mahammadans, and accordingly held that the conviction of the Hindus under sec. 147, I. P. C., could not be set aside as illegal. The case of *Beatty v. Gillbanks* was considered in this case, and the Court said: "The criminal law of England is not identical with the Penal Code. I think the Appellant Beatty would at least have been guilty under sec. 188, I. P. C., and that fact would probably have been sufficient to constitute the Salvation Army procession an unlawful assembly." But it may be noted that the guilt or otherwise of Beatty under sec. 188 would have depended upon the fact whether the order to prohibit the procession was a lawful order so that the disobedience was punishable under sec. 188, I. P. C. This point arose in an earlier case of the Bombay High Court, *Reg. v. Tucker and others*, 7 Bom. 42, the facts of which were almost similar to those of *Beatty v. Gillbanks* and decided in the same year, but in that case the English case was not referred to, probably for the reason that the report of the English case had not then reached Bombay. However there was this additional fact in the Bombay case that after the procession had formed and marched out, the Deputy Commissioner of Police ordered the procession to disperse as it was likely to cause a disturbance of the public peace. The lower Court convicted the leaders of the procession under secs. 151 and 188, I. P. C., but the High Court was pleased to confirm the conviction under sec. 151, I. P. C., as it was of opinion that the order to disperse was a lawful order in the circumstances of the case, and though the question whether the order of prohibition was a lawful order was before the Court in relation to the conviction under sec. 188, it, however, considered its decision on the point unnecessary in view of its finding under sec. 151, I. P. C.

Hence it is necessary to consider what are the rights of the members of a lawful assembly against unlawful interference, and in what circumstances the public authorities are justified in prohibiting an otherwise lawful assembly or ordering it to disperse for the purpose of maintaining the peace? An interference to forcibly disperse an assembly amounts to assaults upon the individual members composing that assembly, so that it would seem to

follow that the right of the members to use force against the interference would be regulated by the general principles which govern the right of private defence, and different considerations would arise according as the resistance to the holding of the lawful assembly, or an attempt to break it up is made by private persons in a spirit of hostility, or by public servants in the exercise of a supposed legal right. When the resistance comes from private persons, a moderate degree of force in assertion, i.e., in maintenance of the right seems to be justifiable. But assuming the case that the object of the opposite party is only to break up the procession, so that if its members disperse, they are in no peril of damage to life or limb, the use of firearms or other deadly weapons, according to the English law, is not justifiable, because the question is not one of defending life but of conducting a procession uninterrupted, though it may not be possible to do so without the use of deadly weapons. The principle of the English Law on which extreme acts of self-defence against a lawless assailant cannot be justified until the person assaulted has retreated as far as he can is applicable to the members of the assembly just as it would be to an individual member thereof. But it seems that if in course of the opposition the members of the opposing faction cause an apprehension of death or of grievous hurt to the members of the assembly, the latter would be justified in making such use of force as may be necessary for the purpose of self-defence, even though the use of force may go to the length of causing death to the assailant. In this case, however, the use of force would be justified as an exercise of the right of private defence of the body rather than that of conducting the procession uninterrupted. It may be here noted that even if the procession were illegal, that fact by itself would be no ground for the opposing party to disperse it by force unless the circumstances were such as to give rise to the right of private defence, *Tirakadu*, 14 Mad. 126, *Anonymous*, 1 Weir 58; and in cases in which there is no right of private defence, the opposing party is bound to take recourse to law instead of using force to prevent the procession. *Anonymous*, 7 Mad. Ap. 35. Under the common law of England this right is allowed. As Kenny says: "The alarm with which the common law viewed unlawful assemblies naturally led to the establishment of the rule that they may

be dispersed forcibly, even by private persons acting on their own initiative." (*Outlines of Criminal Law*, p. 283).

When public servants, e.g., police officers, attempt to break up a procession under a *bonâ fide* but mistaken belief that the circumstances are such that the dispersal is necessary to maintain the peace, or under the orders of a superior officer who *bonâ fide* holds that belief, resistance to such acts of public officers seems hardly to be justifiable. (See secs. 76, 79 and 99, I. P. C.). Here is a dispute between the police officers on the one hand and those who conduct the procession on the other as to a matter of law, and it is but right that the matter should be determined by the Court and not *vie et armis*. It should be noted that use of force against the public officers is unjustified even if their acts are not strictly justifiable by law, but for the purposes of sec. 188, I. P. C., it is necessary that the acts of the public officers should be strictly legal in order that disobedience might be punished under the section. So it becomes necessary to consider whether the order of dispersal of a lawful procession or the order of prohibition to the forming of a procession merely on the ground that it may provoke others to commit a breach of the peace is strictly legal. Certain public servants, e.g., police officers not below the rank of a Sub-Inspector in charge of a police station may not only disperse an unlawful assembly by force or military force, but they may also do so when an assembly of five or more persons, though not unlawful, are likely to cause a disturbance of the public peace. (Secs. 128 and 129, Cr. P. C.). But it is not always easy to say that an assembly is such as to cause a disturbance of the public peace. It is, however, certain that it is not enough that in the opinion of the Magistrate or the police officer who gave the order that the assembly was likely to cause a disturbance of the public peace; facts must be proved which satisfy the Court that such was the case, *Murlidhar*, 1887 P. R. 22; *Girdhar Singh*, 64 I. C. 374 Lah., though the opinions of the policemen as to whether certain acts would lead to a breach of the peace are relevant, *Tucker*, 7 Bom. 42.

Is it right to say that an assembly which is perfectly lawful as regards its object and the manner in which its members conduct themselves is likely to lead to a breach of the peace because mere wrong-doers are likely to interfere and thereby lead to a breach of the

peace? The argument seems hardly to be tenable that a lawful assembly is likely to cause a disturbance of the public peace, because, if the members thereof had not assembled, the wrong-doers would not have got an opportunity of causing a breach of the peace, and so it would be lawful to prohibit the holding of the lawful assembly or to disperse it when formed. In such cases the lawful assembly "no more causes the breach of the peace than a man whose pocket is picked causes the theft by wearing a watch" (Dicey, Law of Constitution, p. 269). So it has been well-said that "tranquillity ought not to be maintained by a sacrifice of liberty" (Mayne, 321), and "if danger arises from the exercise of lawful rights resulting in a breach of the peace the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights" (per O'Brien, J., in *Reg. v. Justices of London-derry*, 28 L. R. Ir. 440, 450).

But owing to the "paramount necessity for preserving the King's peace it may, where the public peace cannot otherwise be preserved, be lawful to interfere with the legal rights of an individual and to prevent him from pursuing a course which in itself is perfectly legal" (Dicey, Law of Constitution, p. 276). Thus if a person without the intention of provoking a breach of the peace wears a party emblem which is offensive to the men of the opposite party, and breach of the peace is caused, a constable may forcibly remove the emblem from the person who refuses to do so at his request, only if the peace could not otherwise be restored, *Humphries v. Connor*, 17 Ir. C. L. R. 1. Fitzgerald, J., doubted whether the power of interference with the rights of the subjects was not in this case carried too far. (*Ibid*, pp. 8, 9.) The applicability of this principle of the common law of England to this country seems to be doubtful. In a Madras case, *Ranganaya Kulu v. Prendergast*, 17 Mad. 37, a procession of the Hindus carried certain banners and the Superintendent of Police was of opinion that a breach of the peace would be occasioned if these banners continued to be displayed, and in good faith, for the purpose of preventing such breach of the peace, he took away the banners from certain persons in the procession. It was held that the act of the Superintendent of Police was not justified by the Madras Police Act, 1859, secs.

21 and 49 and that he was accordingly liable for trespass.

As regards the power of the police to prohibit a procession, the authorities seem to be conflicting. In the special bench case of the Patna High Court, *Emperor v. Abaul Hamid*, 2 Pat. 134, Mullick and Courts, JJ., held that under sec. 30 of the Police Act of 1861 the Superintendent of Police has to be satisfied that a procession is in the judgment of the District Magistrate likely to cause a breach of the peace. He may then issue a notice upon the person directing or promoting the procession to apply for a license. The words of the section are sufficiently general to enable the Superintendent to issue a general notification containing a prohibition against directing or promoting processions without a license even without any limit of time. But Das, J., was of opinion that a power of licensing is a power to regulate, not a power to prohibit; and it is necessary to point out that there is nothing in sec. 30 which gives the police an express power to prohibit a procession if the persons directing or promoting such procession decline to apply for a license, although there is such power when such persons take out a license but violate the conditions of such license. In a very recent case of the same High Court, *Sitaram Das*, 4 Pat. 795, Mullick, J., who was one of the Judges who delivered the majority judgment in the Special Bench case held that sec. 30 gives the police power to control processions and the police have got no power to forbid a procession. The power to control does not include the power to forbid. In these circumstances, it is well worth remembering the concluding words of Das, J., in the above Special Bench case. He said: "Where there are breaches of law and order, it is the duty of this Court to relentlessly apply the law, and to look neither to the position nor the motive of the persons committing or encouraging breaches of law and order. But while this is so, it is equally our duty to assert from time to time and as often as it may be necessary that the subject has his rights as well as his duties, and to assert further that this Court, as the guardian of the rights and the liberties of the subject, will sternly repress any attempt on the part of the executive government to tamper with such rights and liberties, and that an order, in the garb of an order for the maintenance of law and order will not be allowed to stand, if its

object is not to maintain law and order but to make, to quote the memorable words of Lord Halsbury, "a very serious inroad upon the liberty of the subject."

Yours, etc.,

ANUKUL CHANDRA MOITRA.

PABNA :
6-5-1926.

Reviews.

THE INDIAN PENAL CODE. By *Dinesh Chandra Roy, M.A., B.L., Vakil, High Court, Calcutta.* Published by Messrs. M. C. Sarkar and Sons, 90/2A, Harrison Road, Calcutta. Price Rs. 10.

We welcome this excellent edition of the Indian Penal Code.

In these days of numerous annotated editions made up mostly of scissor and paste work put together in total disregard of sequence and coherence it is gratifying to come across a book like the present which is something more than a mere catalogue of decided cases. To annotate a statute like the Indian Penal Code is by itself no easy task and the author's aim to make his book a complete guide both to the prosecution and the defence both on questions of substantive law and procedure really made it Herculean and we congratulate him on the successful termination of his labours.

The plan adopted is to give under each section first its scope as laid down in judicial decisions, then to indicate under the heading "procedure" whether a case under the section is cognizable, bailable and compoundable, whether a Magistrate has to issue a warrant or a summons in the first instance and by what classes of Magistrates it is triable. Under the heading procedure the author has tried to show in the light of judicial decisions what the prosecution must prove and what is necessary for the defence to succeed.

The case-law is then given arranged under appropriate headings and it is here that the skilful hand of one who knows the subject he is dealing with is visible. The Indian Penal Code was passed in the year 1861 and during the long time that it has been in force judicial decisions have accumulated in bewildering heaps and instances are many in which the diversity of views expressed more often than not makes confusion worse con-

founded. The author has grappled with these cases wonderfully well.

He has himself said that in preparing the book he has always kept in view that the highest function of a commentator or legal enactments is to give deep beneath the sea of seemingly unconnected provisions and to help in a thorough grasp of the underlying principles. It is well that he kept this high standard before him and with laborious research he has been able to bring out a volume of over one thousand pages full of solid matter strewn over with gems carefully culled from various repositories and set in bold relief. The busy lawyer will and at a glance what he has got to prove to substantiate a charge or to refute it. It will be equally serviceable to the Bench as a safe guide in determining the guilt or innocence of the accused.

The report of the Law Commissioners has very properly contributed a large share in the historical treatment of the important sections and copious extracts have been given from important judgments, both English and Indian. At the end of the book some minor Acts forming part of the criminal law of the land have been printed and this will enhance the usefulness of the work.

The book is a storehouse of information and will be a valuable addition to every law library. The printing and general get-up are excellent and leave nothing to be desired. The price of the book is for its value very moderate.

THE CODE OF CIVIL PROCEDURE. By *Rai Bahadur Mahim Chandra Sarkar, Sixth Edition: Edited by P. C. Sarkar, Calcutta.* Butterworth & Co. (India), Ltd., 1925.

This is a new edition of the well-known repository of the case-law bearing on the provisions of the Civil Procedure Code, classified under suitable subject-headings. The cases collected and digested under each section are preceded by a commentary explaining its scope with reference to the provisions of the old Codes which the section replaces or reproduces. The increase in the bulk of the book is fairly indicative of the amount of new matter introduced into it. But if the object of the book was to bring the case-law up-to-date, a supplement embracing cases decided when the book was in the press would have fulfilled this purpose more completely. Physically speaking, too, the book would have been

less unwieldy, if it had been divided into two parts. We have further to draw the attention of the editor to the fact that the table of cases is unsatisfactory. The cases in the table are, inexcusably, not arranged with strict regard for alphabetical sequence.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CUMING AND MUKERJI, JJ. CIVIL RULE No. 1346 (8) OF 1925 IN APPEAL FROM APPELLATE DECREE No. 2131 OF 1923. MALU SHEIKH, Appellant, Petitioner v. FILANULLAH MOLLAH and ors., Respondents, Opposite Party. The 26th March 1926.

Review, error of law, if ground of.

The appeal having been heard and dismissed, the present application for review was preferred *inter alia* on the ground that the learned Judges had erred in drawing a presumption which arose from an entry in the record-of-rights, and that their Lordships should have held that the presumption was that the entry was correct at the time of the preparation of the record and not on the date of final publication :

Held—That the question whether the presumption of correctness applied to the actual time when the entry was prepared or at the date of the final publication of the record-of-rights is a question of law and it has been clearly held in *Chajju Ram v. Neke*, L. R. 49 I. A. 144, that an error on a question of law is not a ground on which a review of judgment can be granted. The application was refused.

Babu Hemendra Chandra Sen for the Petitioner.

Babu Profulla Kamal Das for the Opposite Party.

CIVIL APPELLATE JURISDICTION. Before N. R. CHATTERJEA AND PANTON, JJ. F. A. No. 247 OF 1924. MOHIM CHANDRA GUHA, Defendant No. 12, Appellant v. NABA CHANDRA CHOWDHURY, Plaintiff, Respondent. The 30th March 1926.

Civil Procedure Code (Act V of 1908), Or. 26,

7. 8—*Depositions taken on commission, when can be read as evidence—Practice in the Mofussil Courts.*

This appeal arose out of a suit to enforce a mortgage bond which was decreed by the Subordinate Judge of Chittagong.

The facts material to this report are as follows:—The Plaintiff applied for commission for his examination at Rangoon. It was granted and he was examined on interrogatories and cross-interrogatories. This was in January 1923. When the case became ready for hearing the Defendant wanted to have the Plaintiff examined in Court and summons issued on him. The summons was served at Dhurung—his ordinary place of business in the District of Chittagong, but the Plaintiff refused to accept the summons. The Defendant subsequently put in petitions praying that the Plaintiff might be examined in Court. The Defendant's prayer was rejected and the deposition of the Plaintiff taken on commission was admitted in evidence, and the suit was decreed. There was no consent of the Defendant to the evidence of the Plaintiff taken on commission being read against him. On the contrary the Defendant all along insisted upon the presence of the Plaintiff in Court. It was also found that the Plaintiff was at home (*i.e.*, at Dhurung in Chittagong) on the day the evidence was tendered :

Held—That in the circumstances of the case the evidence taken on commission could not be read as evidence in the case against the Defendant.

Evidence taken on commission should only be permitted to be used where the witness is proved to be ill or is absent for other sufficient reason.

39 C. L. J. 165, referred to.

Held, further—That having regard to the laxity of practice with regard to evidence in the Mofussil Courts it was very likely that the Court allowed the evidence to be read without applying its mind to the matter and without exercising its discretion.

The case was sent back to the Court below in order that the Plaintiff might be examined in Court.

Sir Binode Mitter (with Babu Narendra Kumar Das) for the Appellant.

Mr. Sarat Chandra Roy Chowdhry (with Babu Chandra Sekhar Sen) for the Respondent.

H. C. S.

THE Calcutta Weekly Notes.

Vol. XXX.]

MONDAY, MAY 24, 1926

[No 27,

Contents. NOTES

EDITORIAL NOTES—

London Notes

REVIEWS

REPORTS (See Index.)

The recent disturbances.

The scenes of disorder which have lately been witnessed in Calcutta were unprecedented and rarely to be met with in any civilised country. The enemies of law and order, religious fanatics, bullies and bad characters, cocaine and opium smugglers, keepers of toddy shops, gambling houses and other houses of ill fame and others who trade in vice or crime, all had their own way for the greater part of a month. It is now uppermost in the minds of all how peace and order is to be secured in future against similar outbreak of lawlessness.

Hardly the echoes of the Calcutta riots had subsided when in the British Isles the general strike threatened the very foundations of society and of the constitution. A movement of such gigantic proportions, the object of which was to paralyse the public services and the Government and to coerce the community to the class-rule of the labouring classes, is unprecedented. Oligarchy may be bad but mob rule is much worse. The British Government is to be congratulated on having effectively averted a great calamity without any resort to arms or panicky legislation. The strike is over and those who promoted it are to-day much wiser. But we cannot say as much with regard to the promoters of the Calcutta riots.

The Emergency Act.

The Emergency Act has been passed and in addition to the very large powers that the executive already had for proceeding against

bad characters and preventing the commission of offences, the Commissioner of police or the District Magistrate exercising jurisdiction over the area included within the Presidency area, as defined in the Act, will have power to direct any person to remove himself from the Presidency area within a specified time and not return thereto for a period up to two years if the Commissioner or the Magistrate is satisfied that such person is committing or has committed or is likely to commit or is assisting or abetting the commission of a non-bailable offence against any person or property or the offence of criminal intimidation or any offence involving a breach of the peace so as to be a danger to or cause or be likely to cause alarm to the inhabitants of the Presidency area or any section thereof.

The Bill as originally introduced has been altered in some respects in that it has been made incumbent on the Commissioner of police or the District Magistrate to call upon the person to be proceeded against to show cause against the passing of an order of externment against him, but we regret that no provision has been introduced for giving the person externed an opportunity to clear his character in a Court of law, the necessity of which we pointed out in commenting on the bill last week. We regret that our legislators are more anxious to play to the gallery than to do any solid work for protecting the rights and liberties of the people.

The definition of Presidency area as given in the Bill originally introduced has been altered so as to include some places adjoining the suburbs of Calcutta which, though not included therein, are really part and parcel of them. Power has also been given to authorised agents to make representations to Gov-

ernment against the order of externment. Why cannot the executive trust the High Court with powers of revision of the police Commissioner's orders in this behalf? Surely, the police in Calcutta were not handicapped through any dearth of emergency powers!

Besides the new powers conferred by the Act the Code of Criminal Procedure gives ample powers under sec. 55 to the police in Calcutta to whom it is applicable as much as to the police in the Mofussil to arrest without warrant vagrants and suspected persons and habitual offenders. In addition to this under sec. 32 of the Calcutta Police Act any police officer may arrest without a warrant any person found between sunset and sunrise on board any vessel or boat or lying or loitering in any bazar, street, road, yard, thoroughfare or other place who shall not give a satisfactory account of himself, any person found between sunset and sunrise having his face covered or otherwise disguised with intent to commit any offence, any person found between sunset and sunrise in any dwelling-house or other building whatsoever without being able satisfactorily to account for his presence therein or also any person having in his possession without lawful excuse any implement of house-breaking. Then there is the power under the Goonda Act to extern undesirable characters.

Taking the old and the new together it is really a long array of powers and one can reasonably expect that the authorities entrusted with an exercise of all these powers will realise that the wider the powers the greater are the chances of abuse and the abuse of of a power specially conferred to cope with an emergency may make things worse. We commend the example of the Prime Minister and the British Cabinet to the Government of Bengal and that of the British public to our countrymen. Hundreds of thousands of noblemen, gentlemen and university under-graduates enrolled themselves as special constables and did the work of day labourers during the strike.

Presumption of Hindu law that self-acquisition of a member of a joint family is joint family property.

It is said that in respect of acquisitions of

property by a member of a Hindu joint family, there is an initial presumption that it has been acquired for the joint family. But the presumption is a presumption of fact and may be greatly weakened by the special circumstances of a case. Thus where there is no nucleus of joint property or it is so small that it is not likely to yield a surplus income, the presumption is said to be rebutted, or perhaps it would be more accurate to say that the presumption does not arise from the mere circumstance of the family being joint in mess. On the other hand, if the self-acquisition of a member is thrown into the common stock, it becomes joint. It may be a question whether the mere fact that the member who acquired the property applied the income towards the maintenance of the needier members of the family should in itself be regarded as evidence of the property having been thrown into the common stock. The question must ultimately, in every case, be a question of intention. And as the intention has in most instances to be gathered from conduct and surrounding circumstances, it is pertinent to enquire what at the present moment is the normal condition of joint Hindu families, for whether one should start with any sort of presumption must depend on what normally are the facts of a Hindu joint family organisation.

It seems to us unquestionable that the facts at any rate of the normal Dayabhaga Hindu family at the present day do not justify the initial presumption that the self-acquisitions of a member are acquisitions on behalf of the family. Our experience is that in nine cases out of ten, it merely enables the drones of the family who have battered at the expense of the earning member all his life to institute blackmailing litigations against the latter's heirs after his death. It would conduce to justice and conserve social economy, if the presumption were all the other way, viz., that every acquisition in the name of an individual member of a Hindu family should be presumed to be his self-acquisition until the contrary is proved. How painfully Judges have to proceed to get rid of the initial presumption of jointness in order to do justice is well illustrated by the case reported at p. 588 of this volume (*Trailokyanath v. Chintamony*). The presumption grew up at a time when the joint patriarchal

Hindu family was a living institution and does not fit present conditions of Hindu society. Most of the presumptions which encumber Hindu law at the present day are ghosts of institutions which are dead or dying and which should be swept away with a strong hand. They cannot be forgotten, now that they have been enshrined in printed books and judicial decisions—they should be deliberately extinguished, if need be, by legislative enactment.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The Easter Sittings of the Judicial Committee of the Privy Council commenced on 15th April. The Board comprised the LORD CHANCELLOR, LORD ATKINSON, LORD DARLING and SIR JOHN EDGE and they disposed of an appeal from Rangoon, *Maung Po Kin v. Maung Po Shein*, in which arguments were addressed to them on the 15th and 16th.

The Hon. Geoffrey Lawrence, K. C. and Mr. R. W. Leach represented the Appellants, while Messrs. Dunne, K. C. and Gerard Sanders appeared for the Respondent.

The suit was one for the recovery of land, it being alleged that certain transactions were *benami*. At the conclusion of the arguments the LORD CHANCELLOR pronounced the judgment of the Board dismissing the appeal with costs.

The Judicial Committee have now taken over the hearing of Canadian appeals and at the moment it seems improbable that a Board will be constituted for Indian appeals until the middle of May. An announcement has appeared in the "*Times*" to the effect that SIR JOHN WALLIS, Ex-Chief Justice of Madras, has been sworn as a member of His Majesty's Privy Council, and it is anticipated that his wide legal experience and intimate knowledge of Indian affairs may be utilised by the Judicial Committee. The absence of SIR LAWRENCE JENKINS owing to ill health has been a matter of general regret. The Indian list contains 18 appeals including the claim to the Dhalhum Raj where the question of the alienability by Wilt of an impartible Raj is raised and the correctness of the *ratio decidendi* in *Sartaj Kuari's* case (L. R. 15 I. A. 51) is called in question. The appeal was opened last term and was adjourned for hearing by a Full

Board. The remaining appeals are as follows:—6 from Bengal, 3 each from Allahabad, Patna and Oudh, and one each from Lahore and Madras.

April 29th.—The Judicial Committee are still engaged in the hearing of Canadian appeals, but it is anticipated that a Board will be formed for hearing Indian appeals during the ensuing week.

Judgment was delivered this morning in the following appeals:—

(1) *Gokul Prasad v. Lachman Prasad* (Allahabad). The suit had been brought by the Appellants for possession of certain zemindari properties. The main issue was on the question of fact as to when the death occurred of the Appellant's grandmother, as on this question hinged the decision whether or not the suit was barred by limitation. The High Court decided against the claimants and their decision was upheld.

(2) *Bindeswari Prasad v. Kesho Prasad* (Patna). This was a suit by the Maharaja of Dumraon to eject tenants from lands in which they claimed to have an occupancy right. The decision is an important one on the interpretation of sec. 120 of the Bengal Tenancy Act. Their Lordships hold that the admission made by a tenant in the *kabuliyat* as to the character of the land was relevant and admissible as evidence. They approved the decision in *Bhagtu Singh v. Raghunath Sahai* (13 C. W. N. 135) and held that sub-sec. 2 (a) of sec. 120 of the Amending Act—Bengal Act No. I of 1907—does not displace the view taken in the above case. The decision of the High Court that the lands were *zerait* of the Dumraon Raj was accordingly upheld.

(3) *Bai Naghubai v. Pragji Dayal* (Bombay). The Appellant, who appeared *in forma pauperis*, was successful in getting an adverse decision of the High Court reversed. The judgment has not yet been promulgated, but the principle for which the Appellant contended was that she, as the kept mistress of a wealthy Hindu of the Lohana caste living in Bombay, was entitled after his death to maintenance from his estate. The judgment of the Board was delivered by LORD DARLING.

Reviews.

THE LAW OF EVIDENCE IN BRITISH INDIA. By M. C. Sarkar and S. C. Sarkar, B.L. Third Edition by S. C. Sarkar, B.L., Calcutta, 1926. M. C. Sarkar & Sons, 90/2A, Harrison Road.

No greater testimonial to the value of this commentary is needed than the mention of the bare fact that though the last edition appeared early in 1924, a new edition should have been called for so soon after. The case-law has been brought up-to-date and the commentaries revised and in places re-written. Not the least valuable portions of the work are the appendices, of which Appendix G dealing with affidavits is new. Every page of the treatise bears evidence of the editor's industry. The bulk of the work has materially increased. The get-up is excellent.

THE LAW OF PLEADINGS IN BRITISH INDIA WITH PRECEDENTS. By P. C. Mogha, Subordinate and Assistant Sessions Judge (U. P.). Eastern Law House, Law Publishers, 15, College Square, Calcutta. 1926.

In reviewing Mr. Justice Walsh's brochure on Pleadings in India with Precedents (30 C. W. N. lxxxviii), we expressed the hope that that useful introductory to the science and art of pleadings would be supplemented by complete treatises on the lines of Bullen and Leake. We welcome the present volume as a step in that direction. The book is divided into two parts, the first devoted to a discussion of principles and the second to precedents. The latter naturally deals mainly with forms of plaints and written statements, but in addition concerns itself, as indeed does the first part also, with memoranda of appeal and applications. The matter of the first part is formulated with due regard for lucidity, conciseness and logical sequence, and throughout there are citations of appropriate judicial decisions, both English and Indian. It will not be the author's fault, if full use is not made by the profession of the author's labours in elucidating the science and art of pleadings for the purpose, so forcibly stressed by the Civil Justice Committee, of removing the prevailing laxity in the drawing up and manipulation of pleadings. A word of acknowledgment is owing to Sir Grimwood Mears, Chief

Justice of the Allahabad High Court, for the active interest he has been taking in this matter, of which both Mr. Justice Walsh's book and the present treatise bear evidence. That both books should owe their authorship to persons employed in the administration of justice in the United Provinces cannot be viewed as a chance coincidence, for both books acknowledge the inspiration derived from the Chief Justice of the province. The volume is admirably got-up and commendable in every way.

THE INDIAN STAMP ACT (II OF 1899). By M. N. Basu, M.A., B. L. Second Edition. Eastern Law House, Calcutta. 1926.

That the very first edition of a book should have been exhausted within the space of about a year, and a second edition placed in the market within fourteen months cannot be due to accident. The fact bears eloquent testimony not only to the excellence of the author's work but also to his unwearied industry. There are several factors which go to ensure the popularity of a commentary on a statute like the one under notice. The rules and the reported decisions should be brought strictly up-to-date. The present edition which was published in February last incorporates all the decisions reported up to the end of January 1926 and all rules promulgated to date. The notes and commentaries must be so classified and arranged that they may be available for ready reference with the least trouble and expenditure of time. This is specially needed for the efficient handling of a statute requiring such constant application as the Stamp Act. This requirement Mr. Basu's book fulfils in the completest manner. It is hardly necessary to say that the recent provincial amendments are duly embodied in the volume as also the texts of the superseded enactments from the earliest times. The book is handy and excellently got-up. A statement of repeals and amendments, comparative tables and carefully prepared alphabetical list of cases and subject index—in fact everything one would expect from a conscientious worker like Mr. Basu—go to make it as complete a book of reference on the law of non-judicial stamp duties as one may desire.

THE

Calcutta Weekly Notes.

Vol. XXX.]

MONDAY, MAY 31, 1926

[No 28.]

Contents.

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ARTICLE—

The Doctrine of Turn-table Cases

REPORTS (See Index.)

The Emergency Act.

The Presidency Area (Emergency) Security Act, 1926, has received the assent of the Governor-General and in the exercise of the powers conferred by sec. 3 of the Act the Governor in Council has declared that a state of emergency exists in the Presidency area. The effect of the declaration is that for a period of three months from the 24th May on which the declaration was made the Act remains in force. In the reasons for making the declaration of emergency reference is made to the recent disturbances in Calcutta which involved serious loss of life and property and extended with an interval of tranquillity from April 2nd to the end of the month and which were due to conditions which have not yet been removed. It is stated that bitter feelings still subsist between the Hindu and Mohammedan communities and the renewal of rioting on April 22nd after an interval shows that while these feelings subsist there is danger of a fresh outbreak, and the use of the special powers conferred by the Act is necessary to bring it to an end.

Hostile witness.

Under sec. 154 of the Evidence Act, the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. A party may therefore with the permission of the Court put leading questions to the witness under the provisions of sec. 143 or cross-examine him as to the matters mentioned in secs. 145, 146. The rule which excludes leading questions being chiefly founded on the assumption that a witness must be taken to have a bias in favour of

the party by whom he is called may in the discretion of the Court be relaxed. Whenever circumstances show that this is not the case and he is either hostile to that party or unwilling to give evidence, the Judge may in his discretion allow a departure from the general rule. Further by tendering a witness, a party is held to recommend him as worthy of credence and so it is not in general open to him to test his credit or impeach his truthfulness. But there exist cases in which the rule should be relaxed at the discretion of the Court, as for instance, where there is surprise, the witness unexpectedly turning hostile—in which and in other cases the right of examination *ex adverso* is given.

It not infrequently happens that a witness who has been called in the expectation that he will speak to the existence of a particular state of facts pretends non-remembrance of those facts or deposes to an entirely different set of circumstances, in which case the question arises whether the witness has by his conduct entitled the party to cross-examine him. In the language of Lord Denham, it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose to the truth when brought into Court and in the meantime is persuaded to swear when he appears to a completely inconsistent story. Under the law as laid down in secs. 154, 155, it can hardly be said to be a settled rule that it is only when a witness manifestly shows a hostile personal feeling by his conduct and demeanour that the Court ought to allow his cross-examination. The testimony of a witness, if adverse, is only the more dangerous if he shows no hostile disposition, and if he be astute as well as treacherous, he will take care to conceal his true sentiments from the Court.

Under sec. 154 the party calling a witness may with the consent of the Court impeach his

credit by putting any questions which tend to test his veracity, to discover who he is and what is his position in life, or to shake his credit by injuring his character.

The legislature has left the matter entirely in the discretion of the Court whether or not to allow a party to cross-examine his own witnesses and it is the duty of the Court carefully to consider the circumstances under which leave for cross-examination is asked for. It is of course clear that the mere fact that a witness tells two different stories does not necessarily and in all cases show him to be hostile. So it has been held that the mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference which may be drawn in such a case from contradictions going to the whole texture of the story being that the witness is neither hostile to this side nor that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence. But it is also clear that where these conflicting statements involve great discrepancies and contradictions and are the outcome of fraud, dishonesty and treachery on the part of the witness, the party calling him should be permitted to cross-examine him under this section as to the fact and cause of the discrepancies and contradictions and if necessary to impeach his credit under sec. 155. If a party not acting himself a dishonest part is deceived by his witness or if a witness professing himself a friend turns out an enemy and after promising proof of one kind gives evidence directly contrary, is the party to be restrained from laying the true state of the case before the Court? The common sense of mankind might be expected to answer this proposition in the negative and to decide that the true state of the case should be made known. But in relaxing the ordinary rules of examination of witnesses it is the bounden duty of the Court to be cautious not to act in such a manner as to create in the mind of the public an aversion against appearing in Court for the purpose of giving evidence. The result of such a state of things would be disastrous, for our judicial system permits the determination of cases only on evidence produced in Court and every facility should be provided for the forthcoming of evidence.

In a recent case decided by the Patna High Court, *Jhaldhari Singh v. Pershad Bharti*, 1926 Pat. 138, two witnesses for the prosecution in their cross-examination made statements consistent with the defence. The trying Magistrate declared these witnesses hostile and allowed the prosecution to cross-examine them. The reasons given by the Magistrate were that the witnesses did not support the prosecution and were admittedly neighbours of the accused and had been won over. The procedure adopted by the Magistrate is, to say the least of it, dangerous and calls for the strongest condemnation. It is puerile to suppose that the policy of the law is simply to secure a conviction and to show favour to a witness who supports a prosecution and to disfavour one who gives it the go-by. The object of a trial is to find out the truth and punish the guilty and acquit the innocent; on the other hand, it is a cardinal principle of our judicial system that a guilty man should escape rather than that an innocent person should be punished. The administration of justice becomes a farce if Magistrates pounce upon witnesses as soon as they make statements unfavourable to the prosecution.

If this sort of conduct on the part of the Magistracy is countenanced witnesses drawn from the illiterate classes would come to Court with a mandate, as it were, to take oath to speak the truth, the whole truth and nothing but the truth and then proceed to depose in favour of the prosecution irrespective of the truth. The learned Judges who decided the case in the High Court very properly held that the reasons given by the Magistrate for declaring the witnesses to be hostile were not at all sufficient. Their Lordships pointed out that the fact that the witnesses were neighbours of the accused was not a sufficient ground for treating them as hostile in order to discredit the statements that they had made favourable to the accused.

THE DOCTRINE OF TURN-TABLE CASES.

(By A. P. PANDEY, M.Sc., LL.B.)

The "Turn-table Doctrine" may be said to have originated with the classical case of *Lynch v. Nurdin*, (1841) 1 Q. B. 29, and seems to have been baptized in the notable case of *Cooke v. Midland Great Western Railway of*

Ireland, (1909) A. C. 229. Throughout its history, the doctrine has been subjected to criticism. Varieties of judicial structures have been cast upon this doctrine and the minimum levelled against it is that it is an exception to the general rule of law formulating liabilities of land-owners to trespassers. It is not futile, therefore, to investigate into the propriety of this verdict and to seek, if possible, any rational basis for this doctrine.

But before starting upon the discussion, it seems desirable to state at once that undue importance is generally attached to certain fascinating expressions as "trap," "invitation," "implied license," "allurement," and "attraction" with the disastrous consequence that the crucial point of enquiry is thrown into the shade and sometimes lost sight of. The expressions are not in the least illuminative or suggestive of any fundamental principle of legal thought. Further they have been assigned technical meanings which are so far removed from their plain meanings as to surprise a layman. For example, "invitees" are those who are invited into the premises by the owners or occupiers for some purpose of business or of material interest; while those who are invited as guests whether from benevolence or for social reasons are known in law as "licensees." Then again, "trap" is a figure of speech. It is not a formula. It involves the idea of concealment or surprise, of an appearance of safety under circumstances cloaking a reality of danger. Likewise, "concealed trap" conveys the idea of something added to the condition of the ground so as to be dangerous to the "licensee." "Allurement" means attracting with malicious intent to injury.

Now, the re-capitulation of the facts of the case, *Cooke v. Midland Great Western Railway of Ireland*, will considerably facilitate the discussion. The Railway Company kept a turn-table unlocked on the land close to a public road. The Company's servants knew that children were in the habit of trespassing and playing with the turn-table to which they obtained easy access through a well-worn gap in the fence which the Railway Company ought to have, under the statute, kept intact. There was a well-beaten track from the gap to the turn-table which was left unfastened and which seemed to be fixed for the very purpose of a merry-go-round for children. The Plaintiff, in the company of other children, went in and while playing on the turn-table met with an

accident and sustained injuries. It was held that the company was liable for damages.

It is really difficult to extract the ratio of decision from the several judgments which have been pronounced by their Lordships composing the Court, and it is not at all surprising, therefore, to find a sharp divergence of judicial opinion on the principle formulated by the decision. With considerable show of logic it has been said on certain occasions that the liability of the company could have been based upon the breach of the legal obligation, *viz.*, to maintain the fence intact and to patch up the gap, if any; and accordingly the case is no authority for the "turn-table doctrine."

However, Lord Macnaghten observes, at p. 234, "Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and" possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turn-table, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred."

But, as has been observed above, the review and discussion of cases will not be of much avail in finding out the basis of the land-occupier's liability. It can be best determined by investigating into the interests which call for protection and the way which is calculated to secure their adjustment.

Obviously, interests to be taken into consideration are two-fold, *viz.*, individual interests and social interests.

That the individual interest of the child merits protection does not need any extended discussion. One feels instinctively inclined to say that this consideration weighs heavier than the individual interest of a bereaved parent whose child has been killed, for to make provision for a maimed child or a child, one of whose limbs has been permanently disabled, is more important than a hopeless effort to compensate the parent for an irreparable and immeasurable loss. A maimed child unfailingly excites the sympathy of every one who comes across it. Such a child becomes a burden to its parent whose all hopes of the child's earnings and prospects of their leaning upon it in their decaying years are smashed. One's heart naturally flows out in sympathy for the years

of crippled and unhappy life in store for such a child. It is sheer beastly to say that a child trespasser, because of its intrusion, has forfeited all its claims to commonplace humane treatment.

Upon the contrary, the individual interest of the land-occupier demands genuine freedom to improve his land and make beneficial use of the same. His dominion over his land is not to be curtailed and burdened with so many liabilities as to reduce the same to a mere sham. How is a land-occupier to exercise his unfettered discretion with a view to make the utmost beneficial use of his land, if he has to act under the sense that his land has always to offer a harmless site for recreation to strangers?

Then again, apart from the individual interests of the parties, society demands protection of children and security of their life in order to preserve its continuance. Further, it is impossible to conceive of a society or community wherein every parent can provide playgrounds to his children. Accordingly, children are prompted by their instinct to use their neighbour's waste land as their play-ground. And supposing for a moment that at one time the ideal society happens to come into existence and there is such a precisely uniform distribution of wealth that every house has a play-ground appertaining to it, even then children will amuse themselves in the adventure incidental to exploration. This being so, it is in the fitness of things to expect a land-owner to conform to the standard of a man of ordinary caution and not to allow his premises to assume a condition dangerous and harmful to children. No land-owner should be allowed to keep an article on his premises which is likely to attract children, and if he does so, there ought to be a legal obligation imposed upon him to take care that children are not allowed to come near it, or if they do come, the condition of the article should be such as not to endanger their safety, if they intermeddle with the same. The knowledge of this latter contingency is fixed upon the land-owner inasmuch as he, as a man of average intelligence and normal foresight, ought to see the reasonable and probable consequences of his fixing up an attractive article to which children are bound to flock. In the words of Lord Sumner, "Children are little barbarians who in the wantonness of their infancy are certain to go on their quests without regard to the civilised conception of

land-ownership." Children of tender age and immature understanding are not expected to realise the impropriety of meddling with other people's property. As a matter of ordinary knowledge childhood or infancy is above discrimination between its parent's property and those of its neighbours. Instinct of amusement is the guiding factor. Whatever is a source of amusement or attraction will be intermeddled with by a child irrespective of whosesoever property it may be. This being the inborn nature of a child, it is only fair to make concession for the same and it is only just to expect neighbours to take this into consideration while carrying on their operations upon their land. Ignorance of this consideration ought to be sufficient in law to fix the land-owner with liability for injuries sustained by a child-trespasser. It may be urged against this imposition of liability that it will not achieve its object inasmuch as it is known as a matter of social psychology that few people try to know the law and fewer still pay any heed to it after knowing the same. The answer to this is that the enforcement of the doctrine is calculated, in due course of time, to infuse a wholesome atmosphere into the society.

On the other hand, social interest in the free and unfettered use of land has to be reckoned with. The dominion of land will lose all its charms and land will cease to be a valuable commodity, if the ownership is hedged in by a number of onerous restrictions. Land, to retain its present value, must be capable of being improved and available to be used in a way most beneficial to the owner. It is indeed extravagant to expect a land-owner to play the part of a guardian with respect to his neighbour's children and it is highly unjust to saddle him with responsibility of injuries sustained by children in the course of their recreation on his premises. To fix such a heavy duty upon a land-owner is to denude him of all his rights in the land and to substitute an onerous duty in lieu thereof. The imposition of a liability like this is an unsurmountable clog on the ownership of land and will far outweigh the charms of ownership.

(To be continued.)

ERRATUM.

30 C. W. N. cxxii, cl. 2, l. 19 from the bottom, delete "self."

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REPORTS (See Index.)

Actionable prevention of lawful employment.

The law of actionable interference with lawful employment has been making great strides in England and America. That inducing a breach of contract, without lawful justification, is actionable has been settled long ago. It was, however, at first doubted whether preventing a person from obtaining employment in similar circumstances is actionable. The point of distinction which used to be stressed when relief was denied was that where there was no subsisting contract there was no right which was interfered with. But it is gradually coming to be recognised that every man has a right to engage freely in such lawful occupation as he himself may choose, free from hindrance by his fellowmen. But this right too cannot be unqualified. It would prevent free competition for employment if a man was to be prevented from seeking employment for himself, because somebody else was already looking for it. Similar interference may be justified in connection with *bona fide* trade disputes. Employers of girls who are so badly paid that they must be driven to dubious courses to eke out their meagre livelihood have been refused relief, against persons who interfered in the interest of public morality.

It used to be thought at one time that interfering to prevent employment to be actionable must be accompanied by threat, violence or other unlawful means, and actionable conspiracy would be such a means. That would lead to holding that such interference, if purposeless, on the part of a single individual, would not be actionable. Such a view would not seem to be in consonance with justice. If several persons combined to prevent lawful

employment, in the absence of a joint interest requiring protection, the interference would be without lawful justification on the part, at any rate, of those who were not interested. It is therefore not the unlawful means, but the absence of lawful justification which constitutes the essence of the tort. Malicious motive would not appear in itself to be the decisive factor, for if there be lawful justification, the superimposition thereon of malicious motive would make no difference, whilst at the same time a purposeless or officious interference would be actionable. The net result of recent tendencies and developments appears to be that interference to prevent lawful employment is *prima facie* actionable and it is for the Defendant to prove justification, in the shape of exercise of equal or superior right, for such interference.

The Turn-table doctrine.

The *Minnesota Law Review* for March last has an interesting discussion on what is known as the Turn-table doctrine, the occasion being two interesting cases, of which the facts were as follows:—In one a Railway Defendant owned a corner lot on which the other Defendant was operating a well-drilling machine. The lot was not enclosed and had in fact been used for years by pedestrians as a pathway and children were accustomed to play on the lot to the knowledge of the Defendant Railway. A child playing on the lot got his glove caught in the belt of the machine and injured. The Court in this case held that the Turn-table doctrine did not apply but the Railway was liable under ordinary principles of negligence having owed a duty to the child to warn him. In the other case, the Defendant maintained three poles on a plot of ground immediately adjoining a public park but not separated from it, on which were strung wires carrying electric current. One of the poles was fitted with a ladder which could be easily climbed. The poles were not marked dangerous as required by ordinance. A child of twelve went from the park, ascended the pole and was killed by the current. The Court held that it was an attractive nuisance and the Turn-table doctrine applied.

It is unquestionable that under the Turn-table doctrine, by whatever fiction it is supported, a duty is imposed on owners of premises to children which they do not owe to adults. Children coming to premises which are in a dangerous condition, but which, not being properly fenced or enclosed, are yet so attractive that they are bound to affect the immature minds of children and draw them into meddling where adults would keep out of the way, are neither "invitees" nor "licensees." The justification of the doctrine lies not in their being "implied" licensees or "implied" invitees, but upon facts of child psychology. Is a similar duty owed to weak-minded adults? Why not? In the first-mentioned case, it would seem that if an adult pedestrian who did not go out of his way had been caught and injured, the Railway would be liable in the absence of contributory negligence.

THE DOCTRINE OF TURN-TABLE CASES.

(By A. P. PANDEY, M.Sc., LL.B.)

(Continued from p. cxxviii.)

The question then arising for determination is how these opposing and clashing interests are to be adjusted? How will each of these have its due protection? In certain cases it has been laid down that different rules will govern the liability of land-owners according to the different categories of intruders. To rank trespassers, the land-owner owes no duty while some duty is prescribed in the case of invitees and lastly the licensees are entitled to have the premises in a harmless condition. But obviously rules are not possible to frame for every variety of cases. A set of rules based upon different categories of intruders will not avail universally. It is an impossible accomplishment to frame a code of rules which can cover all varieties of cases.

It is suggested, therefore, that the legal standard of caution and judgment claims universal application. Undoubtedly it will remain a variable quantity, subject to modification by the peculiar circumstances of a case. In any individual case the legal standard will have to be determined in the light of the particular circumstances.

It will not be out of place to jot down a number of circumstances that generally arise for consideration in fixing the legal standard.

The first and most feature to be considered is the nature of the use of the land. This

goes a long way in fixing the legal standard of judgment. Let us illustrate this by an example.

Suppose A, the owner of Whiteacre, sinks a well in his premises and leaves it unfenced. B, a child of tender years, goes upon his premises when none is there and while looking down the well falls into it and sustains injuries. Can A be held liable for damages? Sinking a well for the purpose of drinking water and irrigation is in itself a harmless and beneficial use of the land and is not open to objection on any score. But it is an object of attraction to children and A, as a man of ordinary prudence, ought to have anticipated and foreseen the visits of children. Therefore, either he should have set a watch-man to scare away children or he should have erected a fence to prevent children of immature understanding from tumbling down. A departure from this standard constitutes negligence which fastens liability upon A.

Then again suppose A leaves his car in his portico unguarded. B, a child, meddles with it, presses the self-starter with the disastrous consequence that the car starts and injures B. Is A liable? The answer seems to be no. The car is undoubtedly an object of attraction and A ought to have foreseen the flocking of children to the same. But to foresee and anticipate that a child would put on the switch, press the self-starter and start the car is superhuman and therefore A would not be held liable.

Likewise suppose A grows a mango-grove on his premises. B, a child, climbs up a tree and while attempting to pluck a mango falls down and sustains injuries. A cannot be held liable because he, or, for the matter of that, any human being, could not so shape a tree as to make it impossible for any child while ascending to fall down.

Generally the land-owner is not called upon to alter the condition of his premises. He is entitled to say to his trespasser friend, "Here is my land. You may use it as you like." Thereupon a trespasser or licensee has no cause to complain of an excavation if he finds it there. "Any complaint by the licensee may be said to wear the colour of ingratitude so long as there is no design to injure him."—*Per Willes, J., Inderman v. Davies, (1866) L. R. 1 C. P. C. 274 at p. 285.*

Secondly, knowledge on the part of the land-owner as regards the presence of intruders materially affects the standard of test. Law

recognises two kinds of knowledge, *viz.*, actual and constructive. The latter is based on fiction of law, *i.e.*, a man is presumed to know what he ought to have known. It will be better to illustrate this.

A's premises stand on the edge of a public road. Suppose that passers-by use a route inside his premises as a short-cut to reach the road. One morning A digs a ditch on the route with the result that B, a child, falls down into it and sustains injuries. A ought to be held liable inasmuch as he ought to have foreseen the visit of B to his premises as a passer-by to have access to the road.

Thirdly, the relation between the land-owner and the intruder is another factor to be reckoned with. In other terms the standard varies with the category of intruders, *e.g.*, those who come upon the land to conduct business with the occupier, those who come to pay social calls, etc., etc.

Fourthly, the age of the intruder is another circumstance which ought to be taken into consideration. Certain Judges have laid down that a child, if he is a rank-trespasser, does not merit indulgence at the hands of a Court. It is respectfully submitted that it is not at all intelligible to place a child on the footing of an adult trespasser.

It is obvious, therefore, that so many circumstances have to be considered that it is quite impossible to frame a set of formulae based upon different categories of intruders. The only feasible basis of the doctrine seems to be the legal standard of judgment, caution and prudence which is elastic enough to adapt itself to manifold circumstances. The doctrine, then, does not seem to be an anomaly.

(Concluded.)

Correspondence.

THE LAW AS TO PUBLIC PROCESSIONS.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

In a previous issue of your journal, I attempted to state the law as to the right of the members of a procession against interference, and the authority of the public officers to interfere with a procession for the purpose of preserving the peace was considered specially in reference to the authority of police officers in that respect. It is necessary now to consider how far Magistrates may be justified

in prohibiting a procession for the same purpose.

It has been noticed that the right to use a public thoroughfare for the purpose of conducting a religious procession attended by music is one which has been judicially recognised as inherent in every subject (see 6 Mad. 203, F. B.; 26 Mad. 376, P. C.) and consequently the prohibition of the same would be an interference with individual religious freedom. At the same time, it would also be an interference with the free exercise of religion of another community if a procession attended by music is allowed to pass a place of worship while they are *bona fide* engaged in worship. When there is want of mutual toleration, both communities insist on their right to the free exercise of religion, and the imminence of a breach of the peace, if threatened by such conflict of rights, calls forth special powers of public servants to deal with the situation. Such special powers are amply provided for in sec. 144 of the Code of Criminal Procedure under which the Magistrate is empowered to direct any person to abstain from a certain act, if he considers that such direction is likely to prevent a breach of the public tranquillity. Ordinarily these powers are to be exercised in defence of rights and in repression of illegal acts, but when the equally valid rights of two communities clash with each other and peace cannot be maintained otherwise than by interfering with a legal right, the Magistrate may interdict the exercise of a legal right owing to the necessity of preserving the peace, but from the very nature of those powers, it follows that they should be exercised so as to cause as little interference with individual liberty as is consistent with the attainment of the object in view. So, when an order under sec. 144, Cr. P. C., is in the nature of curtailment of an individual right, it is essential that the order should not have the effect of destroying that right altogether. Accordingly it has been held that an order of the Magistrate directing that all music should cease when any procession is passing a certain place of worship is *ultra vires*. *Muthialu Chetty v. Rapun Saib*, 2 Mad. 140. The Court said: "The law, in the restriction it imposes on processions of whatever character, does not go beyond the necessity. . . . For the preservation of the public peace, he (the Magistrate) has a special authority, an authority limited to special occasions. His first duty is to secure to every person the en-

joymment of his rights under the law, and, by measures of precaution, to deter those who seek to invade the rights of others; but if he apprehends that the lawful exercise of a right may lead to civil tumult, and he doubts whether he has available a sufficient force to repress such tumult, or to render it innocuous, regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorised to interdict its exercise. The duration of this authority in the Magistrate is co-extensive with the emergency that justified the exercise of the authority. In a later Full Bench case of the same High Court, *Sundram Chetty*, 6 Mad. 203, it has been affirmed that in case of an emergency this authority to suspend the exercise of the rights is extraordinary, and the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient, and that this authority is limited by the special ends it was designed to secure and is not destructive of the suspended rights.

If an order under sec. 144, Cr. P. C., be passed directing that all music should cease whenever a procession is passing a place of worship of a certain community, that community may choose to build their places of worship on every street so that it would not be possible for another community to conduct a religious procession attended by music at any time and in any place, and if a community insist on their alleged right to the free and undisturbed exercise of religion at all times of the day, it is but right that they should build their places of worship on streets which are their private property (see 2 Weir 89) instead of seeking the Magisterial aid to destroy the rights of another community.

Yours, etc.,

ANUKUL CHANDRA MOITRA.

Notes of Cases CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before RANKIN AND MUKERJI, JJ. APPEAL FROM APPELLATE DECREE NO. 2006 OF 1921. KALI CHARAN HAZRA and ORS. v. UPENDRA NATH GHOSE. The 9th Janu

Rule of justice, equity and good conscience—

New room added to mortgaged premises pending mortgage suit, and not covered by sale proclamation—Purchaser at mortgage sale, if may recover possession of new rooms and on what terms.

Pending a suit for sale of certain mortgaged premises on which at the date of the mortgage there were 3 rooms, the mortgagors built 3 others on a portion of the site. The suit terminated in a decree, in execution of which the premises as they stood at the date of the mortgage were put up to sale and purchased by the Plaintiffs. The result was that the site of the 3 new rooms but not the rooms themselves passed by the sale. In a suit by the Plaintiffs to eject the Defendants from the three new rooms, the lower Appellate Court dismissed the claim for recovery as well of the site of the new rooms as of the rooms themselves: whereupon the Plaintiffs preferred this second appeal. In disposing of the appeal, the Court *inter alia* observed:—

"This is a case where an *impasse* has been arrived at by reason of a change in the condition of certain mortgaged premises between the date of the mortgage and the date on which they were put up for sale. . . . The Vakil for the Respondents has pointed out very fairly that the justice and good conscience of the case is that his clients should not hold the actual site of the new three rooms for nothing. On the other hand, he says, that it is not in favour of the Plaintiff in this sense that the Plaintiff has no real claim for the new three rooms for nothing, and on that point of view, we agree with him. We think we ought to accept his suggestions in the absence of any actual rule of law deciding this matter. We ought not to think of giving a decree for possession of the new three rooms to the present Appellant except on the condition that he submits to pay a fair value for the structure that was erected since the Plaintiff's mortgage suit was commenced; if that is done, we are prepared to say that the Plaintiff ought to be allowed to get possession of those three rooms. If that is not done, we are not prepared to say that in the circumstances this appeal ought to be allowed."

Babus Brojolal Chakrabarty and Susil Kumar Bose for the Plaintiffs-Appellants.

Babu Nagendra Nath Ghose for the Defendants-Respondents.

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*Presumption, conformatory habuliyata containing agreement to
pay rent at an enhanced rate in future*

REPORTS (See Index.)

Indian and Dominion Appeals to the Privy Council.

The Judicial Committee of the Privy Council continues to enjoy the confidence of the self-governing Dominions as an Imperial Court of Appeal inspite of the restrictions imposed in this behalf by colonial legislation. The reason, evidently, is that aggrieved litigants expect that the members of the Judicial Committee would be above any local prejudice or bias and would be able to bring to bear a fresh mind on the issues involved in the case. We find that of the 12 cases that were set down for judgment at the beginning of the Easter Sittings, 2 were from Australia and 9 from India and of the appeals set down for hearing, 10 out of 32 came from Canada and Newfoundland, 2 from New South Wales, 1 from British Honduras, 1 from Gold Coast Colony and 18 from India. By reference to the population of India, the number of appeals to the Judicial Committee from here is by no means large. We are not in favour of the establishment of an Imperial Court of Appeal in India. When the Indian Provinces attain autonomy, the Provincial High Courts should be the final Courts of Appeal. Even after the attainment of Dominion status by India, appeal from the Provincial High Courts may be allowed to the Judicial Committee of the Privy Council under limitations similar to those imposed by the Dominion legislation. There is therefore no scope or utility of an Imperial Court of Appeal in India.

Dominion Status.

—We have in these columns noticed before an

exposition of the status of Dominion Government by Mr. Lloyd George, when he was Prime Minister of England. The recent discussion with regard to the status of South Africa in the Cape Parliament between General Hertzog and General Smuts, which we give below, is also interesting from the same point of view. Our English legal contemporary, to whom we are indebted for the extract, cites the opinion of Mr. Bonar Law which re-affirms the views of Mr. Lloyd George. Both are agreed that if a Dominion wanted to go out of the Empire, there would be no armed opposition or as Mr. Lloyd George had put it, not a single shot would be fired. It is the community of interest that forms the strongest tie between the different self-governing members of the British Commonwealth.

On the 22nd March, on the vote for the Prime Minister's Department in the debate on the Estimates in the House of Assembly of the Union of South Africa, General Hertzog, the Prime Minister, delivered a momentous pronouncement in relation to the international status of South Africa. The Union of South Africa, he maintained, stood on an equal footing with Great Britain. It was no longer a question of fighting for an independent status. They had that status now. He differed from General Smuts in the opinion that there must be in the Empire some superior power as a preventative against disintegration. "We say," said General Hertzog, "that a free nation must recognise only one authority—the will of the people. As far as I am concerned, it must be clearly understood that this country [the Union of South Africa] must recognise only one authority—the will of its own people. As far as I am concerned, it must be clearly understood that this country takes its place in the affairs of the world as a nation free and on an equal footing with the rest of the world." General Smuts, in reply, repudiated General Hertzog's description of his views. "I regard the British Empire," he said, "as an organic combination of equal States. . . . There is no super-State, no super-authority. It is a meeting of equals under one sovereign." General Hertzog has been anticipated, in his exposition of Dominion status as a condition potentially of the complete independence of any State which is a member of the community of nations forming the British Commonwealth of Nations, by Mr. Bonar Law. Speaking in the House of Commons on the 30th March 1920, Mr. Bonar Law, who was himself a Canadian, said, as Leader of the House and a most influential member of the Cabinet, in which he sat as Chancellor of the Exchequer, "What is the essence of Dominion Home Rule? The essence of it is that they [the Dominions] have control over their whole destinies, of their fighting forces, and of the amounts they will contribute to the general security of the Empire. All these things are

vital to Rome Rule. . . . There is not a man in the House who would not admit that the connection of the Dominions with the Empire depends upon themselves. If the self-governing Dominions—Australia, Canada—chose tomorrow to say: 'We will no longer make a part of the British Empire,' we would not try to force them. . . . Dominion Home Rule means the right to decide for themselves."

Duty of the police in conducting prosecution.

Under the English law no evidence with regard to the previous conviction of an accused person may be given during trial. In the case of *Re: v. Dwyer*, [1925] 2 K. B. 799, the police resorted to an ingenious device of producing a photograph of the accused person which bore the number he had on his jail clothes and which indirectly went to show that he had been previously convicted. The photograph had been admitted in evidence at the trial. On appeal, the Lord Chief Justice of England sitting in the Criminal Court of Appeal held that "indirect evidence of previous conviction is as inadmissible as any direct statement." His Lordship's observation with regard to the duties of the police in connection with the prosecution of an accused person should be noted by the police officers in this country. Hewett, L.C.J., said: "It is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has one interest only in securing a conviction of the right man."

Witness interpreting his own evidence to accused.

The case of *Ah Soi v. King-Emperor*, reported in our last issue, shows how sessions trials are sometimes conducted in total disregard of the fundamental principles of our system of jurisprudence.

In the trial of a Chinaman, accused of murder, one of the witnesses for the prosecution was a Chinaman who evidently was in a position to speak in a language other than Chinese and make himself understood both to the accused and to the witnesses and the Court who did not understand Chinese.

Under sec. 361 of the Code whenever any evidence is given in a language not understood by the accused, it shall be interpreted to him in open Court in a language used by him. In the case in question the Chinaman witness, who gave evidence for the prosecution both

before the Committing Magistrate and the Sessions Judge, was selected by the Court to act as interpreter and he interpreted the evidence of the witnesses including his own evidence to the accused who was thus placed at the mercy of this interpreter, admittedly a partisan of the prosecution. One can easily understand what led the learned Sessions Judge to adopt this curious method of getting the evidence of the witnesses interpreted to the accused, a Chinaman, whose only fellow countryman available at the time was the witness who acted as interpreter; but whatever difficulty the learned Sessions Judge might have had in getting a Chinese interpreter, the procedure followed by him was, as pointed out by their Lordships, absurd from the very outset and opposed to elementary ideas of justice. That a witness who had taken an active part during the police investigation, who had given evidence in the Committing Magistrate's Court on behalf of the prosecution and who was found to be ready and willing to give evidence in the Sessions Court on behalf of the prosecution against a man who was charged with very serious offences under secs. 302, 304 should have been chosen to act as interpreter in the case is a procedure which has only to be stated to call forth the severest condemnation. Their Lordships in very rightly condemning the procedure adopted in the Sessions Court say that they trust that a thing like this will never happen again.

Charge to jury—Duty of Sessions Judge.

In *Superintendent and Remembrancer of Legal Affairs, Assam v. G. C. Wilson*, their Lordships have delivered an important judgment on the subject of a Judge's duty in charging the jury in a sessions trial. In this case the Respondent G. C. Wilson, the manager of a tea estate in Assam, was placed on his trial on a charge under sec. 304, I. P. C. The allegation was that one day he went out on a round of inspection of the garden and being not satisfied with the work of a cooly seized him by the neck and struck him with his clenched fist with the result that the cooly fell down, whereupon the manager kicked him. The deceased expired shortly after the alleged assault. The trial took place before a mixed jury of three Europeans and two Indians and a majority verdict of guilty under sec. 334 only was returned. The jury unanimously found the accused not guilty of the charge under sec.

304. and the Judge acquitted him of that charge. The Government preferred an appeal against the order of acquittal. It appeared that the verdict of the jury as recorded by the learned Judge was confused and ambiguous. It further appeared that after the summing up by the Judge when the jury were retiring they were supplied with a copy of the Indian Penal Code. Under the law of procedure it is the duty of the Judge to explain to the jury the law applicable to the case and it is the duty of the jury to accept the law as laid down by the Judge without any extraneous aid. If the jury is unable to understand the law fully and clearly it is the duty of the Judge to explain it to them afresh, but the idea of supplying the jury with a copy of the Indian Penal Code so that they might gather the law therefrom is wholly foreign to what the legislature has enacted as the procedure governing sessions trials for the explanation of the law applicable to the case under trial. It is the duty of the Judge to help the jury in understanding the law to be applied, but what was done in the present case is bound, instead of helping them, to confound them as much as possible. In the first place, it will give them the impression that the Judge's summing up on questions of law is not comprehensive and gaps therein have to be filled up by themselves from the Penal Code. Secondly, that they are not absolutely bound to accept the Judge's statement of the law but are at liberty to arrive at their own conclusion.

Instead of supplying the jury with a copy of the Indian Penal Code the learned Judge might have directed them to his law library and told them that the law reports were there and contained the decisions of the High Courts which laid down the law on the subject. Their Lordships condemn the ridiculous procedure adopted by the Sessions Judge in this respect and also point out that when the verdict of the jury is confused and unintelligible, it is the duty of the Judge to obtain from them a proper and correct verdict before accepting the verdict given, and that the record of the heads of charge should be such as to convey sufficient information to the High Court as to the explanation of the law by the Judge and about important questions of fact.

In their judgment their Lordships refer to one other aspect of the case where they observe

that certain expressions in the charge appear to verge on politics—expressions much to be regretted. We quote here the words of the learned Judges and hope that all Subordinate Magistrates and Judges will take note of them:—"It will be an evil day for the administration of justice if political considerations are to influence the judicial mind of the Judge which should be free from all taint of bias on political, racial, social or personal grounds."

Reviews.

THE TRIAL OF CRIMINAL CASES IN INDIA. Being a discussion of the Code of Criminal Procedure, 1898, as amended up-to-date. By A. Sabonadiere, I.C.S. (retired), Calcutta and Simla. Thacker, Spink & Co. 1926.

Like the Code of Civil Procedure, the Code of Criminal Procedure has grown up gradually in the hands of experts. Both Codes are handy for use by experts, whether judicial officers or legal practitioners. But with their numerous provisions framed and arranged with special regard for economy of space and language, they are for that very reason unsuited as manuals for beginners. Text-books intended to introduce such beginners into the mysteries and intricacies of the Codes are therefore a great desideratum, but the experienced judge or practitioner after some time forgets what he wanted during his apprenticeship and the needs of the beginners are left unattended to. It is possible that we should not have had the present treatise if the author had not after his retirement from the Indian Judicial Service been appointed lecturer in Indian law at the University College, London, and the School of Oriental Studies. In this book the author says he has endeavoured to show how the different parts of the Code fit into one another by examining and explaining the various parts of the Code and their inter-relation. The result is a text-book of 600 odd pages in which the subject-matter of the Code is re-arranged to suit the purposes of a more scientific study of the provisions and the purposes of the Code.

The purposes of the Code have to be gathered largely from rulings of the High Court and this the author does without, however, citing the rulings themselves. The fear that this would overburden the book is explained as the reason, but we do think that this self-denying

ordinance has been carried a bit too far, and citations of the leading cases would certainly have added to the usefulness of the treatise. This reservation however being made, we have nothing but praise for the manner in which the work has been executed. The whole work is a broad and yet intensive study of the provisions of the Code. After a number of introductory chapters of a general character, the incidents of police investigations and the powers and functions of the police are dealt with; then the details of proceedings in Court from start to finish in ordinary and summary trials; preventive proceedings receive their fair share of attention, as do the procedure relating to transfers, appeals and revision and other matters which it is unnecessary to notice in detail. The discussion is rounded up by two concluding chapters, one dealing with discretionary authority and mandatory directions and the other with the Code in practice. Though primarily intended for beginners to whom we strongly recommend this book, so much care and industry have been expended in the elucidation of the provisions of the Code by the author that the treatise cannot but be found useful even by practitioners and judges.

INDIAN SUCCESSION ACT (XXXIX OF 1925).
By Pestonji Limjee Paruck, Attorney-at-Law,
High Court, Bombay. Bombay: Messrs. N. M. Tripathi & Co., Booksellers and publishers. 1926.

This is a handy commentary of the newly consolidated Succession Act, prepared mainly for the use of students; but as the commentary is not sparing in the citation of elucidatory judicial decisions, which so far as we have been able to test is up-to-date, it will be useful also to legal practitioners for all ordinary purposes of practice. Of the usual features of such a work, *viz.*, the statement of objects and reasons and report of the committee, comparative tables of the provisions of the Act and the superseded enactments, table of cases and subject index, none is wanting.

Notes of Cases CALCUTTA HIGH COURT

Recent decisions not yet reported

The important cases to be fully reported hereafter

CIVIL APPELLATE JURISDICTION. Before
CUMING AND R. B. GHOSH, JJ. APPEALS
FROM APPELLATE DECREES NOS. 306 TO 310

OF 1924. JITENDRA NATH RAY,
Plaintiff, Appellant v. ABEJAUNNESSA
BIBI and others, Defendants, Respon-
dents. The 8th March 1926.

Bengal Tenancy Act (Act VIII of 1885),
secs. 30 and 50 (2)—Whether the presump-
tion under sec. 50, cl. (2) of the Bengal Ten-
ancy Act can be rebutted by confirmatory kabu-
liyats containing agreement to pay rent at an
enhanced rate in future.

These five appeals arose out of five suits for
enhancement of rent under sec. 30 of the Ben-
gal Tenancy Act and also for increase of rent
for increase in area under sec. 52 of the Bengal
Tenancy Act. With regard to increase of rent
for increase in area both the Courts below
found that there had been no increase in area
and dismissed Plaintiff's claim under sec. 52.
With regard to enhancement of rent under sec.
30 the Defendants relied upon the presump-
tion under sec. 50, cl. (2), and the Plaintiff's
case was that this presumption was rebutted by
certain *kabuliyats* which, though confirmatory,
yet contained agreement to pay rent at en-
hanced rate in future:

Held—That the presumption under sec. 50,
cl. (2) of the Bengal Tenancy Act was not re-
butted by these *kabuliyats*. Even if the
rates at which the tenants by those *kabuliyats*
agreed to pay rent in future were an enhance-
ment on the rates at which they were then
paying rent, it would not constitute such an
enhancement as would rebut the presumption
under sec. 50, cl. (2) of the Bengal Tenancy
Act, because it would not show change in the
rate of rent. It would only show an agree-
ment to pay rent at an enhanced rate at some
future time. An agreement to pay rent at en-
hanced rate at some future time does not con-
stitute a change in the rate of rent under sec. 50
of the Bengal Tenancy Act. Therefore it can-
not be said that the rates of rent were changed
at the time of the execution of the *kabuliyats*.

Held further—That possibly the Plaintiff
may be entitled to the rates as mentioned in
the *kabuliyats*, but he is not so entitled in the
present suit which he has based not on the
contract in the *kabuliyats* but on the rise in the
prices of the staple foodcrops under sec. 30 of
the Bengal Tenancy Act.

Babu Hemendra Chandra Sen for the Ap-
pellant.

Babu Prafulla Kamal Das for the Respon-
dents.

P. K. D. Appeals dismissed with cost.

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REPORTS (See Index.)

The late Mr. N. C. Bose.

It is with a sense of deep sorrow that we have to record the death of Mr. N. C. Bose, the oldest attorney on the rolls of the Calcutta High Court, which took place in his Calcutta residence on the evening of Tuesday last. He was enrolled on the 17th April 1872 and retired from active practice in 1922, when the jubilee of his professional career was celebrated by the members of his profession. Although he personally retired from the profession, his firm is one of the leading firms of solicitors of this city and is conducted by his son Mr. A. C. Bose. The death of Mr. N. C. Bose may be said to have removed one of the old land-marks of the Calcutta High Court. He was a tall, handsome man with distinctive features and of a remarkable presence. He commanded great respect of the Bench and the Bar, the fellow members of his profession and the general public, both by his ability in the profession and his thoroughly gentlemanly dealings with everybody he came in contact with. In the palmy days of his practice, he was a conspicuous figure in the Original Side Chambers, where he used daily to make many applications on behalf of his clients. His delivery, bearing and deportment made him very popular with the Judges. The Chamber applications in those days used to be taken at 10-30 A.M. and Mr. Bose never failed to put in his appearance at that hour. In fact the punctuality that he observed in coming to Court to attend to his Chamber work would have enabled others to regulate their watches by reference to it. He had a very lucrative practice but he spent much of what he earned like a gentleman. He dressed well, lived well and spent much of his earnings in entertaining his friends. He was also generous to his dependants. He

earned much but was never exacting to his clients. He was a good citizen though he never took part in public affairs. All the same he was a silent admirer of those who worked for the good of the people and the country and gave expression to his appreciation of their good work by entertaining them as guests. For instance, he had great admiration for the late Sir Tarak Nath Palit, who was his senior in age and Sir Surendra Nath Banerjee who was junior to him. Amongst the younger generation he had many very warm friends, such as Lord Sinha and the late Sir Ashutosh Chaudhuri. The senior European members of the Bar, all now retired and many dead and gone, were very friendly with him, and the contemporary members of the Bench had so much confidence in him that many of them used to consult him as their solicitor in their personal legal affairs. Even this brief review of his career takes us back to the very interesting and memorable period of the last quarter of the nineteenth century. The death of Mr. N. C. Bose thus creates a further lamentable gap in the past. We convey our sincere condolence to Mr. A. C. Bose and other members of the bereaved family.

Government Counsel for the High Court Sessions.

The creation of the appointment of Government Counsel is a move in the right direction which has been long overdue. Hitherto the Standing Counsel used to conduct the prosecution in murder cases only at the Criminal Sessions of the High Court of Calcutta; in all other cases before the Criminal Sessions, Counsel used to be specially briefed on behalf of the Crown. Under a system like this there is always a risk of Crown prosecutions being conducted in a manner in which Crown prosecutions should never be allowed to be conducted. There is too much temptation of attempting to secure a conviction at any cost. It is for these reasons that we thoroughly approve of the new arrangement. The appointment of Mr. A. K. Basu to this position of responsibility is a good selection. He has good academic qualifications and although comparatively a junior in his standing

at the Bar, he has acquired considerable experience in conducting cases in the Sessions Court, which we expect would ensure the success of the new arrangement.

Search Warrants.

Though the Courts in England constantly refused to compel discovery in criminal cases on the ground that no man should be compelled to produce evidence to criminate himself, the legislature in this country has from the beginning authorised the production, and under certain circumstances the compulsory production, of an accused person's documents in Court. When once an accused person's documents are in the possession of the Court by virtue of the due execution of a search warrant issued under the provisions of sec. 96 of the Criminal Procedure Code there is no distinction between such documents and those of any description found upon his person at the time of his arrest or on his premises at the time of or subsequent to his arrest.

By the criminal law of India as laid down in the Code of Criminal Procedure, an accused person may be compelled to furnish evidence, the production of which might have the effect of criminating him.

A reference to the proceedings of the Legislative Council upon the Criminal Procedure Bill of 1872 shows that the departure from the English law was deliberately made rightly or wrongly in view of the peculiar circumstances of this country.

The speech of the then Lieutenant-Governor of Bengal in the course of the discussion on the Bill is interesting :—" The criminal law was a law of overwhelming importance in this country—not only the law for the administration of criminal justice but the executive administration as carried on through Magistrates. The prevailing ideas on the subject of criminal law have been somewhat affected by the English law and the departures from the rules of the English law which the Committee recommended were founded on this ground that many of the prominent parts of the English law were based on political considerations, the object of those familiar rules of criminal law being not to bring the criminal to justice but to protect the people from a tyrannical government, and the functions of juries have been for many centuries principally directed to the protection of the interests of the people. Not only

were those provisions now unnecessary in England but they were specially out of place in a country where it was not pretended that the subject enjoys that liberty which was the birth-right of an Englishman and it was not intended to introduce rules into the criminal law which were designed with the object of securing the liberties of the people. That being so, they might fairly get rid of some of the rules, the object of which was to secure for the people that jealous protection which the English law gives to the accused. They were not bound to protect the criminal according to any code of fair play but their object should be to get at the truth, and anything which would tend to elicit the truth was regarded by the Committee to be desirable for the interests of the accused if he was innocent and for those of the public if they were guilty. That being so, he had no sympathy whatever for some of those things which his honourable friend Mr. Stephen (afterwards Sir James Fitzjames Stephen) had called superstitions. He did not see why they should not get a man to criminate himself if they could, why they should not do all which they could to get the truth from him, why they should not cross-question him and adopt every other means short of absolute torture to get at the truth. They had already done a good deal in the direction of clearing away English prejudices and the Committee proposed to make further concessions to common-sense in the present Bill."

In spite of these concessions to common-sense and progress in the direction of clearing away English prejudices, under the law as it is, the issue of a search warrant is a judicial act and sec. 96 of the Code permits a Court to issue it only when it has reason to believe that certain contingencies mentioned in the section are likely to happen. In the very important judgment delivered by C. C. Ghose and Chotzner, JJ., in *Walekar v. King-Emperor*, published in our last issue, their Lordships, in interpreting sec. 46 of the Calcutta Police Act which authorises the issue of a warrant by the Commissioner of Police for the search of a house which he has reason to believe is used as a common gaming house point out that the expression "reason to believe" is entirely different from the expression "cause to suspect." The former connotes a great deal more than is conveyed by the latter. The police may have cause to suspect that a certain house or place is used as a common gaming house but the officer who issues the warrant has to bring his judicial mind to bear upon the question

and he can only issue the warrant contemplated under sec. 46 of the Act if in his opinion there is reason to believe that a certain house or place is used as a common gaming house. The law clearly intends that evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is reason to believe that a house, room or place is used as a common gaming house."

Courts should be very careful in issuing a search warrant which must not be issued for the mere asking by the police, but the law should be strictly followed. In the words of their Lordships in the case referred to above, search warrants are always open to very serious objections and very great particularity is justly required by law in cases where they are authorised before the privacy of a man's premises is allowed to be invaded by the ministers of law.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The general strike has been responsible for considerable disorganisation in the law Courts, mainly owing to the difficulty experienced alike by Judges, Counsel and litigants, in procuring adequate means of transport. This difficulty led to alterations in the rules of the Supreme Court, permitting pleadings to be written or typed, and enlarging the time within which appearance might be entered to a summons.

There were also many instances of cases being adjourned owing to the inability of parties or witnesses to be present.

May 18th.—The Judicial Committee, which has been hearing Canadian appeals throughout this term, somewhat unexpectedly, when the strike was at its height, formed a second Board for the hearing of Indian appeals and on May 11th they commenced their sittings. This Board was presided over by VISCOUNT DUNDON who was assisted by LORD ATKINSON and MR. AMER ALI. Two connected appeals were the first to be heard—*Bhagwan Singh v. Allahabad Bank* and *Bhagwan Singh v. Bhawani Das*.

The Appellants in each appeal were represented by Sir George Lowndes, K. C. and Mr. Kenworthy Brown. For the Allahabad Bank Messrs. Dunne, K. C., Wallach and Dubé appeared, but there was no appearance on behalf of the Respondent firm in the second appeal.

The Bank instituted the suit on *hundis* which were alleged to have been accepted by

the Appellant and discounted by the Bank. The argument was mainly concerned with whether an appeal lay to the Privy Council, the Respondent contending that it was precluded by concurrent findings of fact within the meaning of sec. 110 of the Code of Civil Procedure. Leave had been granted by the High Court on the ground that the decision of that Court did not affirm the decrees of the Court below.

Sir G. Lowndes, K. C. for the Appellants contended that the Board were entitled to go behind concurrent findings provided there were clear and definite grounds for doing so.

For the Respondents it was urged that there was *some* evidence on which the findings of the lower Courts were based, and that in view of that fact the findings were conclusive even though the Courts had not come to a similar conclusion with regard to particular items of evidence. Judgment was reserved.

May 14th, 17th and 18th.—*Rawat Sheo Bahadur Singh v. Beni Bahadur Singh*. In this appeal from Lucknow the Appellant claimed half the estate of Rawat Jogeshwar Bakhsh Singh, deceased, as one of two reversioners entitled to succeed to it on the death of his widow.

The Defendant who was in possession of the estate claimed to retain it as the son of the deceased through adoption by his widow under a power given to her by his Will.

The arguments were directed to the evidence as to whether the document under which the Respondent was adopted was in fact made by the deceased.

Judgment was reserved.

Messrs. DeGruyther, K. C. and Dubé for the Appellant.

Sir G. Lowndes, K. C. and Mr. F. B. Raikes for the Respondent.

May 11th.—*Jowad Hussain v. Gandan Singh* (Patna). The question at issue was whether the right of the Respondents as mortgagees to have a decree *nisi* for sale passed under Or. 34, r. 4 was barred by limitation. The Appellant contended that time ran from the date of the decree of the Court of first instance, but both Courts in India held that time only ran from the decree of the Appellate Court.

Judgment was reserved.

Mr. A. Majid for the Appellant.

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Respondents were not called upon.

May 11th.—*Lakshman Ch. Mandal v. Takin Dhali* (Bengal). In this appeal there were concurrent findings of fact and the appeal was dismissed without calling on the Respondent.

Messrs. DeGruylher, K. C. and H. N. Sen for the Appellant.

Messrs. Dunne, K. C. and Hyam for the Respondent.

May 17th.—Judgment was delivered in *Ch. Shekhar Bakhsh Singh v. Mt. Raj Kunwar*. The appeal was dismissed.

In *Pancham v. Ansar Husain*, judgment was delivered, the appeal being dismissed.

May 19th.—*Madat Khan v. King-Emperor*. This was an application for special leave to appeal from a judgment of the High Court of Lahore affirming sentences of death passed by the Sessions Judge of Attock.

Mr. W. Wallach for the Petitioners stated the facts and submitted that the Sessions Judge had acted illegally in importing into his judgment statements of witnesses in another case and a statement of one of the Petitioners which was not produced in Court. He contended that the Courts had been influenced by such extraneous evidence and had violated the fundamental principles of natural justice.

Leave was granted.

Mr. Kenworthy Brown for the Crown.

The Courts rise on the 21st for about 10 days for the Whitsuntide Vacation.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important ones to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before B. B. GHOSE AND GRAHAM, JJ. APPEAL FROM APPELLATE DECREE No. 1162 OF 1924. *PANCHANAN PAL* and another, Plaintiffs, Appellants *v.* *SUSILA BALA DASSI* and others, Defendants, Respondents. The 6th May 1926.

Copies of a plaint and of a compromise decree notified in the list annexed to the plaint, not produced along with the plaint and not produced on the day fixed by the Court for the production of documents—Copies produced when case was taken up for actual hearing and accepted by the trial Court—Proper way of dealing with them.

The appeal was out of a suit for recovery of

possession of a 4/15th share of a piece of land on the ground that the Plaintiffs held the same as tenants under *pro forma* Defendants Nos. 6 and 7. Defendants Nos. 1 to 4 contested the suit. They *inter alia* denied Plaintiffs' tenancy right under the *pro forma* Defendants Nos. 6 and 7. In the trial when the hearing commenced, the Plaintiffs in order to prove their tenancy right for the first time produced two documents, Exs. 2 and 3, which were certified copies of a plaint in a rent suit and of a compromise decree. The plaint purported to have been filed against the present Plaintiffs by the *pro forma* Defendants Nos. 6 and 7 and the compromise decree was passed in that suit. These two documents were not entered in the Plaintiffs' list of documents nor were they produced along with the plaint. The documents were not also produced on the day fixed by the Court for the production of documents. But when the case was taken up for actual hearing the Plaintiffs produced those documents and the trial Court accepted them notwithstanding the objection raised by the contesting Defendants. The trial Court, however, gave no reasons why it accepted the documents. The trial Court also refused the prayer of the contesting Defendants that they may be allowed opportunity to show that those documents were not real and binding documents. The trial Court then passed a decree in favour of the Plaintiffs mainly relying on those two documents. On appeal the District Judge dismissed the Plaintiffs' suit without considering those two documents:

Held—That although the procedure of the trial Court was open to comment, by practically rejecting those two documents the District Judge fell into the opposite error. When once the trial Court in the exercise of its discretion had accepted the documents, the lower Appellate Court could not altogether reject them as pieces of evidence. Although the District Judge has not expressly rejected the documents, he has not at all considered them as evidence in the case. This the District Judge was not justified in doing; what under the circumstances the learned Judge ought to have done was to allow the Defendants an opportunity of rebutting the evidence of those two documents. The learned Judge could, certainly do so under the provisions of Or. 41, rr. 27 and 28 of the Civil Procedure Code.

Babu Prafulla Kamal Das for the Appellants.
Babu Biraj Mohan Mazumdar for the Respondents.

P. K. D.

Case remanded.

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REPORTS (see index.)

Parliamentary privilege and breach of the Criminal law.

On the declaration of the general strike, Mr. Saklatvala, M. P., the Parsee Communist member for Battersea, made some violent speeches and was brought up on the 4th May last before Mr. Biron, the Chief Magistrate, Bow Street Police Court in London, on a charge of being a disturber of peace and inciter of other persons to cause breaches of peace and other offences. The Magistrate fixed the 6th of May for hearing and enlarged Mr. Saklatvala on bail and at the same time informed the Speaker of the House of Commons of the proceedings, as the Magistrate has to do when a member of Parliament is brought up before him on a criminal charge. On the 6th of May, when Mr. Saklatvala was again brought up before the Magistrate, he ordered Mr. Saklatvala to enter into recognisance in the sum of £500 and to find two sureties, each in the sum of £250, to keep the peace and be of good behaviour to His Majesty and his subjects for the term of 12 months, and in default to be committed to prison for two months. On Mr. Saklatvala refusing to comply with the order, he was committed to prison in the Second Division for two months, unless he should sooner comply with the order. On the 6th again the Magistrate wrote to the Speaker of the House of Commons informing him of the orders made against the member. On the 7th of May last the Speaker, according to Parliamentary practice, read the letters of the

Magistrate before the House of Commons, for the information of the House. Thereupon Mr. Kirkwood got up and appealed to the Speaker to protect the member against the order of commitment and claimed Parliamentary privilege for him. The Speaker thereupon said that no privilege could be claimed by a member of the House any more than by a member of the public in respect of criminal offences. He said: "The privilege of a member of the House does not extend to covering any breach of the criminal law."

In view of the above case the following statement with regard to Parliamentary privileges, for which we are indebted to our English legal contemporary of the *Law Times*, will be found interesting:—

The Parliamentary privilege of freedom from arrest for the persons of members during the continuance of the Parliamentary session, and for forty days before its commencement and after its conclusion, is thus tersely and accurately defined. The freedom from arrest is among the privileges of the House of Commons which are claimed at the commencement of every Parliament by the Speaker addressing the Lord Chancellor after the formal notification of his own election to the speakership and of its approval by the Crown. They are claimed as an ancient and undoubted privilege, and are, through the Chancellor, most readily granted and confirmed. This privilege of freedom of person, which Professor Redlich thinks is a survival from the ancient Teutonic idea of judicial safe conduct, is subject to an important qualification. Parliamentary immunity is excluded not only in cases of treason and felony, which have been exceptions from the earliest days, but in every case of an arrest for an indictable offence—practically in all criminal matters. The privilege was never held to protect members from the consequences of treason, felony, or the breach of the peace. In 1781 both Houses resolved, in the case of Mr. Wilkes, that it did not extend to the writing or publishing of seditious libels, and since that time the rule has been considered settled that privilege is not claimable for any indictable offence. Nor does the privilege protect a member from being committed to prison for contempt of Court. Members' servants were held to be covered by the privilege of their master. By statutes such as 12 & 13 Will. 3, c. 12, and 10 Geo. 3, c. 50, privileges were conceded to suitors against members of Parliament and their servants, and it was provided that no process was to be stayed by reason of privilege, but members were privileged from arrest and imprisonment. Thus the members' servants entirely lost their immunity, and the members themselves only retained the privilege of freedom from arrest. The Speaker, how-

ever, continued to include the estates of members in his demand for privileges until the Parliament which met in 1837, of which the Speaker was Mr. Shaw-Lefevre (Viscount Eversley) who raised the dignity of the House of Commons. The Speaker's demand for the privileges of servants of the House of Commons was included in his demand for privileges till 1892. In all cases in which members of the House of Commons are arrested on criminal charges the House of Commons must be informed, through a letter addressed to the Speaker by the committing authority, of the crime for which they are detained from their Parliamentary service.

The relation of mental states to negligence.

A very learned and instructive article on the subject appears in *Harvard*. The learned writer begins by saying: "According to Melville M. Bigelow it should be made clear at the outset that negligence is a state of mind, a fact obscured by the circumstance that stated external standards are applied to the proof of it" This mental view takes a variety of forms. Sir John Salmond elaborated it in an extreme form and adhered to it in successive editions of his works on Torts and Jurisprudence. Negligence, he said, consists in a certain mental attitude of the Defendant towards the consequences of his act. He is guilty of negligence when he does not desire the consequences and does not act in order to produce them but is nevertheless indifferent or careless whether they happen or not and therefore does not refrain from the act notwithstanding the risk that they may happen. Negligence essentially consists in the mental attitude of undue indifference with respect to misconduct and its consequences.

Professor Chapin in his book on Torts takes a milder view: not that negligence is, but that it necessarily involves, a particular mental fact—negligence presupposes culpable inadvertence. Bouvier's Law Dictionary in defining negligence states that "due care is such attention and effort applied to a given case as the ordinary prudent man would put forth under the same circumstances." Ruling case-law has it that "negligence or contributory negligence is lack of foresight or forethought. The authors of three several American text-books on negligence—Wharton, Thompson and Barrows—all agree that inadvertence or inattention is necessary to negligence. The same idea is not infrequently expressed by the Courts. The more or less familiar proposition that the phrase wilful negligence is a contradiction in terms reflects the same doctrine."

The learned writer continues—"I submit that all this is erroneous. Negligence neither is, nor involves, either indifference or inadvertence or any other mental characteristic, quality, state or process. Negligence is a unreasonably dangerous conduct, i.e., conduct abnormally likely to cause harm. Freedom from negligence (commonly called 'due care') does not require care or any other mental phenomenon but requires only that one's conduct be reasonably safe—as little likely to cause harm as the conduct of a normal person would be" In his article on Public Wrong and Private Action Dean Thayer said—"Much of the confusion in the cases has come from obscurity as to fundamental conceptions of the law of negligence. To-day some things can to advantage be re-examined and re-stated. The very breadth of the subject has made it easy to hide confusion of thought behind ambiguous and question-begging phrases."

"Probably no phrases about negligence are more ambiguous than the orthodox and apparently fundamental ones in which words like 'care' occur. . . . When a case speaks, as multitudes do, of 'care' as the turning-point, it is usually open to the state-of-mind school to take 'care' to mean what the dictionaries say it means—anxiety or the like—and to ask where is the evidence that the Court is using words in a fictitious or technical sense. Yet fictitious and technical senses are not so rare in the law as to make a word or two a secure basis on which to erect a theory of negligence particularly if the word is so common and therefore so ambiguous as 'care.' And there is evidence that Judges and lawyers when they use the phrase 'due care' in any sense more definite than the opposite of negligence, commonly use it in a purely technical sense. The alleged requirement of 'care' is commonly only an artificial way of saying that conduct must be reasonably safe."

SCOPE OF THE AMENDED SEC. 162 OF THE CODE OF CRIMINAL PROCEDURE.

(By P. RAM CHANDRA RAO, Vakil.)

There is difference of opinion among the High Courts as to the scope of the present amended sec. 162 of the Criminal Procedure

Code. The question may be dealt with under the following three heads:—

I. Whether the application of the new section is confined, as that of the old one was, to the written record of the statements made to the police during the course of investigation or whether the prohibition contained in the new section applies to oral statements as well.

II. (a) What are the purposes for which statements to the police may be used and how are they to be used?

(b) Whether the prosecution may use such statements to corroborate a prosecution witness or to contradict a defence witness.

(c) Whether under the first proviso to the section the accused may use such statements at large for the purpose of showing that they do not corroborate or assist the story as put forward in the first information report or whether the privilege conferred on the accused by the proviso is restricted to contradicting a prosecution witness.

(d) Whether the Court may use such statements for the purpose of contradicting the witnesses.

III. Whether the new sec. 162 (1) applies to accused persons and whether it overrides the provisions of sec. 27 of the Indian Evidence Act.

These will be dealt with seriatim:—

I. In I. L. R. 48 Mad. 640, the Madras High Court held that the application of the new sec. 162 is confined, as that of the old one was, to the written record, that as regards proof and use of oral statements the law is unaltered and is as it was before, and that all oral statements which are previously admissible under the Indian Evidence Act, the use of which was not prohibited by the Criminal Procedure Code are still admissible and may be used. This view proceeds on the construction of the phrase "such statement" as meaning "statement if reduced to writing." His Lordship Justice Wallace observed as follows:—"When the section uses the phrase 'such statement' I am clear that 'such' means 'if reduced into writing.' The old sec. 162 had nothing to do with statements not reduced to writing and was designed to prevent entries in police diaries from being used against an accused person. If the scope of the new section was to be so much wider than the old as to include any statement not reduced to writing, I should have expected, considering the voluminous case-law that has endeavoured to interpret the

old section [see, e.g., 35 Mad. 247; 35 Mad. 297; 36 Cal. 281; 39 Bom. 58], that the new section, if it was to cover oral statements also, would have unequivocally stated so."

The Lahore, Patna and Calcutta High Courts take a different view. In I. L. R. 6 Lahore 171, their Lordships of the Lahore High Court observed thus:—"Sec. 162 as it existed prior to its amendment in 1923 expressly prohibited the use of the record containing the statement of a witness to the police as evidence against the accused; and while the High Courts were at variance as to the admissibility of the oral evidence of such statement in order to corroborate the prosecution witness, they were unanimous that the writing could not be admitted in evidence against the accused. Even the controversy as to the admissibility of such statements by oral evidence has now been set at rest by the amendment made in 1923 which has substituted the words 'nor shall any such statement or any record thereof . . . be used for any purpose (save as hereinafter provided) at any inquiry or trial . . . ' for the words 'nor shall such writing be used as evidence' which occurred in sec. 162 prior to its amendment. The result is that not only is the record of the statement of a witness taken under sec. 161 of the Criminal Procedure Code excluded from evidence, but also the proof of such statement by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution." See also 89 Ind. Cases 252: s.c. 26 Cr. L. J. 1308 (1913) and I. L. R. 6 Lahore 24.

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

June 3rd.—The Trinity Sittings of the Privy Council commenced to-day and two petitions were heard in connection with Indian appeals.

In *Moola v. Mooljee Dharsee & Co.* (Rangoon), *Messrs Dunne, K. C. and Gerard Sanders* applied to set aside a stay of execution which had been granted by the Board on an *ex parte* application some three months ago. *Sir George Lowndes, K. C.* and *Mr. E. B. Raikes* opposed the application which was refused, but without costs.

In *Shridhar v. Laxinarayan, Messrs. DeGruyther, K. C.* and *Parikh* applied for and obtained special leave to appeal from a deci-

sion in the Central Provinces. Mr. E. B. Raikes opposed the application.

The Board consisted of VISCOUNT HALDANE, LORD ATKINSON and LORD DARLING.

The list of business for the current term is a lengthy one. In addition to 32 Indian appeals there are 10 from Canada, 9 from the Crown Colonies and 2 from New Zealand, and the Crown Colony list is being taken first. Early in the list of Indian appeals is *Sri Protap Chandra Deo v. Sri Raja Jagadish Ch. Deo*, which was adjourned after a short hearing for consideration by a full Board. The Plaintiff is claiming the Dhalbhum Raj under the provisions of the Will of the last holder. The Defendant bases his title on a family custom of lineal primogeniture and it is contended on his behalf that the decisions in *Surtaj Kuar's case* (L. R. 15 I. A. 51) and in the *Pittapur cases*, based upon it, were wrongly decided, and are inconsistent with *Rajinath Prosad v. Tej Bali* (25 C. W. N. 564). The question is of considerable interest and it is hoped that judgment will be delivered before the long vacation.

G. D. M.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL REVISIONAL JURISDICTION. Before RANKIN, J. CIVIL REVISION No. 1031 OF 1925. UPENDRA NATH GHOSE, Plaintiff-Petitioner *v.* HIRA LAL GHOSE and others, Defendants, Opposite Party. The 11th January 1926.

Civil Procedure Code (Act V of 1908), sec. 115—Specific Relief Act (I of 1887), sec. 9—Possessory suit, dismissal of—Right to bring title suit, if adequate remedy—Interference by High Court in revision—Question of jurisdiction.

The facts material to this report are as follows:—

This Rule arose out of a suit brought by the Petitioner under sec. 9 of the Specific Relief Act in the Munsif's Court at Narail. Plaintiff's case was that he was dispossessed by the Defendants in Magh 1830 B. S., and he filed the suit in Jaisa 1331 B. S. The Munsif held that Plaintiff was in possession in Magh 1830

B. S. within six months before the institution of the suit. It appeared, however, that the Plaintiff between the date on which he was dispossessed and the date of the institution of the suit sold the lands to Defendant No. 2, not one of the ousting Defendants, but another person, and he suffered the latter to sue him in Court, to get a decree for *khas possession* and to get that executed by the Court. About a month after the institution of the suit, Defendant No. 2 executed a deed of release to the Plaintiff and the document appeared to shew that Defendant No. 2 was in possession of the land on the strength of the purchase. Upon these facts the Munsif held that at the time the Plaintiff brought the suit he had no right to sue for possession, and he dismissed the Plaintiff's suit. Against this decision of the Munsif Plaintiff obtained the present Rule on the ground that the Munsif, having found that the Plaintiff was in possession of the lands in suit within six months immediately previous to the institution of the suit, had no jurisdiction to dismiss the suit.

His Lordship in discharging the Rule held as follows:—

" . . . In these circumstances I am not of opinion that I can or should interfere under sec. 115. It is quite true that the right to bring a title suit is not in all cases an adequate remedy, but in this case I see no reason why it will not be. Apart from that if people will enter into transactions to defeat their creditors it may be that they get their right from the Court of law, but it does prejudice their position when they come under sec. 115. I think on the whole that it is not a question of jurisdiction and there are substantial reasons why I should not interfere in any case. The Rule is accordingly discharged with costs."

Babu Prafulla Kamal Das for the Petitioner.

Babu Hemendra Chandra Sen for the Opposite Party.

H. C. S.

Rule discharged with costs.

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REPORTS (See Index.)

Mr. Justice Buckland knighted.

We are glad to find that in the list of Birthday Honours published last Saturday, the High Court of Calcutta comes in for its due share and that a Knighthood has been conferred on Mr. Justice Buckland. He has done his work on the Original Side of the Court for many years with expedition and ability and we congratulate him on the honour conferred upon him.

Habeas Corpus.

The writ of *habeas corpus* may be issued by any of the High Courts of Judicature at Fort William, Madras and Bombay for the production of any person detained within the limits of its Ordinary Original Civil Jurisdiction, before itself, to be dealt with according to law. This power these High Courts have not under the Code of Criminal Procedure but as incidental to the jurisdiction they have inherited from the Supreme Courts which administered the English common law in the Presidency Towns. That being so, any other High Court, whether a High Court established under Letters Patent subsequent to the establishment of the three High Courts aforesaid or any other Court established by the Government of India which is a High Court within the meaning of the Code of Criminal Procedure, cannot exercise the power of issuing a writ of *habeas corpus*.

Sec. 491 of the Code of Criminal Procedure, as it stood before the amendment in 1923, laid down that any of the three High Courts of Judicature at Fort William, Madras and Bombay might issue directions of the nature of a *habeas corpus* in respect of a person within

the limits of its Ordinary Original Jurisdiction. The effect of this was that the said High Courts could not issue the direction in question to operate outside the limits of its Ordinary Original Civil Jurisdiction, in respect of which area it had the undoubted power to issue a writ of *habeas corpus* proper under its jurisdiction, inherited from the Supreme Court and the power to issue directions in the nature of the aforesaid writ under sec. 491 of the Code.

The law embodied in sec. 491, as it then stood, was a gross misconception of the powers of the High Courts of Calcutta, Madras and Bombay. The matter has now been set right by the amendment of sec. 491 so as to give any High Court, whether established by Letters Patent or by the Government of India as a High Court for the purposes of the Code of Criminal Procedure, power to issue directions in the nature of a *habeas corpus* in respect of a person within the limits of its Appellate Criminal Jurisdiction.

The result now is that the power of the three High Courts of Calcutta, Madras and Bombay to issue a writ of *habeas corpus* within the limits of its Ordinary Original Civil Jurisdiction is kept intact and all other High Courts including these three are given a power which they did not possess, viz., the power to issue directions in the nature of a *habeas corpus* in respect of the area over which it exercises Appellate Criminal Jurisdiction.

The distinction between a writ of *habeas corpus* and a direction of the nature of such a writ as is provided for in sec. 491 should not be lost sight of. Under sub-sec. (3) of sec. 491 no direction in the nature of a *habeas corpus* can be issued in respect of a person detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819, Bombay Regulation XXV of 1827 or the State Prisoners Act, 1850 or the State Prisoners Act, 1858, but

when a person is detained under any of the aforesaid Regulations and Acts within the limits of the Ordinary Original Civil Jurisdiction of the three High Courts of Calcutta, Madras and Bombay, a writ of *habeas corpus* may be issued by these Courts for the production of such person before itself.

SCOPE OF THE AMENDED SEC. 162 OF THE CODE OF CRIMINAL PROCEDURE.

(By P. RAM CHANDRA RAO, VAKIL.)

(Continued from p. cxliii.)

The Patna High Court holds the same view. In 6 Patna Law Reports 620 : s.c. 27 Cr. L. J. 362, his Lordship Justice Macpherson observed as follows :—" The effect of the Amending Act of 1923, which is very great, has not yet been fully appreciated by the Subordinate Courts. Before that enactment came into operation sec. 162 merely enjoined that the written record of a statement made by any person to a police officer in the course of an investigation under Chap. XIV should not be used as evidence. The proviso permitted the statement itself to be used in certain circumstances to impeach the credit of the maker when examined as a witness. The new Act has substituted a section which prohibits the use of any such statement or any record of it whether in a police diary or otherwise or any part of such statement or record for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

The Calcutta High Court is also of the same opinion. In 30 C. W. N. 142, the Calcutta High Court held that the new sec. 162 is clear enough to exclude any statement made by any person to a police officer in the course of investigation under Chap. XIV of the Criminal Procedure Code and directs that such statement shall not be used for any purpose (except as provided in the proviso). Accordingly where in a sessions trial the investigating police officer was asked in examination-in-chief whether he had examined any witnesses on behalf of the accused and he said that he examined only two witnesses, and that both of them stated they were not present at the occurrence, it was held that the statement by the police officer was not admissible under sec. 162. In 12 Cr. L. J. 524 it was held that under

the new sec. 162 no statement or any record thereof whether in a police diary or otherwise or any part of such statement made by any person to a police officer in the course of investigation under Chap. XIV of the Criminal Procedure Code is admissible as evidence except as provided in the proviso to the section, and that the trial was vitiated on account of the erroneous admission of evidence as to what the complainant and another witness had stated to the investigating police officer.

It is humbly submitted with the greatest respect that the view of the Madras High Court is opposed to (a) the plain meaning of the words of the section and (b) the legislative history of the section.

(a) The words "such statement" in their ordinary and natural sense will cover oral as well as written statements. The interpretation of the words "such statement" as meaning "statement if reduced to writing" does not take note of the words "or any record thereof" occurring immediately after the words "such statement" and would make the words "or any record thereof" meaningless or redundant.

The first proviso to the section requires that the Court shall refer to "*such writing*" and direct that the accused be furnished with a copy thereof in order that any part of *such statement*, if duly proved, may be used to contradict such witness. It will be seen that the words "such statement" in the first proviso are used in contra-distinction to the words "such writing" and "copy thereof" to make it clear that the writing cannot be used, but only the oral statement when duly proved may be used to contradict the witness. If the phrase "such statement" in the first proviso is interpreted to mean "statement reduced to writing," it would follow that the writing itself may be used to contradict the witness; but even under the old Code all the High Courts were agreed that the writing could not be so admitted and still more so under the present section the written record of the statement cannot be admitted in evidence. 26 Bom. L. R. 965.

(b) The legislative history of the section also leads to the conclusion that the view of the Madras High Court is not tenable.

Sec. 162 of the Code of 1882 was as follows :—

"No statement, other than a dying declaration made by any person to a police officer in

the course of an investigation under this chapter, shall, if reduced to writing, be signed by the person making it, or (shall) be used as evidence against the accused."

In the Code of 1898, sec. 162 ran thus:—

"No statement made by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall *such writing* be used as evidence."

Construing the language of the section in the Code of 1898, their Lordships of the Calcutta High Court in I. L. R. 36 Cal. 281 observed as follows:—"Sec. 162 now in force enacts that if any statement is taken down in writing during the course of a police investigation, the writing cannot be used as evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but the statement, if not reduced to writing can, the answer is that the legislature has chosen to alter its language in sec. 162 of the present Criminal Procedure Code drawing a distinction between the statement and the writing."

In I. L. R. 35 Mad. 397 at page 537 his Lordship Justice Sundara Ayyar observed as follows:—

"The language of sec. 162 (of the Code of 1898) is too clear to my mind to justify the adoption of the argument that because the writing is declared inadmissible it must have been the intention of the legislature to shut out oral evidence also of the statement made to a police officer. Perhaps it is a sufficient answer to this argument to say that the legislature has not said so, but has deliberately restricted the inadmissibility to the writing. It is urged that the expression 'such writing' is used in the section really to denote the statement made to the police officer which he is not prevented from taking down in writing. But why did not the legislature say 'nor shall *such statement* be used as evidence' instead of using the word 'writing.'"

In view of the distinction between the "writing" and the "statement" which is embodied in the writing, emphasised in the rulings quoted above and other rulings, the present amended section has been drawn up on the lines suggested by Justice Sundara Ayyar in I. L. R. 35 Mad. 397 in the extract from the judgment quoted above.

The present section runs thus:—

"Nor shall any *such statement* or any record thereof . . . be used for any purpose

(save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation when such statement was made."

It will be noted that the important change between the old and the amended section in this respect is that while the old section enacted "nor shall such writing be used as evidence," the amended section enacts "nor shall any such statement or any record thereof be used for any purpose (save as hereinafter provided)."

The Report of the Select Committee of 1916 states as follows in respect of the amendment of this section:—

"The re-draft of the section which we propose will make it clear that the statements taken down under sec. 161 (*and not merely the written record of such statements*) are not to be used in any way or for any purposes except as allowed by the proviso."

It is therefore submitted that the present amended sec. 162 governs oral as well as written statements and makes all such statements, oral or written, inadmissible for any purpose at any inquiry or trial save as provided by the first proviso which constitutes an exception to the general prohibition in regard to oral statements contained in the body of the section.

(To be continued.)

Reviews.

MEMORANDUM DEALING WITH INTESTATE SUCCESSION.

We have received a copy of a Memorandum which has been recently brought out by Mr. Alexander Kinney, the Administrator and Official Trustee of Bengal, in connection with the distribution of intestate estates. This Memorandum deals firstly with the distribution in accordance with the provisions of the recent Indian Succession Act of 1925 and the latter portion deals with the distribution in accordance with the English law. This Memorandum will serve to bring the old editions of the Act up-to-date.

HAND-BOOK OF CRIMINAL CASES. By L. N. Ganatra, Pleader, Rajkote, Kathiawar.

It is a verbatim reprint of all criminal cases reported in the six series of the Indian Law Reports for the years 1922 to 1924.

To enhance the usefulness of the work a table of cases reprinted in the hand-book has been given and in it the corresponding pages

of the I. L. R. series have been noted. At the end of the book a digest has been given which is carefully prepared.

THE LAW OF GIFT IN BRITISH INDIA. By *Bimla Charan Law*, Ph. D., M.A., B.L. Second Edition. Eastern Law House, 15, College Square, Calcutta. 1926.

Though small in size, the book contains a scholarly discussion of all the aspects of the subject dealt with. The three parts into which the discussion resolves itself are—I. The law of gift as applicable to Hindus; II. The law of gift as applicable to Mahomedans; and III. The law of gift as contained in the Transfer of Property Act. The Mahomedan law of gift stands in a manner apart, as the provisions of the Transfer of Property Act relating to gifts are specially excluded from operation upon gifts by Mahomedans (sec. 129). But the provisions of the Registration Act bearing on gifts are of universal application, and though these provisions are reproduced in an appendix, the author does not appear to have considered the application of these provisions to gifts evidenced by documents, apart from the provisions of the Transfer of Property Act. The provisions of the Transfer of Property Act relating to gifts apply to gifts by Hindus or Buddhists, but except as provided by sec. 123 they do not affect any rule of Hindu or Buddhist law (sec. 129). What therefore is the Hindu law as to gifts and how far it has been affected by sec. 123 of the Transfer of Property Act therefore justly occupies a large amount of space in Part I and also comes up naturally for consideration in Part III. It was of course not necessary for the author to repeat the discussion in Part III, but the omission of a cross-reference in Part III, where sec. 123 is dealt with, to the discussion in Part I seems inexplicable. In the discussion of the topic in Part I, full use has not been made of the judgment of the Privy Council in *Sadek Husain v. Hashim Ali*, 38 All. 627 : s. c. 21 C. W. N. 180. It was a case of a Mahomedan gift and so what their Lordships say as to the interpretation of secs. 122 and 123 of the Transfer of Property Act is *obiter*. Nevertheless it is the only case in which the Privy Council have proceeded to place their own interpretation on these sections. Upon the hypothesis that the sections applied to gifts by Mahomedans, the Judicial Committee observed : "Sec. 122 of the Transfer of Property Act still requires a transfer. This

would *prima facie* mean a valid transfer and would therefore require the transfer to be accompanied by delivery of possession." This interpretation appears to throw doubt upon what since the decision in *Dharmadas v. Nistarini*, 19 Cal. 446, has been treated as settled law in this Province that sec. 123 of the Transfer of Property Act has abrogated the necessity of delivery of possession, even where this is necessary to complete a gift by a Hindu. Whether delivery of possession is in any case necessary to complete a gift under Hindu law is of course a different question. The Calcutta view as represented in the last mentioned decision favours the opinion that delivery of possession is not essential under Hindu law. But there is no definite pronouncement on this point by the Judicial Committee and it cannot by any means be regarded as finally settled. The few minor omissions we have noticed above must not, however, be taken to detract from the value of the book as a whole, for the book is no mere compilation of case-notes, and the author has thought out things for himself, thereby lending material assistance to the reader in arriving at rational conclusions for himself upon any topic on which he may be seeking for light.

THE CATTLE TRESPASS ACT, 1871. Being Act I of 1871 with subsequent modifications and notes, By *Khagendra Nath Mitra*, B.L. N. M. Ray Chowdhury & Co. College Street Market, Calcutta.

Although it is an All-India Act and was passed so long ago as 1871, the book under notice appears to be the first annotated edition of the Act which has so far been published. Besides case-notes and explanatory notes appended to the sections, which are full and up-to-date, the author collects in an appendix, orders and notifications relating to pounds issued by the Bengal, Assam and Bihar Governments and notifications of these and a number of other Governments determining the scale of fines to be recovered in respect of impounded cattle. The book ought to prove useful.

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Judges of Indian experience in the Judicial Committee.

The Judicial Committee Bill which was introduced in the House of Lords for making provision for the appointment of two Judges with experience in Indian law on an annual salary of £2,000 has been passed by the House of Lords. Under the existing statute an allowance of only £400 is provided for the appointment of a Judge with Indian experience to serve in the Judicial Committee. This paltry sum of £400 may be divided amongst two such Judges. It is evident therefore that it is no attraction to any retired member of the Indian Bench to lend his services regularly to the Judicial Committee. For many years Sir John Edge has served in the Judicial Committee but through old age he has got incapacitated and we understand that his services would be no longer available. The Rt. Hon'ble Mr. Ameer Ali, the other Indian Judge who has sat regularly in the Judicial Committee, is also in failing health and cannot render for long the services that he has done at great personal sacrifice to the Judicial Committee for so many years. The health of Sir Lawrence Jenkins, we learn with regret, has also broken down. The number of Indian appeals to the Judicial Committee are on the increase. It is therefore urgent that some provision be made for the appointment of some Judges of Indian experience for lending

the Board their assistance in disposing of the Indian appeals. We are of opinion that it will add to the strength of the Board as also strengthen the bond between England and India if at least one of the Judges be an Indian who has made his mark either on the Bench or in the legal profession.

We give below an extract from the report of the debate during the second reading of this Bill in the House of Lords from the *Morning Post* of the 9th June last which will be found very interesting:—

"The Lord Chancellor, in moving the second reading of the Judicial Committee Bill, said it authorised the appointment of two additional members of the Judicial Committee with experience of Indian law at a salary of £2,000. The appeals to the Privy Council had grown rapidly during the last 20 years, and the Indian appeals especially now averaged 91 yearly. It had sometimes been difficult to find enough Judges to constitute the tribunals.

Viscount Haldane, supporting the Bill, said it was only because of the patriotism and self-sacrifice of retired Judges that the Judicial Committee had been able to carry on the work of the Empire. During the strike old Judges over 80 years of age walked long distances to assist with the business. The other day a Judge of 88 sat. It was impossible to carry on properly with this 'ragged regiment.' (Laughter.)

The second reading was agreed to."

The saving section of the Code of Criminal Procedure.

The legislators who amended the Code of Criminal Procedure in 1923 really did it in a liberal spirit and the view-point of the accused was always more prominent before them than that of the prosecution—evidence of this is to be found all over the Code. To refer to one instance out of many, the amending Act of 1923 has altered

the Code so as to provide that whenever in connection with any proceedings taken under the Code against several accused it becomes necessary by virtue of any special provision to refer the case of any one of the accused to a higher Court, the cases of all the other accused will also be submitted to the higher Court.

One of the most notable amendments made in the Code is the introduction of sec. 561A. No Code dealing with any subject can be or ever was complete. The Code of Criminal Procedure is one of the most carefully prepared Codes and is as exhaustive as possible, but experience extending over a long period since it was first passed in the year 1861 has shown that in spite of all honest efforts to remove its defects by amendments from time to time, it is practically impossible to make the Code perfect. The idea that it is practically impossible to work out the provisions of the Code in strict compliance with every letter of it and that in spite of all honest attempts to apply the Code faithfully it is inevitable that there should be deviations, prompted the legislature to put in a provision like sec. 537 which has come to be designated the curing section of the Code. It purports to cure irregularities in connection with proceedings taken under the Code, which, though irregularities, have not occasioned a failure of justice. Substantial justice is after all the aim of all law and if this has been done any irregularity committed by Magistrates or Judges may be overlooked. In a Code which lays down the procedure for instituting, prosecuting and defending cases connected with the commission or prevention of offences, a provision like the one referred to is in a sense dangerous, for it condones the conduct of a judicial officer who makes an order restraining the liberty of a subject in a manner not in conformity with the law of the land. The provision, however, has been in the Code for long and although abuses there have been, it is not in practice commonly resorted to and in fact the scope of it when properly analysed is not what it is generally considered to be.

Sec. 537 in laying down the provision it contains begins by saying that it shall operate "subject to the provisions hereinafter contained" and these provisions

practically make up the entire Code. In spite of this safeguard, it is a provision of law which cannot be looked upon with favour consistently with the liberal ideas of our system of jurisprudence.

In 1923 the legislature has introduced a section in the Code, the necessity of which really follows as a corollary from the proposition that the Code is not exhaustive. It is sec. 561A which saves the inherent power of the High Court, which after all is the custodian of the rights of the subjects. Under this provision nothing in the Code of Criminal Procedure shall be deemed to limit or affect the inherent power of the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This power was always supposed to exist and it was never denied that the arms of the High Court were long enough to reach any kind of wrong, but still in the absence of any express provision of law recognising the existence of this power the exercise of it could not be relied upon as an effective remedy for all cases of failure of justice. The legislature very properly put in the section in 1923 and it may be called the saving section of the Code—a counterpoise to the curing section.

SCOPE OF THE AMENDED SEC. 162 OF THE CODE OF CRIMINAL PROCEDURE.

(By P. RAMA CHANDRA RAO, VAKIL.)

(Continued from p. cxlvii.)

II. (a) *Purposes to which statements to the police may be used.*—Under the new sec. 162 statements made by any person to a police officer in the course of investigation under Chap. XIV of the Code can only be used for one purpose and that is by the accused to contradict a prosecution witness in the manner provided by sec. 145 of the Evidence Act. 26 *Bom. L. R.* 965. In other words, such statements shall not be used for any purpose except to contradict a witness at the request of the accused in the manner provided in the first proviso to the section. 30 C. W. N. 503. See *contra* 48 *Mad.* 640. Statements made to the police during investigation are not admissible as substantive evidence against the accused. 43 *Mad.* 640. This is an elementary proposi-

tion: though instances are not uncommon of such statements being treated as substantive evidence in the subordinate Criminal Courts. See *A. I. R., 1925, Lahore, 483*; s. c. 27 Cr. L. J. 289. To believe a witness because a perusal of the police diaries satisfied the Court that the witness was examined at the earliest opportunity and had made the same statement even then, is to make an improper use of the diaries. 94 Ind. Cases 358; s. c. 27 Cr. L. J. 614 (Lahore). The Court is not justified in referring to the statements made in the police diaries unless and until the witnesses have been confronted by those statements. 94 Ind. Cases 271; s. c. 27 Cr. L. J. 607 (Lahore).

How to use such statements.—The written record of the statements to the police cannot be admitted in evidence even at the instance of the accused for the purpose of contradiction. The first proviso to the section says that the accused be furnished with the copy of the statement of a witness "in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by sec. 145 of the Evidence Act, 1872." The words "if duly proved" clearly show that the record of the statement cannot be admitted in evidence straightway but that the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied upon by the accused for the purpose of contradicting the witness; and the provisions of sec. 67 of the Evidence Act apply to this case as well as to any other similar case. If the particular police officer who recorded the statement is not available, other means of proving the statement may be availed of, *e.g.*, evidence that the statement is in the handwriting of that particular officer. 26 Bom. L. R. 965; see also 6 P. L. T. 620. This was the view taken under the old Code also. 33 Cal. 1023; 17 All. 57; 22 Bom. 596 (601); 11 Bom. 657 and 659.

(b) Regarding the question as to whether the present amended section allows the prosecution to use the oral statements to corroborate a prosecution witness the Madras High Court differs from the other High Courts.

In 46 Mad. 640 the Madras High Court held that the present amended sec. 162 is not a bar to the admissibility of statements made to the police to corroborate the evidence of those witnesses given at the trial. The Bombay High Court in 26 Bom. L. R. 965 held that under

the present amended sec. 162, it is not now permissible for statements made to the police, whether oral or written, to be put in evidence in order to corroborate a prosecution witness. The Lahore High Court in 6 Lahore 171 held that the general rule contained in sec. 157 of the Evidence Act is controlled by the special provisions contained in sec. 162 of the Criminal Procedure Code relating to criminal trials and that under the provisions of sec. 162, Criminal Procedure Code, statements made to the police are not admissible for the purpose of corroborating the testimony of a prosecution witness.

It will be useful here to compare the language of the present sec. 162 with the language of the section in the previous Codes, and note how the language of the section in the previous Codes was construed.

Under sec. 162 of the Code of 1882, the language of which was "no statement made by any person to a police officer shall be used as evidence against the accused," it was held that the positive prohibition under sec. 162 could not be set aside by reference to sec. 157 of the Evidence Act, that the general provisions of sec. 157 of the Evidence Act were overridden by the special provisions of sec. 162 and that therefore such statements were not admissible for the purpose of corroboration. 22 Bom. 596; 2 C. W. N. 702.

(To be continued.)

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before CHATTERJEA AND PANTON, JJ. FIRST APPEAL No. 148 OF 1925. DWIJENDRA NARAIN ROY, Defendant No. 1, Appellant *v.* JOGESH CHANDRA DEY, Plaintiff, Respondent. The 7th June 1926.

Civil Procedure Code, sec. 2 (2)—Or. 26, rr. 11-12—Order appointing Commissioner for ascertainment of mesne profits and giving him direction as to the mode and principle in which mesne profits should be assessed, made after the passing of the preliminary decree, if appealable.

The Plaintiff-Respondent No. 1, prior lessee of the lands in dispute, brought a suit for de-

claration of his title to and possession of the lands demised to him by the Appellant, the Defendant No. 1, on 17th January 1913 with mesne profits making the lessor, the Appellant, and also the subsequent lessee under a lease, dated the 24th May 1915, Defendants therein. The suit was decreed on 22nd June 1922 and the Plaintiff-Respondent was declared entitled to possession with mesne profits. The Plaintiff-Respondent No. 1 then got possession on 1st April 1924 and applied for ascertainment of mesne profits on 5th June 1924. Then on 21st May 1925 the lower Court assessed mesne profits at the rate of Rs. 1,240 a year in respect of lands other than *khas*, *bhag* and *jote* lands, etc., and appointed a Commissioner for ascertainment of mesne profits as regards the latter.

The appeal was by the lessor Defendant against the last order. A preliminary objection was taken on behalf of the Plaintiff-Respondent No. 1 that the appeal was not maintainable as the order appealed against and dated the 21st May 1925 was merely an interlocutory order made before the passing of the final decree and after the preliminary decree.

The Appellant contended—that the order having determined an issue in the case and the rights of the parties about the properties was a decree within the meaning of sec. 2, cl. (2), Civil Procedure Code :

Held—There was a preliminary decree in the case which was appealed from—the present order was merely one for the purpose of giving direction to the Commissioner and was not a final decree against which an appeal would lie. The matter not having been finally decided, the order was not appealable at this stage.

Babus Braja Lal Chakravarti, Romesh Chandra Sen and Birendra Kumar Dey for the Appellant.

Mr. Hemendra Nath Sen (Advocate) (with him *Babu Gopendra Nath Das*) for the Plaintiff-Respondent No. 1.

Habu Durga (Jharan Mitra for the Defendant No. 3, Respondent.

H. D. C. *Appeal dismissed with costs.*

JEE and others, Defendants, Respondents. The 30th March 1926.

Estates Partition Act (V of 1897), sec. 99—Encumbrance created by co-sharer on specific piece of land, sec. 99, if applies—Equitable principles, applicability of.

This appeal arose out of a suit for *khas* possession of certain lands. The Courts below dismissed the Plaintiffs' suit. Against the decision of the Subordinate Judge of Faridpur Plaintiffs preferred this second appeal.

The point for determination in this appeal as also in S. A. No. 198 of 1924 which were heard together was whether under sec. 99 of the Estates Partition Act the Plaintiffs were entitled to get the lands in suit free from any encumbrance created by their former co-sharers :

Held—That sec. 99 of the Estates Partition Act applies only where a co-sharer creates any encumbrance with regard to his share in the joint estate. But where an encumbrance by way of lease, grant or otherwise is created on a specific piece of land the terms of sec. 99 do not apply.

In order to bring into operation the equitable principles laid down in *Bajinath Lal's* case, 1 L. A. 106 : s.c. 21 W. R. 233, it must be established that the person seeking the assistance of that principle never consented to the creation of the encumbrance. If the encumbrance was created under such circumstances from which it can be inferred that all the co-sharers had agreed to its creation, the equitable principle cannot come into play.

The appeals were dismissed with costs.

Mr. Amarendranath Bose (with *Babu Prakash Chandra Pakrasi*) for the Appellants.

Babus Jogesh Chandra Roy and Hemendra Chandra Sen for the Respondents.

H. C. S. *Appeal dismissed with costs.*

CIVIL APPELLATE JURISDICTION. Before B. B. GHOSE AND CHAKRAVARTI, JJ. APPEAL FROM APPELLATE DECREE No. 197 OF 1924. *JOGES CHANDRA BANDO-PADHYA and others, Plaintiffs, Appellants v. BINODE BEHARI CHATTER-*

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REPORTS (See Index.)

The Bengal Tenancy Bill.

Of the bills which were expected to come up for discussion at the last sitting of the Bengal Legislative Council, the Bengal Tenancy Bill was the most important. After much time and labour spent over it the bill has been dropped for the present. The Select Committee which sat to consider the bill finished its labours with expedition so as to make the consideration of the bill in the present session possible. The Select Committee made many changes in the bill as originally framed and as appears from the statement made in Council by the Hon'ble Member in charge of the bill, Government was not prepared to approve of those changes which were not consistent with the policy of the Government in framing the bill. We understand it is the intention of the Government to introduce in the new Legislative Council which will come into existence in the near future a new bill in which the recommendations of the Select Committee will be incorporated as much as possible consistently with the avowed policy of Government.

The influence of the legal profession.

The *Harvard Law Review* contains a very learned article entitled "The English struggle for procedural reform." The article is prefaced by some interesting observations on the legal profession which are quoted below—"The progress of civilisation has always realised itself in the

development of specialised social functions and this process has produced a highly complex organization of interrelated social groups. Each of these groups has definite interests of its own which always appear more or less antagonistic to the interests of other groups, so that the history of society has consisted of a perpetual struggle of group against group for power and privilege.

No other group occupies a position in the social structure of such potential power as the legal profession, for it controls the operation of the laws to which all groups are subject. The physician deals with a single social group, the physically unwell; the clergyman deals with the commandments of the church; the banker deals with those who employ credit; the teacher with those who wish to acquire wisdom. But the lawyer holds in his hand the wordly destinies of all.

The influence of the legal profession is increased by the further fact that it is the most highly unified of all the social groups. This results from the circumstance that it employs a standardised technique which every member is compelled to use. In the middle ages the same thing could have been said of the clergy. Ecclesiastical practice tolerated no departure from approved rituals and sacraments and the uniformity of ceremony contributed much to the solidarity of the church as a social institution. With the disintegration of Catholic supremacy this uniformity disappeared, for rival ecclesiastical groups differing as widely in their ceremonial forms as in their theological doctrines multiplied and prospered. But in the field of the law no such development has been permitted to occur. The state has insisted upon keeping control of the mechanism for administering justice making it a public monopoly and it has pursued the policy of rigidly prescribing rules to govern the practice of the Courts. All the lawyers in the state are

therefore forced to become familiar with the same rules of procedure, to follow the same sequence of steps, to use the same technical language and to think in the same logical formula. Such uniformity in training, conduct and ideas could not fail to produce a class with a highly developed group consciousness.

The monopolistic nature of a technique prescribed by law has moreover the tendency to produce resistance to change. Those who employ it compete with one another only within the limits of the established rules. No one is allowed to outbid his competitor by offering a new remedy or by using a superior procedure. The question of new rules therefore never becomes a professional problem in the strict sense of the term, for it is normally outside the scope of professional activity. Individual success in practice suffers no apparent loss from the use of a defective system, because the handicap operates equally upon all competitors. Accordingly immediate self-interest offers no convincing reason for leaving the familiar paths and undertaking a struggle with new problems. Furthermore the lack of experience with any other technique makes it difficult for the bar to see defects in the current system or to appreciate their seriousness, if pointed out. Not until inefficiency reaches a point when it threatens to drive away business, does the unreasoning group instinct scent danger and prepare to assume the burden of inevitable.

The problem of group adjustment is therefore in this instance a peculiarly complex one. Compare it with the simple problem of the medical profession. Legislation does not in the slightest degree prescribe the methods to be employed by physicians or surgeons. Established practice crumbles instantly before a new discovery. Regularity counts for nothing in the face of actual results and professional ingenuity knows no limits except the limits of the human mind. Every member of the group has direct, constant and powerful incentive to strive after new processes and to employ them at once in the service of society. The community of interest between the medical group and the public is so obvious that aside from a few prosecutions against malpractice and incompetence the adjustment is almost frictionless.

Can a parallel adjustment between the bar

and the public be brought about? Is there in the mutual relations of these social groups a sound basis for the evolution of remedial rights? If so, where is the motive force? Will the public take the lead and either devise a technique of its own to be forced upon the bar or compel the bar in order to escape that calamity to co-operate with it in the development of a more adequate system of practice? Or will the bar take the lead and with a social vision which recognises the ultimate identity of interest between the contending groups admit the justice of popular complaints, emancipate itself from the petty tyranny of stereotyped ideals and cheerfully assume whatever temporary burdens may result from a re-construction of procedural processes?"

SCOPE OF THE AMENDED SEC. 162 OF THE CODE OF CRIMINAL PROCEDURE.

(BY P. RAMA CHANDRA RAO, VAKIL.)

(Continued from p. cli.)

The language of the section was altered in the Code of 1898 into "nor shall such writing be used as evidence," and under the Code of 1898 it was held that oral evidence of the statement made to the police was admissible to corroborate the evidence given at the trial, under sec. 157 of the Evidence Act, and that there was nothing in the special provisions of that Code (of 1898) to override the general provisions of the Evidence Act as to proof by oral evidence of former statements. 36 Cal. 281 : s. c. 35 Mad. 247; 35 Mad. 397. In 35 Mad. 397 at page 447, his Lordship Justice, Wallis remarked as follows :—"In 1898 an attempt was made by the prosecution to use the previous statement to the police of an approver to corroborate him, but the statement was rejected as inadmissible under sec. 162 (of the Code of 1882) (2 C. W. N. 702); and if the section, as it then was, had not been altered, there can be no doubt the statements now in question would have been inadmissible. In the Code of 1898 which came into force in 1899, the provisions of sec. 162 were altered."

The language of the present amended sec. 162 is much more explicit than the language of the section in the Code of 1882. The language of the present section is—"No such statement or any record thereof shall be used for any purpose." Therefore under the present

section, as under the section in the Code of 1882, it is submitted that such statements are not admissible for the purpose of corroboration.

As to whether the statements can be used to contradict a defence witness, the Bombay High Court held in 26 Bom. L. R. 965 that such a statement cannot be admitted to contradict a defence witness. Referring to the present amendment of sec. 162, the Select Committee say:—"We do not think that power should be given to contradict by police diaries a prosecution witness who has turned hostile and still less should power be given in respect of defence witnesses."

In 32 Bom. 111 at page 143, his Lordship Justice Beaman observed as follows:—"On the face of it the proviso does not cover the case of a witness for the defence, whose statement may have been recorded by a police-man, nor allows the prosecution to impeach the credit of such a witness by examining him upon any written statements he may have made to the police. The proviso could never have been intended to allow the prosecution to impeach the credit of its own witnesses for its own purposes, and against the wish of the accused, by reference to police testimony."

(c) Regarding the question as to whether under the first proviso to the section statements to the police may be used by the accused at large for the purpose of discrediting the prosecution case in general or whether the privilege conferred on the accused by the proviso is restricted to contradicting a prosecution witness, the Patna High Court in 6 P. L. T. 620: s. c. 27 Cr. L. J. 362, held that statements made by witnesses during police investigation can only be used to assist the accused by showing that the witness who in Court deposes to certain facts has in his statement before the police given an account or made statements which are contradictory to the testimony which he gives in Court and that they cannot be used at large for the purpose of showing that the statement does not corroborate or assist the story as put forward in the first information report. "The first proviso makes an exception in favour of the accused but it is an exception most jealously circumscribed under the proviso itself. 'Any part of such statement' which has been reduced to writing may in certain limited circumstances be used to contradict the witness who made it. The limitations are strict—(1) only the statement of a prosecu-

tion witness can be used and (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in sec. 145 of the Evidence Act, that is, it can only be used after the attention of the witness has been drawn to it or to those parts of it which it is intended to use for the purpose of contradiction, and there are others. Such a statement which does not contradict the testimony of a witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the investigating officer."—*Per Macpherson, J.*, in 6 P. L. T. 620.

But the Bombay High Court is more liberal to the accused in its interpretation of the proviso. Where a prosecution witness stated before the Court that he and his father were dragged out of the hut, but made no such allegation before the police, it was held that the fact that no such allegation had been made by him to the police could be proved in order to discredit him under sec. 145 of the Evidence Act. 26 Bom. L. R. 965.

The Calcutta High Court also held in 36 Cal. 560, a case decided under the old Code, that if the Court finds anything in the statements of the prosecution witnesses recorded by the police upon which the accused would be advantaged by being allowed to cross-examine thereon, it should allow the accused to cross-examine the witnesses with regard to such statements. Where therefore the trying Magistrate at the instance of the accused called for the statements of certain prosecution witnesses recorded by the police during investigation and then returned them to the police remarking that they in no way contradict the evidence given, the High Court directed that the lower Court should send for the statements recorded and if it finds anything in them of advantage to the accused, it should summon the witnesses and submit them for cross-examination after supplying copies of their statements to the accused. 36 Cal. 560.

(To be continued.)

Review.

CRIMINAL PROCEDURE IN BRITISH INDIA.
By Sir John Woodroffe. Published by Thacker, Spink and Co. Price Rs. 28.

Sir John Woodroffe's name is a sufficient commendation for any legal publication and the present book which is on the lines of the author's previous publications complete his commentary on the processual law of British India. To quote the author's own words, the work of a commentator calls for an orderly and compendious arrangement of the law and, in the case of conflict of decisions an expression of opinion on the points in dispute verifiable by selected precedents accompanying it, and the learned author has supplied what is required both by students and practitioners in accordance with these principles.

His experience as a Judge and as a teacher of law at Oxford has enabled him to ascertain the wants of legal practitioners and students alike. The average student may not care much for a commentary on the Code of Criminal Procedure and may be satisfied with a superficial knowledge of the provisions of the Code just sufficient to enable him to get through his examination but those who are minded to make a study of it feel the need of a commentary. Indeed it is impossible to master the Code without it. The want of a real commentary on the Code of Criminal Procedure was long felt and in fact there was no commentary of the Code after Sir Henry Prinsep's book and this want will now be supplied. Equally was the want of a commentary felt by the profession, especially in view of the great and increasing number of reports containing many conflicting and irreconcilable decisions which more often confuse than help and are a source of perplexity.

In order to grasp the law accurately and to secure its proper administration, some of the cases must be discarded. From this point of view Sir John Woodroffe's book will be the only guide both to the legal practitioner and the student of law. Whenever there is a conflict of decisions the learned author has given his own opinion and for the decision of a conflicting point every Judge and practitioner will eagerly refer to the considered opinion of one in the position of Sir John Woodroffe which is not entitled to any less respect than a judgment of one of the High Courts in India. Simply for these opinions one will not grudge to spend

the amount which is the price of the book. The book, however, does not consist of such opinions alone but is an exhaustive commentary on the Code in which every important case has been considered and discussed. It will be greatly useful to all, the bench, the bar and the students alike. The get-up of the book is in the usual excellent style of the author's previous publications for which great credit is due to the publishers. One thing strikes us that it would have enhanced the usefulness of a very useful book if there had been head lines in the commentary indicating the subject dealt with so as to catch the eye readily.

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before B. B. GHOSE AND CAMMIADÉ, JJ. S. A. No. 706 OF 1924. HARKUMAR DE, Plaintiff-Appellant v. JAGAT BANDHU DE, Defendant-Respondent. Heard on 17th and 18th June 1926. Judgment on 18th June 1926.

Civil Procedure Code (Act V of 1908), Or. 39. r. 1—Damages, suit for, for attachment before judgment wrongfully and maliciously obtained, if maintainable.

The Appellant brought an action against the Respondent for damages for wrongfully obtaining an order of temporary injunction under Or. 39. r. 1, Civil Procedure Code, on insufficient grounds. The primary Court awarded compensation to the Appellant; the lower Appellate Court on Defendant's appeal was of opinion that such a suit did not lie. The only question for decision in the second appeal in High Court was whether a suit of this nature and description was maintainable:

*Held—*Suit for damages for obtaining an attachment before judgment wrongfully and without reasonable or probable cause is maintainable and it cannot be thrown out on the ground that it is not maintainable.

The judgment of the lower Appellate Court reversed—appeal decreed and case sent back to him for decision on other questions. Costs of the appeal to abide the result.

Babu Norendra Kumar Das for the Appellant.
Babu Chandra Sekhar Sen for the Respondent.

H. D. C.

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REPORTS (See Index.)

Use of photographs in the detection and punishment of crime.

The legitimate use of photographs of accused persons in criminal trials was the subject-matter of discussion in *King v. Thomas Dwyer and another*, [1925] 2 K. B. 1925. In this case the two Appellants were convicted of breaking and entering a house and stealing rings, watches and other things. The question at the trial was as to the identification of the two prisoners. The witnesses for the prosecution before identifying the prisoners were shown two photographs of each of the prisoners and these photographs showed the prisoners with prison numbers upon their breast. These photographs were also shown to the jury. The matter came up before the Court of Criminal Appeal presided over by Lord Hewart, C. J., Shearman and Salter, JJ., and the Lord Chief Justice who delivered the judgment of the Court remarked in quashing the conviction that the photographs having been handed to the jury it was apparent to them that the prisoners had been previously convicted and it was just as clear a statement to the jury that the prisoners had been previously convicted as would have been shown by evidence to that effect and the conviction could not stand.

As to the principle relating to the use of photographs in the detection and punishment of crime his Lordship observed as follows:—

“ It is not possible to attempt hastily to enunciate a series of rules upon that matter. But this observation may be added. The circumstances of different cases differ greatly and it is not easy to lay down general rules.

“ One distinction, however, is quite clear. It is one thing for a police officer who is in doubt upon the question who shall be arrested to show a photograph to persons in order to obtain information or a clue upon that question, it is another thing for a police officer to show beforehand to persons who are afterwards to be called as identifying witnesses photographs of those persons whom they are about to be asked to identify. It would be most improper to inform witnesses beforehand who are to be those persons whom they are about to be asked to identify. It would be most improper to inform a witness beforehand who was to be called as an identifying witness by the process of making the features of the accused person familiar to him through a photograph. But even when photographs are employed for the purpose of obtaining information, on the question of arrest it is fair that all proper precautions should be observed. I shall not attempt to enumerate all possible contingencies but it would be manifestly open to remark if in a doubtful case the police were to show one or two photographs to a person who was supposed to be able to give information and then having obtained the assent of that person to act upon that information. The fair thing is to show a series of photographs and to see whether the person who is expected to give information can pick out the appropriate person It is the duty of the police to behave with exemplary fairness remembering always that the Crown has no interest in securing a conviction but has an interest only in securing the conviction of the right person.”

Delay in the disposal of cases.

The judgment of the Chief Justice and Mr. Justice Pearson in *Thomas J. H. Arnup v. Kedarnath Ghose*, reported in our last issue, discloses a lamentable state of things in the Calcutta Police Court. It appears that the Opposite Party instituted a case under sec. 323, I. P. C., against the Petitioner, a sergeant of the Calcutta Police. The alleged occurrence took place on the 19th February 1924 and the case was finally disposed of on the 2nd March 1925 more than a year after the event. Witnesses were examined in August, September, October and November 1924 and the decision was not given till March 1925. It is really strange that so much time should have been taken over this petty case and from the point of view of all concerned, the complainant, the accused as also the witnesses it is deplorable that a case should be kept hanging for so long. The time taken up in the disposal of this petty criminal case was sufficient for the disposal of a civil litigation involving the determination of the knottiest points of law and affecting rights of the greatest magnitude.

The learned Chief Justice in directing a copy of the judgment to be sent to the Government of Bengal remarked as follows :—" This was a simple case—an ordinary assault case—which in my judgment ought to have been disposed of within a week or so after the event . . . Whether this is considered from the point of view of the complainant or from the point of view of the Petitioner such a delay as took place in this case is inexcusable having regard to the simple nature of the case and it might easily amount to a denial of justice." His Lordship pointed out that some steps must be taken to prevent such delays occurring in the future. Mr. Justice Pearson while agreeing with the Chief Justice in the judgment delivered by him added :—" It seems inconceivable that a simple assault case—which ought to have been disposed of within a few days of the event or at any rate within a few days of the complaint—should spread itself over a period of more than a year before the decision was arrived at. Such a delay is simply inviting evidence which cannot be relied upon. The longer the period allowed to elapse from the time of the event to the time when the witnesses give evidence the greater the probability of confusion and of the truth being obscured, particularly in a case

like this where the accused happens to be a police officer and the alleged offence arises out of his conduct during the course of his duties." The concluding words of Pearson, J., deserves very careful consideration and clearly point out the serious consequences of letting a case drag on indefinitely. To allow this to happen is to put obstacles in the way of both the prosecution and the defence. Witnesses to a casual assault committed by one stranger against another are not ordinarily expected to remember every detail after the lapse of a considerable time; on the other hand, if a man does happen to remember all the circumstances and is able to speak to them in detail even after a long period of time, it is at once open to the comment that he has been tutored. Looking at the matter from the point of view of the accused it is a great harassment to have a criminal charge hanging over one's head for a prolonged period—a charge which, if proved, may bring about dismissal from the service of Government besides the punishment inflicted.

The matter is really a serious one and effective measures should certainly be taken to put a stop to unnecessary delay in the disposal of cases. The policy of the legislature in the Code of Criminal Procedure is to shape the procedure to be followed by Presidency Magistrates in such a way as to give them every facility to dispose of cases quickly and in spite of these special provisions a petty case of assault takes over an year to be finished there must be something wrong which is at the root of this evil and it must be spotted and removed.

SCOPE OF THE AMENDED SEC. 162 OF THE CODE OF CRIMINAL PROCEDURE.

(By P. RAMA CHANDRA RAO, VAKIL.)

(Continued from p. clv.)

(d) Regarding the use of such statements by the Court the Calcutta High Court held in 42 C. L. J. 528 that the Court cannot use the statements made by witnesses to the police officer during the course of investigation under Chap. XIV for contradicting those witnesses. The power conferred on the Judge under sec. 165 of the Evidence Act cannot be exercised for the purpose of introducing evidence in contravention of the law. The last paragraph of sec.

2 of the Evidence Act leaves the provisions of the Criminal Procedure Code unaffected. Under sec. 162, Cr. P. Code, statements made to a police officer are prohibited from being used for any purpose save as provided in the section; and there is no provision for allowing the Judge to use such statements for contradicting the witnesses with them. To use the statements for this purpose is to contravene the provisions of sec. 162 of the Code. Where therefore in a Sessions trial the Judge in the exercise of the power conferred upon him by sec. 165 of the Evidence Act put questions to the witnesses with regard to the statements they made to the police, in order to show that the witnesses had made contradictory statements to the police officer and before the Court, it was held that the Judge was clearly wrong in making such use of the statements—42 C. L. J. 528.

III. Regarding the question as to whether the present amended sec. 162 (1), Cr. P. Code, applies to accused persons and whether it overrides sec. 27 of the Evidence Act, the High Courts differ.

Sec. 162 (1) prohibits a statement made by any person to a police officer during investigation from being used for any purpose. If the words "any person" in sec. 162 (1) are construed as including an accused person who makes a statement to the police in the course of investigation, then sec. 162 will virtually repeal sec. 27 of the Evidence Act. The Rangoon High Court held that the present amended sec. 162 overrides sec. 27 of the Evidence Act: *J. L. R. 3 Rang. 656; s. c. 84 I. C. 545; 26 Cr. L. J. 321*. But the Lahore, Patna and Madras High Courts as also the Sind Judicial Commissioner's Court are all agreed that the provisions of sec. 27 of the Evidence Act are quite independent of the sections of the Criminal Procedure Code and cannot be treated as impliedly repealed in consequence of the amendment of sec. 162 of the Criminal Procedure Code: *21 Law Weekly 199; I. L. R. 48 Mad. 640; 27 Cr. L. J. 484; s. c. 93 Ind. Cas. 884 (Patna)*, and they so interpret sec. 162 (1) as not to have the effect of virtually repealing sec. 27 of the Evidence Act.

According to the Lahore and Patna High Courts as also the Sind Judicial Commissioner's Court, sec. 162 (1) applies to statements of persons examined as witnesses in the course of investigation and not to the statement of an accused person in respect of whom such investigation is held: *A. I. R. 1926 Lahore 88; 26*

Cr. L. J. 897 (Sind); 27 Cr. L. J. 456 (Sind); 27 Cr. L. J. 484; s. c. 93 Ind. Cases 884 (Patna).

"It is obvious that, while sec. 27 of the Evidence Act is confined in its operation on an incriminating statement made by an accused person in police custody, sec. 162, Cr. P. Code, contains a general provision embracing all statements made by persons examined during police investigation; and it is a cardinal rule of interpretation that a general statute is to be construed as not repealing a particular one, that is, one directed to a special object or a special class of objects. 'Now if anything be certain,' observes Lord Selborne in *Seward v. The Vcera Cruz* (10 A. C. 59), 'it is this: that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of general words, without any indication of a particular intention to do so.' Having regard to the above rules of interpretation we are of opinion that sec. 162, Cr. P. Code, applies to the statements of persons examined as witnesses by the police in the course of investigation, and not to the statement of an accused person; and that it does not override or modify sec. 27 of the Evidence Act."—*A. I. R. 1926 Lah. 88*.

The main object of the alteration in secs. 161 and 162 of the Criminal Procedure Code is to prohibit the use of the statements of prosecution witnesses as corroboration under sec. 157, Evidence Act, and the general provisions of law with regard to admissibility of statements made by the accused like other admissions do not seem to be affected. Therefore, while statements made by witnesses during police investigation, except for certain limited purposes, have been entirely excluded, the statements of the accused, provided they do not amount to a confession, are still admissible in law: *27 Cr. L. J. 484; s. c. 93 Ind. Cases 884 (Patna)*.

The Madras High Court is of opinion that sec. 162 (1) applies to accused persons also, and to avoid the conflict with sec. 27 of the Evidence Act, which that view necessarily involves, the Madras High Court interprets the words "such statement" in sec. 162 (1) as meaning "statements reduced to writing" and holds that the prohibition contained in the new sec. 162 (1) applies only to the written record of

the statement and that all oral statements which are previously admissible under the Evidence Act, the use of which was not prohibited under the Criminal Procedure Code are still admissible and may be used.

The chief considerations which weighed with their Lordships of the Madras High Court in placing such a narrow construction on the words "such statement" are that if the new sec. 162 be read as applying to oral statements also it would virtually repeal sec. 27 of the Evidence Act and that if the new sec. 162 had been designed to prohibit the use of oral statements made to the police officer in the course of investigation, sec. 27 of the Evidence Act would have been amended. As already submitted the view of the Madras High Court puts a very narrow construction on the words "such statement" in sec. 162 (1) and it is further opposed to the spirit of the new section, the plain meaning of the words used in the section, and the legislative history of the section. The other High Courts have solved the difficulty without putting a strain on the plain meaning of the words of the section. It is submitted with the greatest respect that the view of the Madras High Court requires reconsideration.

(Concluded.)

Notes of Cases. CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RANKIN AND CHOTZNER, JJ. CRIMINAL REVISION No. 534 OF 1926. HIRALAL GHOSH, Petitioner *v.* PARBATI CHARAN SEN, Opposite Party. The 16th June 1926.

Criminal Procedure Code (Act V of 1898), sec. 144—Rival bazar—Ex parte order under sec. 144, without police report, propriety of—Circumstances not shewing case of emergency, ex parte order set aside by High Court.

The facts material to this report are as follows:—

The Opposite Party, an officer of the proprietors of Kalagachi bazar, made a petition to the S. D. O. of Narail on the 3rd May 1926 making some allegations against the Petitioner, an officer of Babu Hemanta Kumar Roy,

Zemindar of Narail, and proprietor of Kanchanpur bazar, and some other persons, and praying for action under secs. 107 and 144, Cr. P. C. The S. D. O. of Narail on receiving the said petition on the 3rd May 1926 passed the following order:—"Police to enquire and report by 18th May 1926." On the 18th no report from the police arrived, but the S. D. O. upon taking some evidence on behalf of the Opposite Party and without any notice upon the Petitioner passed the following *ex parte* order on the said date:—

"No report from police. It appears from the petition of Parbati Charan Sen and the evidence of three witnesses examined that Babu Hiralal Ghosh, Rajendra Nath Basu and Sabdar Hossain Molla are trying to set up a new bazar at Kanchanpur in close proximity of the old bazar at Kalagachi and this may lead to imminent breach of the peace. I therefore direct that injunction under sec. 144, Cr. P. C., be issued against these persons forbidding them to take anybody by force to Kanchanpur or to restrain anybody from going to Kalagachi bazar and that a general injunction be issued forbidding all persons to buy or sell any article at the new bazar at Kanchanpur."

Against that order the Petitioner moved the District Magistrate of Jessore who rejected the petition. Thereupon the Petitioner obtained the present Rule.

Held—That the circumstances of the case did not disclose such state of emergency as to justify the Magistrate in making the *ex parte* order under sec. 144, Cr. P. C., without notice and the rule was made absolute and the *ex parte* order was set aside.

Mr. B. L. Mitter (*Advocate-General*) with Babus Hemendra Chandra Sen and Surendra Nath Basu (*Sr.*) for the Petitioner.

Babu Satindra Nath Mukerji for the Opposite Party.

H. C. S.

Rule made absolute.

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Duty of the prosecution in a criminal trial.

The observation of the Lord Chief Justice that it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction but has an interest only in securing the conviction of the right person, in *King v. Thomas Dwyer* to which we referred in our last issue, was meant for the police in England whose honesty and integrity are too well-known. How much more is it necessary in this country to impress upon the police what their duty is and how it is to be performed. These officers of the Crown who have onerous duties to perform are entitled to all legitimate help from the public, but the very nature of their duty makes it imperative that they should be above suspicion. Unfortunately in this country the police have a bad reputation generally and this they acquired long ago. When the Evidence Act was passed in 1872, Sir James Fitz James Stephen thought it proper to make every statement made to a police officer inadmissible in evidence against the accused. The very fact that the police have been made infamous by statute, as Sir James himself said on the conclusion of his labours in codifying the law of evidence, bears testimony to the fact that at the time when the statute in question was passed the reputation of the police was such as to call for a special provision to guard against the ends of justice being frustrated by the admission of a class of evidence about

which there was a presumption that it was not reliable. However, it must be said that the continuous vigilance of the High Court as regards the conduct of police officers in connection with criminal trials has produced a very wholesome effect on the administration of criminal justice. Quite recently in the case of *Batabi Moni Dassi v. King-Emperor*, reported in our last issue, the Calcutta High Court had occasion to condemn the manner in which the prosecution was conducted by the officers concerned.

It was a prosecution relating to the illegal possession and sale of cocaine. The accused alleged that the search of her premises was conducted in a spirit of vindictiveness. Her case was that a large number of men, excise and police officers, rushed pell-mell into the house, some rushing up the staircase, some scaling over ladders and the excise men overran the whole house wantonly breaking door panels, glasses, almirahs and boxes, tearing up bolsters and pillows and doing various other acts of wanton mischief and that she herself was seized by two excise orderlies under orders of an Inspector and threatened to be dishonoured if she made the slightest attempt at movement, that she was kept in custody for a long time without food and even a drink of water and without being allowed to answer calls of nature.

As regards this part of the case their Lordships came to the following conclusion:—
“There may be exaggerations in the complaint made by the accused about the manner in which her premises were searched and the way she was treated, but indications are not wanting on the record to show that the search was conducted and the accused detained in an inconsiderate manner. The prosecution in cases of this nature, or for the matter of that in every case, ought to be conducted fairly and squarely and nothing should be done so as to give ground

for complaints on the part of the accused such as have been made in this case. We trust it will not be necessary for us to repeat the observations we have just made in future."

Another aspect of the case which called for disapprobation from their Lordships was that the Magistrate passed an exemplary sentence (one year's rigorous imprisonment on two charges, sentences running consecutively) on the accused relying on the extraneous matters not supported by evidence. The punishment inflicted was characterised by their Lordships as "extraordinarily severe and quite uncalled for, if not outrageous" and was reduced to rigorous imprisonment for one month and a fine of Rs. 500.

The learned Advocate-General in the course of the hearing of the case also expressed his deep regret on behalf of the Crown that irrelevant matters should have been referred to by the Magistrate in his judgment and in the way in which the case had been conducted in the Police Court.

Excise and police officers should take note of what fell from their Lordships, but at the same time it goes without saying that their preventive and detective activities should be given a free scope in dealing with cocaine and opium smugglers who are pests of the town and whose ingenious devices are very often beyond comprehension. The hardihood of these people is also too well-known and calls for drastic measures. But that cannot in any way be a justification for a departure from the established procedure laid down for conducting searches and trials.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

A Board has once more been constituted for the hearing of Indian Appeals and LORD PHILLIMORE has been presiding over it. The other members are LORD CARSON, MR. AMEER ALI and SIR JOHN WALLIS.

June 24th.—Judgment was delivered in *Dayal Singh v. Indar Singh* (Lahore) and the appeal was allowed.

June 24th, 25th and 28th.—*Messrs. DeGruyther, K. C. and Dubé* appeared for the Appel-

lant *ex parte* in *Sheikh Nasiruddin v. Ahmad Husain* (Allahabad).

This was an action by the Respondent for specific performance of an agreement for sale of a zemindari. The present Appellants are in possession of the property under a deed of sale, the factum and validity of which is impugned. Judgment was reserved.

June 28th.—In *Dayal Mahton v. Doman Mahton*, Mr. E. B. Raikes was successful in obtaining special leave to appeal from a judgment of the High Court at Patna.

In *Bhujendra Mohan Sarkar v. Sukdeb Rathi*, a suit to enforce a mortgage, the Plaintiff had been unsuccessful before the Indian Courts which had held that he was debarred from raising his case by the terms of a compromise into which he had entered. The Board were of opinion that the appeal did not lie in view of the concurrent findings of the lower Courts and they dismissed it.

Messrs. DeGruyther, K. C. and DeMello for the Appellant.

Mr. W. Wallach for the Respondent.

June 28th, 29th and July 1st.—*Mussamat Nand Kunwar v. Mt. Indar Kunwar*. This appeal is still being heard and relates to a claim to one of the taluqdari properties in Oudh.

Messrs. DeGruyther, K. C. and Hyam for the Appellant.

Messrs. Dunne, K. C. and Dubé for the Respondent.

July 1st.—Judgment was delivered in *Sheo Bahadur Singh v. Beni Bahadur Singh* and the appeal was dismissed.

G. D. M.

Correspondence.

LOCATION OF THE IMPERIAL COURT OF APPEAL IN INDIA.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

The subject under discussion, has, of late been agitating the political leaders and there seems to have grown up considerable opinion among lawyers in favour of the location of the final Court of Appeal within the borders of In-

dia. The strongest argument of the supporters is that the transfer of the seat of the Judicial Committee will place justice within the reach of the middle class people. The accuracy of the argument is reserved for later discussion. Concerning the point, for the time being, the further question arises, whether in case of transfer, the quality of justice will remain unimpaired? If the answer be in the affirmative, the sooner the Court is located in India, the better both for lawyers as well as for litigants. But the question is not easy to answer. The highest aim and ideal of any system of administration of justice is to inspire the confidence of those who seek the redress of their grievances. The litigant should feel confident that the tribunal meting out justice is not under the slightest influence of anything extraneous to the records of the case. The judicial tribunal ought to be above executive influence, local atmosphere and administrative considerations. Can this object be achieved if the final Court of Appeal is located in India? Under the present constitutional circumstances of India, it is very doubtful whether the final Court of Appeal, if located in India, will be above the various influences enumerated above. In a place where the executive is not responsible to the legislature, where there is no separation of the executive from the judiciary, it is only in the fitness of things that the administration of justice should be, at least, unconsciously tampered by administrative considerations. Take the case of France, where inspite of wholesome constitutional developments within the last 30 years, one comes across a number of cases, where the supremacy of law is sacrificed to administrative considerations.

Therefore so long as the present political constitution of India exists, let India continue to avail herself of the decisions of the Judicial Committee of the Privy Council, sitting at Westminster, above all local atmosphere, political prejudice and bias. Let the legal literature of India be composed of the monumental expositions of law by the Lord Chancellors and English Judges who have been nourished upon a constitution wherein the law is supreme in all its various shades of meaning. It is pretty certain that India's salvation lies in close imitation of English political institutions modified, undoubtedly, by geographical and physical conditions. Therefore, so long as India does not attain Dominion status, let the highest tribunal be situate at a place where no extra-

neous force is likely to influence the course of justice.

The outstanding feature of the English constitution is the complete and genuine independence of the judiciary of the executive. It will suffice to point out that the Prime Minister of England is liable to be tried like an ordinary citizen by a Court of Justice for any breach of law. Such being the sovereignty of the judiciary, the chances of its ever being influenced by the executive are very remote indeed. This is further guaranteed by the courage of the people, such being their political training, to expose any miscreant, however high his position may be, to public censure. One has to refer to Lord Birkenhead's article on "English Judges" published in the columns of the *Law Times* to see how many Lord Chancellors were taken to task and disgraced publicly for their improper conduct. Their independence is further guaranteed by the fact that the Judges are irremovable unless there be a joint address of both the Houses of the Parliament. Under these circumstances, it is very unlikely that the Judicial Committee of the Privy Council will allow its decisions to be tampered by executive or administrative considerations.

The supporters of the proposition perhaps do not realise that in case the Imperial Court of Appeal is located in India the Judges will be appointed on the recommendation of the executive by the Secretary of State for India. Therefore let the ultimate Court of rectification of miscarriage of justice be situate at a distance far remote from the influence of the executive of India.

Now, let us consider the question of expenses. There can be no two opinions on the point that Counsel practising in England are far more expensive than Counsel here in India. But under the present system India is not paying anything towards the pay of the personnel of the Judicial Committee. If the pay of the Judges be made a charge on the Indian revenue, as the location of the Court in India will necessarily entail, the administration of justice will be dearer than it is now. The High Courts are, for all practical purposes, the final Courts of Appeal in India and it is only exceptional cases which are taken up in appeal before the Privy Council. Therefore it does not seem desirable to create an unnecessary charge on the Indian revenue by shifting the seat of the Privy Council to India.

A. P. PANDEY, M. SC., LL.B.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before PANTON AND CHAKRAVARTI, JJ. M. A. No. 401 of 1925. NABIN CHANDRA BARUA v. ETINJAN and others. The 28rd July 1926.

Additional evidence, taking of, in appellate stage.

This appeal is against an order of the District Judge of Chittagong, affirming the decision and order of the Munsif of North Roujan, setting aside a sale held in execution of a mortgage-decree.

The facts of the case are as follows:—

In execution of a mortgage-decree the decree-holder put up for sale the mortgaged properties and purchased the same himself on 12th March 1924. On 10th April 1924 the judgment-debtor Sresmati Etinjan deposited the purchase-money and applied for setting aside the sale under Or. 21, r. 89, C. P. C. Objection was filed on behalf of the decree-holder on 16th May 1924 and the hearing was fixed for 25th April 1924. On that date a compromise petition was filed ostensibly on behalf of Etinjan by which she sought to withdraw the deposit amount and agreed to the confirmation of the sale, and order to that effect was passed. On 16th September 1924 the said Etinjan made an application challenging the compromise, and alleging that her agent, having been instigated by the decree-holder, collusively put in the aforesaid petition and withdrew the money and praying for setting aside the order confirming the sale. The Munsif found the case to be true and treating the application as an application for review granted her prayer and set aside the sale. The decree-holder applied to the District Judge and the learned Judge, after partly hearing the appeal, of his own motion took further evidence, and thereafter, agreeing with the Munsif dismissed the appeal.

Babu Probodh Kumar Das for the Appellant contended that the Courts below had no jurisdiction to entertain the application and erred in law in treating the same as an application for review. Or. 47, C. P. C. does not authorise interference on such grounds. Further the procedure adopted by the District Judge in taking further evidence on the simple

statement in the order sheet that it was necessary was not sanctioned by law.

His Lordships held the case was a fit case for interference under sec. 101, C. P. C. and held also that the Judge was right in taking additional evidence in the appellate stage.

P. K. D.

CIVIL REVISIONAL JURISDICTION. Before GRHAM, J. CIVIL REVISION No. 171 of 1925. SHEIKH GARIBULLA and others, Defendants, Petitioners v. NABIN CHANDRA BHATTACHARJA and others, Plaintiffs, Opposite Party. The 30th June 1926.

Specific Relief Act (I of 1877), sec. 9—Bargadar, dispossession of—Possessory suit, if maintainable by landlord—Ouster of tenant, if dispossession of landlord.

The question for determination in this Rule and the other two Rules (Civil Revision No. 211 of 1926—*Sheikh Garibulla v. Ananda Kishore Chowdhry*, and Civil Revision No. 385 of 1926—*Sheikh Garibulla v. Gajendra Kumar Roy*) was whether the Plaintiffs, Opposite Party, not having been in actual physical possession of the lands in suit but having been in possession through their bargadars were entitled to sue under sec. 9 of the Specific Relief Act. The Munsif of Habiganj who tried the suits held in favour of the Plaintiffs and decreed the suits. Against this decision of the Munsif the Petitioners obtained the present Rules.

His Lordship held that the suits were maintainable and in discharging the Rules held as follows:—

"The learned vakil for the Petitioners referred to the case of 6 C. W. N. 616. That case however does not appear to have been followed in any other case. I need only refer to one of the recent authorities—15 C. W. N. 715, where the point was considered and it was held that the ouster of tenant is ouster of the landlord for which the landlord can sue under sec. 9."

Akhil Ch. De v. Akhil Ch. Biswas, 15 C. W. N. 715, followed.

Sonatan Shome v. Sheikh Helim, 6 C. W. N. 616, not followed.

Babus Chandra Sekhar Sen and Sati Kumar Banerji for the Petitioners.

Babus Hemendra Chandra Sen, Binoyendra Nath Pal and Somnath Chakravarti for the Opposite Party.

H. C. S. Rules discharged with costs.

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Barbarous punishments.

A marked characteristic of ancient criminal law was its severe and cruel punishments. With the advance of the human race in intelligence and morality and in enlightenment and civilisation the criminal law has been steadily improving subjectively and objectively both as regards the character and extent of crimes and the nature and severity of punishment and also as regards the conditions of liability and the methods of enforcing it.

The oldest collection of the rules of criminal law in a well developed condition is to be found in the Code of Manu which itself refers to laws of a still earlier date. Though Manu recognises the punishment of gentle admonition and harsh reproof, yet according to him an adulterous wife is to be punished by being devoured by dogs in a public place and her paramour burnt to death on a red hot iron-bed with logs placed under it and these punishments were still severer in regard to offences committed by men of inferior castes over the superior as the Code is conspicuous by the fulness of its caste legislation.

The laws of Draco affixed the penalty of death to almost all crimes alike—to petty thefts for instance as well as to sacrilege and murder; and the only explanation Draco is said to have given of that is that minor offences deserved that penalty and he could find no greater for the more heinous. The ordinary modes of inflicting the penalty of death at Athens were stoning, burning, beheading by the sword, strangling or hanging by the rope, poisoning, usually by hemlock, throwing from a preci-

pice, drowning, crucifixion, beating to death a person while hung to a pole, throwing a person into a pit with sharp spikes at bottom.

The Twelve Tables prescribed the punishment of precipitation from the Tarpeian Rock for giving false evidence and of drowning after sewing up in a sack with a dog, an ape, a cock and a viper for the murder of a parent. Breaking on the wheel, exposing to wild beasts and crucifixion were among the delectable sights at Roman executions.

Nor was English law till recently behind any other system in the extreme severity of its punishments; the life of a man being deemed to be of less esteem than that of a beast of the forest. At times and those not very remote two hundred different acts hardly deserving the name of an offence were punished with death in various forms. Burning, drowning, beheading, starving to death were ordinary penalties for offences by no means extraordinary and inflicted throughout the middle ages on persons of both sexes. Boiling to death was not unheard of and criminals were sometimes even flayed alive.

One of the most cruel punishments inflicted was death with torture, pure and simple, for which judgment was delivered both for men and women somewhat in the following terms:—"That you be taken to the prison whence you came to a long dungeon into which no light can enter; that you be laid on your back on the bare floor with a cloth round your loins but elsewhere naked; that there be set upon your body a weight of iron as great as you can bear and greater; that you have no substance save on the first day three morsels of the coarsest bread; on the second day three draughts of stagnant water from the pool nearest to the prison door; on the third day again three morsels of bread as before and such

bread and such water alternately from day to day until you die." It was substituted about the beginning of the reign of Henry IV by penance and imprisonment in a narrow cell with absolute starvation.

Among other punishments pillory was one of the very cruellest, the populace being called in to aid the vengeance of law, and terrible in many instances were the sufferings inflicted by an excited and ignorant mob on an unpopular offender who was sometimes literally stoned to death. When the ears were nailed to the pillory the victim had sometimes to tear them off. 5 Eliz., C. 14 enacted that any person who forged any false deed, charter, court-roll or the Will of any person with intent to defeat, recover or change the interest of any person in any real property or who should give any such deed or writing in evidence knowing it to be forged shall besides suffering imprisonment for life and forfeiting the profit and issues of his land for life "be set upon the pillory in some open market-town or other open place and there to have both his ears cut off and also his nostrils to be slit and cut and seared with a hot iron so that they remain for a perpetual note or mark of his falsehood."

In Henry VIII's time the penalty for merely striking so as to draw blood was the loss of the right hand. The cucking-stool, the brank, and the scold's bridle were in general use for scolds. Whippings with rods, birches, leathern whips or heavy scourges of cords were dealt out freely and the extent and severity of the flogging seem often to have been quite at the pleasure of the flogger. Under Edward VI's Statute of Vagabonds, idleness and vagrancy were made penal in as high a degree as any offence except treason and the punishments were branding, beating, chaining up and burning through the gristle of the ear. Thus mere vagabonds were often branded with a V and idlers with an S for slave.

These disabling punishments partly answered the demand of revenge and retaliation and being sharp, strong and permanent they better suited the rough and ready character of those times. Increasing humane notions have swept away these physical disabilities but death, the most absolute and the permanent disabler of all, has survived all attacks.

AD INTERIM PROTECTION UNDER THE PROVINCIAL INSOLVENCY ACTS OF 1907 AND 1920.

The latest Ruling reported at p. 834 of Vol. 30, Calcutta Weekly Notes has brought about a far-reaching change in the law on *ad interim* protection in Insolvency cases. In this case, Cuming and Page, JJ., have held that under the Provincial Insolvency Act, V of 1920, the Courts exercising Insolvency Jurisdiction cannot grant *ad interim* protection in the exercise of their inherent power during the pendency of the Insolvency proceedings as the Insolvency Act V of 1920 has made no specific provision for it. Mr. Justice Cuming's judgment is clear and emphatic and Mr. Justice Page gives a concurring judgment. This decision would cause hardship to some people who really deserve sympathy and who seek protection of the Insolvency Court, when hard-pressed, to save themselves from the ignominy of arrest and other insults at the hands of the creditors.

Under the old Provincial Insolvency Act, i.e., Act III of 1907, there was also no specific provision for granting *ad interim* protection, but Mr. Justice Asutosh Mookerjee, in the case reported at p. 586 of Vol. 14 of the Calcutta Weekly Notes, was of opinion that the Insolvency Court could grant *ad interim* protection on a true construction of sec. 47 of Act III of 1907 and of sec. 151 of the Civil Procedure Code of 1908. The Insolvency Court has been granting *ad interim* protection in pursuance of the decision reported at p. 586 of Vol. 14, C. W. N., in the exercise of its inherent power, even after the Insolvency Act V of 1920 came into force, though there was no specific provision made in Act V of 1920 for the grant of *ad interim* protection; but now that the decision at p. 834 of Vol. 30, C. W. N., is published, the Insolvency Court would no more grant *ad interim* protection.

Now, here we are face to face with a conflict of rulings of two of the High Courts. After the passing of the New Provincial Insolvency Act V of 1920, the High Court of Madras held, in a case reported at p. 677 of Vol. 85, Indian cases, (*Nallagati v. Ramana*), that the Insolvency Court had ample jurisdiction under Act V of 1920 for the grant of an *ad interim* protection in the exercise of its inherent power. The High Court of Madras followed the judgment of Mr. Justice Asutosh Mookerjee reported at p. 586, 14 C. W. N., and discussed

the law on the subject and held that under sec. 5 of the Insolvency Act V of 1920 (which section is a verbatim reproduction of sec. 47 of Act III of 1907), the Insolvency Court had jurisdiction to grant *ad interim* protection in the exercise of its inherent power. The learned Judges of the Madras High Court observed that as sec. 5 of Act V of 1920 is a verbatim reproduction of sec. 47 of Act III of 1907 and as on a true construction of sec. 47 of Act III of 1907 in 14 C. W. N., p. 586, it was held that the Insolvency Court had inherent power to grant *ad interim* protection, so under sec. 5 of Act V of 1920, the Insolvency Court had power to grant the same relief in the exercise of its inherent power.

It is to be observed here that the attention of their Lordships (Cuming and Page, JJ., was not drawn to the case reported at p. 677, 85 Indian Cases, *Nallagati v. Ramana*; at least it seems so from the reports. If the attention of their Lordships would have been drawn to this Madras High Court Ruling, the decision might have been otherwise. I hope that some lawyer member of the Legislative Assembly would kindly take up the question and set at rest the two contradictory Rulings of the two High Courts by inserting a specific provision for *ad interim* protection and thus remove the hardship for the protection of some really deserving people—which protection is, according to the Statement of Objects and Reasons, one of the aims of the legislature in passing the present Insolvency Act V of 1920.

SURESH CHANDRA GHOSH.

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

The hearing of Indian Appeals by the Judicial Committee has been once again resumed but at present there is little prospect of completing the Indian list before the Long Vacation.

Judgment has been delivered in the following appeals:—

Rawat Sheo Bahadur Singh v. Beni Bahadur Singh, in which the question for determination was the validity of a Will which gave a power of adoption. The Judicial Committee confirmed the findings of the Court of the Judicial Commissioner of Oudh and dismissed the appeal.

Niladri Sahu v. Chaturbuj Das (Patna), where the question at issue was whether a mortgage was binding on the property which it purported to transfer or merely gave a personal right against the mortgagor. The lower Courts had refused a mortgage decree but their decision was reversed by the Privy Council and the appeal allowed.

July 8th.—Before LORD CARSON, MR. AMEER ALI and SIR JOHN WALLIS was heard *Ram Bujhawan Prasad v. Kuldip Sahay*—*Messrs. Dunne, K. C.* and *Hyam* appearing for the Appellant and *Mr. Dubé* for the Respondent. The appeal raised the question, of antecedent debt and Counsel for the Appellant stated that in view of the decision in *Brij Nara-in v. Mangla Prasad* (L. R. 51 I. A. 129), he was not in a position to contest the decision of the High Court.

On the same day, *Lucas v. Bank of Bengal* was heard by the same Board. The Appellant raised several objections to the validity of a mortgage of which the Bank had obtained a transfer from the original mortgagees and on which their suit was founded. *Sir G. Lown-des, K. C.* and *Mr. E. B. Raikes* appeared for the Appellant and *Messrs. A. M. Dunne, K. C.* and *Douglas McNair* for the Respondent. Judgment was reserved.

July 12th.—Before the LORD CHANCELLOR, LORD JUSTICE WARRINGTON and the CHIEF JUSTICE OF CANADA, an appeal was argued from the High Court of Bombay, *Sobhagmal Gianmal v. Mukund Chand*. The Respondent claimed nearly 2 lakhs of rupees as due to him on contracts for the purchase and sale of cotton and also for *teji mandi* transactions. The claim was resisted as being of the nature of gambling and wagering within the meaning of sec. 30 of the Contract Act and the Bombay Act of avoiding wagers (III of 1865). The validity of the transactions has been upheld by the High Court. *Hon. Geoffrey Lawrence, K. C.* and *Mr. E. B. Raikes* appeared for the Appellant and *Mr. A. C. Clauson, K. C.*, *Sir Geo. Lown-des, K. C.* and *Mr. B. K. Chappel* for the Respondent. Judgment was reserved.

G. D. M.

Correspondence.

VAKALATNAMI IN CRIMINAL CASES.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

Permit me, through the columns of your esteemed journal, to place before the legal profession and the criminal judiciary the law as to the filing of *vakalatnama* in criminal cases. A recent Executive Circular of the Government of Bengal in the Judicial Department requiring Mofussil Criminal Courts to insist on the filing of separate powers by a party in a criminal case in which he is represented both by a pleader and a muktear has once more brought to the forefront the question—Whether it is obligatory on a party when he is represented in a criminal case by a pleader or a muktear or both to file a *vakalatnama* or *muktearnama* or separate powers respectively?

Now, sec. 4, cl. (1), sub-cl. (r) of the Criminal Procedure Code, which defines the word "pleader" makes it abundantly clear that there is no distinction in the eye of the law between a pleader and a muktear, while acting in a Criminal Court. Hence, it does not appear how far the Executive Circular referred to above is valid in law, specially when there seems to be no objection to two or more pleaders or two or more muktears appearing and acting on the strength of the same power. The Circular in question seems to be *ultra vires* having regard to the express provision of the law as laid down in sec. 4 of the Criminal Procedure Code.

The next question which arises for consideration in this connection is—Whether it is at all obligatory on a party in a criminal case to file a power when he is represented by a pleader or muktear? The Criminal Procedure Code contains no provision as to the appointment of a pleader or the filing in Court of a power. But the Civil Procedure Code has expressly laid down in Or. 3, r. 4 the law as to the appointment of a pleader and the filing of the power in Court. In fact under the mandatory provisions of the Civil Procedure Code no pleader can act or appear in a Civil Court except on the authority of a written power duly executed by a party or his agent and filed in Court. It is not therefore strange that the legislature which laid down elaborate provisions for the appointment of a pleader and the filing of a power in civil cases made no provision whatsoever in this

direction for criminal cases. The only legitimate inference is that the legislature which permits an outsider with the permission of the Court (*vide* definition of the word "pleader" in sec. 4, Criminal Procedure Code) to act in a criminal case never intended that a power must be filed by a pleader or muktear before he can act in a criminal case. The provision of the law as laid down in sec. 340, cl. (1) of the Criminal Procedure Code also supports this view. Supposing that an accused person gets a pleader to defend him in a criminal case but is unable or unwilling to file a power. Is it contended that in the face of the imperative provision of the law as contained in sec. 340, cl. (1) of the Criminal Procedure Code, that "any person accused of an offence before a Criminal Court may of right be defended by a pleader," the Court would be justified in disallowing the pleader to act on the ground that he has filed no power? The answer must clearly be in the negative.

The question has also been judicially considered, though not by the Calcutta High Court but by other High Courts. For instance, the Patna High Court has recently held in a case (Criminal Revision No. 20 of 1926), reported in 94 Indian Cases 714, that no *vakalatnama* need be filed by a *vakil* while conducting a criminal case; and the law as laid down in sec. 4, Criminal Procedure Code, makes no distinction between a pleader and a *vakil* and a muktear while conducting a case before a Criminal Court. It was also held by the Madras High Court (*vide* 7 M. H. C. R. App. xi) that no *vakalatnama* was required to be filed by a pleader for the accused in a criminal case.

Such being the state of the law on the point, I fail to see how the Criminal Courts can at all insist on the filing of *vakalatnama* or *muktearnama* by a pleader or muktear, and how can the executive Government order the Subordinate Criminal Courts to exact double powers from parties who are represented both by a pleader and a muktear? The question is of paramount importance as the filing of each power means payment of Re. 1 in court-fee stamp. I appeal to you, sir, to comment editorially on the question and to draw the attention of the Hon'ble High Court and of the Government to it.

I remain,

Sir,

Yours faithfully,

KIRAN CHANDRA GHOSE.

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Judicial Committee for hearing Indian appeals in urgent need for strengthening.

The Judicial Committee of the Privy Council has gone into recess from the beginning of this month owing to the long vacation and will not resume its sittings till its termination in the first week of October. We regret to note that during the last session the Board of the Judicial Committee for hearing Indian appeals experienced great difficulty in securing a sufficient number of Judges of Indian experience and Ex-Chancellors or Law Lords, present or past, who are members of the Privy Council, to lend their services for hearing Indian appeals. Of the Indian Judges Sir John Edge is too ill to attend. The Rt. Hon'ble Mr. Ameer Ali, in spite of his advanced age, is never reluctant to lend his services although it causes a severe physical strain to him. Sir John Wallis, the late Chief Justice of Madras, furnishes new blood in this venerable tribunal. His Indian experience is limited as an ex-Chief Justice of the Madras High Court. It will take him time to familiarize himself with the local laws and customs prevailing in the other Presidencies and Provinces of India. Sir Lawrence Jenkins, who began his Indian career as a puisne Judge of the Calcutta High Court and thereafter served as Chief Justice of the Bombay and Calcutta High Courts for the full term in succession, would have been an ideal member of the Judicial Committee for rendering assistance to the eminent English Judges who may be requisitioned and willing to lend their services for disposing of Indian appeals. But unfortunately we are very sorry to learn that Sir Lawrence's

health has quite prematurely broken down. We have noticed of late that while as many as five Law Lords and ex-Lord Chancellors are found to serve in a Board for hearing Canadian appeals, not more than three members of the English judiciary are available for hearing the Indian appeals. Their reluctance may be due to the fact that their Lordships do not find themselves quite in their element in the administration of an alien system of law. There was a time when eminent English Judges sitting in the Judicial Committee boldly bore the burden and have in no small measure contributed to the elucidation and the development of even the personal and customary laws of India. We would therefore appeal to the noble Lords to follow in the footsteps of their illustrious predecessors and manfully take to the task of reviewing the decisions of the Indian High Courts in the broad spirit of equity and justice which have gone to build up the prestige and fair fame of the Privy Council in this distant country and inspire confidence in the Board amongst its teeming millions. We invite the attention of the Government of India as well and would urge on them to take early steps for appointing such Indian members of outstanding merit to the Judicial Committee as would be in a position to render valuable assistance to the Law Lords and ex-Lord Chancellors who would in that case, we presume, be as willing to lend their services for the disposal of Indian appeals as they seldom grudge when their services are requisitioned for the disposal of Canadian and other important Colonial appeals. The discrimination that the noble Lords have of late been observed to make in the matter of lending their services in respect of Indian appeals is producing considerable dissatisfaction amongst the Indian public and it will indeed be very unfortunate to allow it to gain ground. It is therefore a matter that should receive the immediate attention of the Indian as well as the British Government.

Trade mark.

The recent decision of the Bombay High Court in *Wulfig v. Jivandas*, reported in 50 Bom., page 402, is of great importance to the mercantile community. The action in this case related to the two well-known medicinal products, Sanatogen and Formamint, which are very largely used. It appeared that prior to the declaration of the war in August 1914 the Plaintiffs carried on business of manufacturing chemists among other places at Berlin, Amsterdam and London. For several years prior to 1914 the Plaintiffs had manufactured and sold under the names Sanatogen and Formamint certain chemical compounds for use in medicine and pharmacy and made according to secret formulæ.

The said compounds were first imported into India and sold under the said names by the Plaintiffs in the year 1906 and a declaration of ownership of the marks was registered in India in 1906. Within a short time the said compounds acquired a very high reputation throughout India and the sales thereof were large and profitable and the Plaintiffs contended that the names "Sanatogen" and "Formamint" had come to mean chemical compounds of the Plaintiffs' manufacture. On the outbreak of the war the said compounds necessarily ceased to be imported into India from Berlin, but they continued to be imported by the Plaintiffs' London firm until the property and assets of the latter in London were sold in June 1917 by the Controller appointed under the Trading with the Enemy (Amendment) Act, 1916, to Genatosan, Limited. Henceforward the said Genatosan, Limited, imported the said compounds under the names "Sanatogen" and "Formamint." On the termination of the war the Plaintiffs started and imported "Sanatogen" and "Formamint" from Berlin claiming that they were the original manufacturers and had the original exclusive right to the use of the said names, which right by the treaty of peace was restored to them. The Defendants imported into Bombay some compounds under the names of "Sanatogen" and "Formamint" and began to sell the same at much lower rates than the Plaintiffs' said goods. The Defendants *inter alia* contended that the trade marks "Sanatogen" and "Formamint" were avoided and removed from the register of trade marks in October 1916 by and under the order made by the Board

of Trade and under the rules under the Patents, Designs and Trade Marks Temporary Rules Act, 1914, and thereupon the said marks and names became public property both in England and in India. They further pleaded that the said names and marks became public property by reason of common user.

It was held that in respect of rights in trade marks and trade names any rights acquired by the parties in England have no effect on the rights of the parties in India and the rights of industrial property in India are governed by the laws of India and are in no way affected by the laws of England. It was pointed out that there being no Registration Act in India giving the right of property in trade marks by registration, the only right of action a trader or manufacturer has is the common law right of action which entitles him to an injunction restraining the use of trade mark belonging to them if such use is calculated to pass off the Defendants' goods as the goods of the Plaintiffs. It was held that the fact that in England since the avoidance of the trade mark in 1916 a large number of manufacturers have been manufacturing Sanatogen and Formamint did not affect the question in India at all and the Plaintiffs were entitled to the rights in the said trade marks as possessed by them at the outbreak of the war and that sale by the Defendants of the compounds under the names Sanatogen and Formamint was an infringement of the Plaintiffs' said rights.

INSANITY AS A DEFENCE IN A CRIMINAL TRIAL IN INDIA.

Insanity from a medical point of view is not synonymous with insanity from the point of view of criminal law; and a true appreciation of this distinction is highly necessary before one sets up the plea of insanity as a defence in a Court of Justice. What is then connoted by the term "insanity"? To lay people, it means some derangement in brain making a man unfit for affairs and resulting in some peculiar change in manner and disposition of the diseased. Even medical experts in defining this disease find a very hard nut to crack. Dr. Ewens has honestly confessed in his book "Insanity in India" that it is comparatively easy to recognise that a person is insane but it is difficult to embrace all the varieties of mental

disease in one comprehensive definition, though the attempts to do so have been very many. Instead of criticising the various definitions suggested by eminent authorities, let us confine ourselves to the one given by Bucknell which has been accepted in some quarters to be less objectionable. Bucknell calls it a disease of the brain affecting the integrity of the mind whether marked by intellectual or emotional disorder, this not being the mere symptom or result of fever or poison.' But this definition does not stand the legal test as laid down in sec. 84, I. P. C., and is defective in two ways. Firstly, our law does not extend non-liability to the cases in which insanity affects only the emotions. Secondly, if high temperature or poison produce unsoundness of mind and destroy the cognitive or intellectual faculties of a person, he, I submit, is entitled to immunity recognised by our law.

What is then meant by "insanity" from the legal view? The law of India on the subject of insanity as a bar to criminality is to be found in sec. 84, I. P. C., which section, to all intents and purposes, is a "replica" of the law as it was stated in *McNaghten's case*. Sec. 84 limits non-liability only to those cases in which the insane person, "by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law." Thus the ingredients of legal insanity are—(1) There must be unsoundness of mind. Unless there is mental disease, there cannot be insanity within the meaning of the Penal Code. The presence of mental disease alone is not sufficient. (2) It must also appear that the insane person, by reason of disease affecting the mind, was deprived (at the time of the committing of the criminal act) of the power of distinguishing right from wrong. According to medical science insanity may affect the intellectual as well as moral functions of a man's mind. It is only when mental disease destroys a man's intellectual or cognitive faculties which guide his actions and thus deprives him of the power of passing a rational judgment on the character of his acts that our law allows immunity. If the cognitive faculties are sound but the functions of the moral sense—our will and emotions—are diseased, sec. 84 affords no protection. That is the test laid down by our law. (Refer to 3 P. L. W. 356; 7 W. R. 64; 23 Cal. 604; 23 C. W. N. 621; 34 Cal. 686 and many other cases on the point).

Law exists for the welfare of society and as such it must control even the insane as far as possible. The doctrine of non-responsibility, laid down in sec. 84, must not be applied so as to unduly diminish the ordinary legal rule that makes a man liable for his acts. It may be mentioned here that in a case reported in 23 Cal. 604, the learned Judges refused to extend the doctrine of non-responsibility to the cases in which insanity affects only the emotions and the will on the ground that the object of criminal law is to make people control their insane as well as their sane impulses.

Then there are certain salutary procedural safeguards that are intended to prevent abuse of immunity granted by sec. 84. Law presumes every person to be sane unless the contrary is proved and even in case of lucid intervals, there will be a rebuttable presumption that the offence was not committed during derangement. Refer to 20 W. R. 70. Then again, it will not avail merely to raise the plea of insanity. The onus is upon the prisoner to prove it. (*Vide* sec. 105 of the Indian Evidence Act). Considering the gravity of the position—a position in which even most gruesome crimes will be condoned, our Courts very rightly demand strict proof of the fact that the accused was insane during the commission of the crime. How far then may insanity be inferred solely from the nature of the act complained of and the conduct of the accused at that time? Here again medical and legal jurists do not agree. There is no gainsaying the fact that crimes committed by the insane generally show certain peculiarities which are of some assistance in distinguishing such crimes from those committed by sane people. Nevertheless, it is not always safe to allow a plea of insanity in a trial upon an inference drawn merely from certain peculiarities of the crime. Let us take an illustration. A man deliberately murdered his wife believing that she was haunted by evil spirits. His cognitive faculties do not appear to be impaired. Our law will not excuse him; but a medical man may pronounce it to be a case of insanity. Then further suppose that the culprit makes some attempt at concealment. Legally, this will be another proof that his reasoning faculty was intact. But medically, even such conduct may be consistent with insanity as Dr. Ewens observes that the shock itself suddenly sometimes produces an amelioration and then the person in fright makes some effort at concealment.

Then what should be the standard of proof? Each case will certainly be governed by its peculiar facts. In this connection the following passage may, with profit, be reproduced from a very interesting judgment quoted at length in Mr. Ratan Lal's book, "The Law of Crimes":—

"Man, at his best, is only a very highly developed animal with all the instincts and passions of the inferior animal. In him they are softened . . . controlled by generations of civilisation and education and restrained by social opinion and the fear of punishment . . . Man, at his worst, is very little above the lower animals and is only made more dangerous by that reason which distinguishes him from them . . . Education, religion, civilization, all strive to cover up or find excuses for this blood-thirstiness; but it is there as part of our animal nature; it may be controlled but it can never be eradicated. The crime called 'running amok' . . . may be due to . . . insanity . . . But I believe that in the majority of cases it is nothing but the reckless indulgence of a natural desire to kill" (17 C. P. J. R. 113). After criticising the human nature at length, the learned Judge holds that the theory of insanity must be proved to the exclusion of other hypotheses.

To wind up, the law as administered in India is considered to be defective by some jurists in that it does not cover those cases in which loss of control is caused by mental disease. The English law on the point is at present in some ways in advance of the law as it was stated in *McNaghten's* case.

It is for the Indian judiciary and legislature to consider whether they are prepared to extend the scope of sec. 84.

SUDHANSU SEKHAR MUKHERJI.

Correspondence.

To
THE EDITOR, "CALCUTTA WEEKLY NOTES."
SIR,

Your learned correspondent's note on "*Vakalatnama* in Criminal Cases" cannot fail to arouse the interest of the legal profession and I instinctively feel inclined to ask you to publish what I have got to say on the topic. While writing this, I am fully cognisant of the fact that after the enactment of the Bar Council Bill, the scope of the subject will be confined to the grade of pleaders and mukhtears only; nevertheless I hope I am justified in endorsing the correspondent's views and joining him in his prayer for an editorial comment. It is no use making a secret of one's feeling of humiliation when one is called upon to file a *vakalatnama* in the absence of any statutory provision enjoining to do the same. What the learned correspondent says on the subject with regard to the Mofussil Courts holds good in the case of the High Courts as well so far as the law is concerned. I am not aware of the rules framed by other High Courts, but the High Court of Allahabad has framed a rule which runs as follows:—

"No attorney or vakil, except when representing another advocate, attorney or vakil, shall appear or plead in any suit, appeal or *proceeding* in this Court until he has filed a *vakalatnama* authorising him to act in the matter."—Ch. XV, r. 22.

I am told that it has been ruled by the Allahabad High Court that the expression *proceeding* covers the case of a criminal appeal. If so, it is respectfully submitted that the construction is in direct conflict with the rule of *ejusdem generis*, and one feels inclined to doubt the accuracy of the ruling.

A. P. PANDEY.

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The filing of vakalatnamas or muktearnamas in criminal proceedings.

A question has been raised by two learned correspondents in the last and the previous issues of our journal as to the legality of a recent executive circular of the Government of Bengal requiring Mofussil Courts to insist on the filing of separate powers by a party in a criminal case in which he is represented both by a pleader and a muktear and we have been asked by the learned correspondents to express our opinion with regard to the same. Sec. 340 of the Code of Criminal Procedure confers on the accused person the right to be defended by a pleader. The definition of a pleader in sec. 4 (r) is very wide. In criminal cases the Court has discretion to allow any person to defend an accused person at his request. He may be an advocate, vakil, pleader, muktear or even a private person. The last-named, if permitted under the discretionary powers of a Court, would come under the definition of a pleader in sec. 4 (r), Cr. P. C. Under the circumstances our view is that no *vakalatnama* or *muktearnama* need be filed by any person appearing to defend an accused person when the party is present in Court and that the circular of the local executive Government referred to above is *ultra vires*. There is enough of judicial authority as expressed in cases decided by the High Courts in India to show that a Magistrate may permit a person including a pleader not authorised to practise in his Court to appear for and defend an accused person before him. This is also in accordance with the public policy that no person, either by reason of his poverty or being a stranger or for such other reason, should be allowed to go un-

defended. In such circumstances legal practitioners at the request of the presiding Judge or Magistrate are known to defend accused persons. A lawyer may also do so as *amicus curiæ*. Would it be proper in such cases for the executive Government to require that such persons should file *vakalatnamas*? In some recent cases in Madras it has been ruled that a pleader appearing in a criminal case must put in a *vakalatnama* or a memorandum of appearance, but even the latter is unnecessary if the party is present along with his pleader. This is quite a reasonable view to take. If an accused person is absent the Court may in his interest require a muktear or a pleader to produce an authority that he has been authorised to plead for him. But in other cases there is no authority in law or reason that a muktear or a pleader appearing with the accused person in Court should be required to file a *vakalatnama*.

As a matter of practice a *vakalatnama* is always filed by a pleader when appearing in a Criminal Court and if there are more than one lawyer in the case, the same *vakalatnama* is accepted by all. The same *vakalatnama* is accepted by more than one lawyer in civil as well as criminal cases in the High Court and it is rather strange that the executive Government should go out of its way and insist on separate powers being filed by each of the several lawyers appearing in a criminal case in which a lawyer should be permitted to appear without a *vakalatnama*. It is against public policy that the executive Government should attempt to raise any revenue out of criminal cases. It may be noted that no *vakalatnama* is necessary in the Calcutta Police Court. So we would suggest to the Local Government to withdraw the circular and substitute one in its stead that a *vakalatnama*, *muktearnama* or a memorandum of appearance need only be filed by a pleader when the party to a criminal proceeding is not himself present in Court. With regard to the interpretation of the word pleader reference may be

made to the judgment of Ameer Ali and Henderson, JJ., in the case of *Abbas Peada v. Queen-Empress* in 2 C. W. N. 484. Should the executive Government be unwilling to withdraw the circular, it would be desirable to have the question tested in the High Court.

Compounding of offences.

One should have thought that no question could arise as to the effect of a compromise arrived at in a criminal case between the complainant and some of several accused. Where on the complaint or information of an individual several persons are placed on their trial on a particular charge arising out of an incident in which each of those persons did some injury to the complainant, each of such persons has to answer the charge individually. The policy of the legislature in allowing the compounding of an offence is to give the person aggrieved an opportunity to settle the matter with the offenders on such terms as he may like. The legitimate object of punishment not being retribution, it is fit and proper that the injured party should have the right to compromise. At the same time preservation of law and order and the safe-guarding of the community at large being the prime consideration in inflicting a punishment on an offender who has broken the law and has done injury to a fellow citizen, this right of the injured party is subject to the limitation that in cases of serious offences the compounding must be with the leave of the Court. The desire to secure the greatest benefit to himself by dropping a prosecution for a serious offence may in many cases result in mischief to society and frustrate the very object with which a system of punishment for offences committed has been provided for. Once the settlement is effected in accordance with law, the accused can no longer be put in peril of a further prosecution for the same offence; in other words, the compounding will have the effect of an acquittal of the accused.

Where there are several accused persons and each of them has committed an offence against the complainant who has a grievance against each of them, he is at liberty to compound the matter with all or any one of them and he alone of the accused with whom the compromise is arrived at is entitled to the benefit of an acquittal. It is common sense that in such a case even after the compromise with some,

the case may be proceeded with against the others with whom no settlement has been arrived at. Sec. 345 of the Code which deals with the law on the subject as it stood before the amendment was pretty clear and there was hardly any room for discussion as to whether the compounding of an offence with one of several accused could operate as an acquittal of all of them, but judicial opinion was expressed, though in one or two solitary instances only, that compounding with one of several accused had the effect of putting an end to the whole case. All doubts have, however, been set at rest by the amendment of cl. 6 of sec. 345 in 1923 so as to lay down that the compounding of an offence under the section shall have the effect of an acquittal of the accused with whom the offence has been compounded. Law is after all common sense crystallised, but glaring instances of lack of common sense are sometimes to be found in the administration of law and not only had the legislature to intervene to reiterate what was abundantly clear but even after the expression of its intention in unequivocal terms the Magistracy is still found to be unable to grasp what the law really is. In the recent case of *Crown v. Mohua*, 7 Lahore 344, the Punjab High Court had occasion to draw the attention of the Magistrate concerned to the recent amendment of sec. 345 referred to above and correct the error committed by the lower Court.

BENAMI PURCHASE AT AUCTION SALE.

(By MATHURANATH HALDER.)

In a case decided by the Calcutta High Court and reported at pp. 160-63 of the current volume of the C. W. N., it has been held by Cuming, J., (Chakravarti, J., concurring) that a suit for confirmation of possession equally with one for recovery of possession, comes within the prohibition of sec. 317 of the Civil Procedure Code of 1882 (sec. 66 of the present Code) when the Plaintiff's case is that the Defendant's certificated purchaser at a Court sale purchased on the Plaintiff's behalf as the latter's *benamdar*.

The case was governed by the old Code and sec. 317 of the same runs as follows :—"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of another person or on behalf of some one through whom such other person claims."

The learned Judge, in delivering judgment, dissented from 23 Cal. 699, a case under the old Code. In this case, the beneficial owner, being in possession, sued for a declaration of her title to the property against the certified purchaser of the same. The learned Judges held: "Sec. 317 does not make all *benami* transactions invalid nor read with sec. 316 does it confer upon the ostensible purchaser a title as against the real purchaser. It merely declares that a suit shall not be maintained against the certified purchaser on the ground that he was only the ostensible purchaser. The ostensible purchaser could not insist on his certified title to recover from the real owner in possession. If therefore the Defendant sets up the sale-certificate as an answer to the Plaintiff's case, there is nothing to prevent the Court from going into the question whether that sale-certificate did or did not confer a valid title upon the Defendant as against the Plaintiff. It is not a case in which the Plaintiff relying on a sale-certificate seeks to obtain a decree for possession against the ostensible purchaser. Resting as it does on an existing possession, we do not think that it is a suit of the nature prohibited by sec. 317 (present sec. 66)."

In the case under review, the Plaintiff, alleging herself to be in possession, sued for a declaration of her title to the property and for confirmation of possession of the same. The trial Court found that the Plaintiff had been in possession and held, after the ruling laid down in 23 Cal. 699, that the provisions of sec. 317 (present sec. 66) were no bar to her case. On appeal to the District Court by the Defendant No. 1, the learned Subordinate Judge found that the Plaintiff was not in possession at the date of the suit and consequently the ruling in 23 Cal. 699 did not preclude him from finding that sec. 317 (present sec. 66) was a bar to the Plaintiff's case. The Plaintiff again appealed to the High Court and urged that the lower Appellate Court had wrongly found that she was not in possession and as she was in possession she was entitled to maintain a suit for confirmation of possession. In support of her contention she relied on the case of *Sasti Charan v. Annapurna* (23 Cal. 699). But as the finding of the lower Appellate Court on the fact of Plaintiff's possession at the date of suit was conclusive, Cuming, J., rightly held that the suit was barred by the provisions of sec. 317 (present sec. 66). Thus upon the facts found by the lower Appellate Court there was

no room for deciding a case wherein the Plaintiff was, as a matter of fact, in possession of the property at the date of suit. Appreciating this difficulty, the learned Judge has observed in his judgment: "Reading the section, as it stands, it is quite immaterial whether the Plaintiff was or was not in possession at the time of the suit. It seems to me that a declaratory suit equally with a suit to recover possession comes within the mischief of the section."

(To be continued.)

LONDON NOTES.

(FROM OUR CORRESPONDENT.)

July 28th.—The Privy Council will conclude their sittings on the 30th of this month and the hearing of a large number of the Indian appeals in the list will have to be postponed until after the long vacation.

Two Boards are hearing Indian cases during this week. In the Council Chamber VISCOUNT HALDANE presides and with him are LORD DARLING and CHIEF JUSTICE AUGLIN of Canada.

In the Board room the Committee consists of LORD ATKINSON, LORD CARSON and SIR J. WALLIS.

July 16th.—Judgment was delivered in *Sheik Nasiruddin v. Ahmad Hussain* (Allahabad), a suit for specific performance of a sale of land. Appeal dismissed.

The hearing was concluded on July 22nd of the appeal, *Mt. Abadi Begum v. Mt. Bibi Kainiz Zannab* (Patna). The suit was brought by the Respondent, a Mahomedan lady, who claims to be heiress to the property left by her aunt Asmatunnissa. The Defendants who were in possession of the property based their title as *mutwallis* under deeds of *wakfnama* executed by Asmatunnissa during her life-time. The validity of these deeds is impugned, and a bar of limitation was set up by the Defendants.

Mr. W. Wallach represented the Appellant. Messrs. DeGruyther, K. C. and Dubé for the Respondent.

Judgment was reserved.

July 22nd and 23rd.—*Narayan Krishna Godbole v. Pandu Chandrabhan* (C. P.). In this appeal heard by the Board presided over

by LORD ATKINSON, the dispute relates to land in the Amraoti District which originally belonged to the Respondents' grandfather, and which was alleged to have been sold to the first Appellant, a pleader who had represented one of the parties in family litigation. The sale deed was alleged to be without consideration and the Plaintiffs' cause of action to be barred by limitation.

Mr. Parikh for the Appellant.

Mr. Hyam for the Respondent was not called upon.

July 23rd.—Judgment was delivered dismissing the appeals in *Thakur Bhagwan Singh v. Allahabad Bank* and *Thakur Bhagwan Singh v. Bhawani Das Bhagwan*. Before the same Board (LORDS ATKINSON and CARSON and SIR J. WALLIS), Messrs. DeGruyther, K. C. and E. B. Raikes applied for special leave to appeal in *Maharaja of Dumraon v. Chunni Kamkar* and *Maharaja of Dumraon v. Dudnath Panday*. They submitted that in each case there were substantial questions of law under sec. 11 and sec. 22 of the Agra Tenancy Act respectively, and a decision of the Privy Council was desired as to whether an occupancy right could be conferred on a tenant by agreement as well as by statute.

Leave was granted in each case.

Ma Mi v. Kallandev Ammal (Rangoon). This appeal was heard by the same Board on July 23rd, 26th and 27th and is concerned with the Hanafi law of divorce. The Respondent is claiming the estate of her deceased husband and is met with a defence that she had been divorced by the deceased before his death. Evidence of an oral divorce by pronouncement of 3 *talaks* was rejected by the High Court and they were of opinion that evidence which had been given of the contents of a written document of divorce was inadmissible.

The first Appellant is a Burmese lady who claims to be the widow of the deceased and is in possession of the property.

Sir Geo. Lowndes, K. C. and Mr. R. W. Leach for the Appellants.

Messrs. A. M. Dunne, K. C. and E. B. Raikes for the Respondents.

July 26th.—Judgment was delivered in *Sobhagmal Gammal v. Mukund Chand*, in

which it was alleged that certain forward cotton transactions in Bombay were in the nature of wagering contracts. That view was negatived by the Privy Council who dismissed the appeal.

Judgment was also delivered in *Hogarh v. Cony Brothers* (Bengal), in which the appeal was allowed and in *Lucas v. Bank of Bengal*, where the appeal was dismissed.

July 27th.—An application for special leave to appeal was made in *Abdul Majid v. King-Emperor* (C. P.) by Messrs. A. M. Dunne, K. C. and M. Y. Shareep, who contended that the Appellate Court had come to their decision on evidence which the trial Judge had characterised as prejudiced and unreliable.

Mr. Kenworthy Brown represented the Crown.

The Board consisted of VISCOUNT HALDANE, LORD DARLING and CHIEF JUSTICE AUGLIN of Canada, who also heard arguments in *Seth Umed Mal v. Chand Mal* (Ajmeer-Merwara). The chief question in the appeal is whether the Commissioner had power to revise the decisions of the lower Courts in India.

Sir G. Lowndes, K. C. and Mr. E. B. Raikes for the Appellants.

Messrs. DeGruyther, K. C. and Hyam for the Respondent.

In *Krishnendra N. Sarkar v. Rani Kusum Kamini Debi*, the question arose whether the rent of a tenure was fixed or liable to enhancement under the provisions of the Bengal Tenancy Act.

Messrs. DeGruyther, K. C. and E. B. Raikes for the Appellants.

Messrs. Dunne, K. C., Parikh and Khandkar Ali Afzal for the Respondents.

July 29th.—*Mirza Umrao Beg v. Mt. Faiyazi Begum* was an appeal from Allahabad in a suit brought by the first Respondent to recover her share of her parents' inheritance from her brother.

She had succeeded in the lower Courts and on their concurrent findings the suit was dismissed by the Privy Council.

Messrs. A. M. Dunne, K. C. and B. Dubé (ex parte) for the Appellant.

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MONDAY, AUGUST 30, 1926.

[No. 41.]

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The Calcutta High Court Pooja Vacation.

The Long Vacation of the Calcutta High Court commenced this year from the 27th of this month. In recent years the autumn closing of the High Court has been taking place much earlier than in the past. It is provided in the High Court Rules that the Long Vacation should commence on the second Friday of September. Of course, the Hon'ble the Chief Justice and his brother Judges may close the Court earlier or later at their discretion. Formerly, the High Court vacation usually commenced at about the middle of September and re-opened after the middle of November—usually at the commencement of the third week of November. We beg to point out that the practice followed in the past was far more convenient for the public and the legal profession than the practice now followed and that for the following reasons. The Civil Courts in Bengal close from the *Mahalaya* for the *Poojah* Vacation. The *Mahalaya* falls this year on the 6th of October. So the Civil Courts will remain open for five weeks after the High Court closes. During this time there may be occasions for preferring urgent appeals and motions from the Civil Courts all over Bengal to the High Court, and seeking various reliefs in their connection. This cannot be done owing to the early closing of the High Court and many suitors will be seriously inconvenienced in consequence. Even on the Original Side of the High Court, applications have got to be made for withdrawal of money or other relief in connection with suits or estate matters, but as the High Court closes quite six weeks before the *Poojah*, parties will be prejudiced in not being in a position to make the applications so much in advance. We have been informed that the Hon'ble Judges before rising for the Long

Vacation on Thursday afternoon were unable to dispose of all the Chamber applications pending before them. If the Hon'ble Judges would be pleased to fix the commencement of the Long Vacation only a fortnight before the *Mahalaya*, it would obviate much of the inconvenience felt by the general public and the legal profession owing to the present early closing. It would not interfere with the Judges' going home to England during the vacation, while it would confer on the members of the legal profession the well-deserved rest that they too require no less than the Hon'ble Judges. The solicitors, the vakils and the junior members of the Bar have to stay on for realizing their dues till the public *Poojah* holidays commence, which this year begin on the 13th of October. So out of the nine weeks of the Long Vacation, no more than three weeks holidays are available to the majority of the members of the legal profession. We hope therefore this matter will receive consideration of the Hon'ble Judges in fixing the Long Vacation in future in such a manner as to suit the convenience of all concerned.

Appointment of Lord Sinha as a member of the Judicial Committee.

The appointment of Lord Sinha as a member of the Judicial Committee of the Privy Council is the very best that could have been made in the interest of India. His Lordship had a brilliant career at the Calcutta Bar and enjoyed at one time the largest practice amongst his contemporaries. He was for some time the Standing Counsel of the Bengal Government and later on the Advocate-General of Bengal. He enjoyed all through his career at the Bar the reputation of being a very able and sound lawyer. He was never too technical and his mastery over the facts and the law in his advocacy before the Courts was very remarkable. He is a man of very strong common sense, of very sober views and is particularly free from any passion or prejudice. A man of his learning, experience and temperament is

sure to make an ideal judge. We hardly know of any other man on the Bench and Bar in India who has had such a vast and varied experience of human affairs. Besides that acquired at the Bar during a long and successful career, he was the first Indian Law Member of the Viceroy's Cabinet, was also the first Indian selected to represent India at the Imperial War Conference in 1917. He then became Under-Secretary of State for India, and was the first Indian to sit in the House of Lords. He was associated with Mr. Montagu and helped him and the Joint Parliamentary Committee in the framing of the present Indian constitution and in getting the Government of India Act of 1919 passed through the House of Lords. He was then appointed Governor of Bihar and Orissa, a position never before or since filled by any Indian during British administration of India. He thus acquired such a working knowledge of the constitution and administration of the country as is hardly possessed by any outsider. His vast and varied knowledge of the law, administration and the people will prove of rare value in the discharge of his duties as a member of the Judicial Committee. We cannot conceive of any better selection that could have been made for discharging the judicial duties of the Privy Council. It is also a great gain to the Indian public that as a member of the House of Lords he will be able to take part in the debates on Indian questions. His Lordship's health had broken down through the strains of the onerous duties of Governorship of Bihar and Orissa during the critical and anxious times of political unrest that prevailed in India after the Great War. But latterly he has completely recovered from its effects and we are sure that in the cool and salubrious climate of England he will be able to discharge the more congenial judicial duties of the highest Court of Appeal in the Empire with conspicuous ability for many years to come. We wish him health and long-life.

The British Protectorates and the Privy Council.

The judgment of the Privy Council in the Swaziland case, *Sobhuza II v. Miller and others*, which we report in this issue, throws a lurid light on the policy that is pursued by the British Executive with regard to the Protected States and their native subjects in South Africa. We accept the definition of Protected States as given in

the judgment of the Judicial Committee without demur. It would be applicable to the States of Protected Princes of India. But the status of the Indian Ruling Chiefs differ very materially from that of the South African Chiefs. Their Lordships describe the Protected Chiefs as semi-sovereigns. We take it that their Lordships use this term with regard to the Ruling Chiefs in South Africa. Some of the Ruling Princes in India, such as the Nizam and others with whom the British Government concluded treaties of alliance, are described as Friends and Allies. These treaties impose on them the limitation that they cannot hold any communication with the foreign powers and so would fall within the definition of Protected Rulers as given by the Judicial Committee in the Swaziland case. We think it would not be correct to describe such Ruling Princes in India as semi-sovereigns. So far as their internal administration is concerned, they are considered as sovereigns. We may refer in this connection to the Privy Council decision in *Yusuf-uddin's* case, reported in 2 C. W. N., p. 1. There the Judicial Committee held that the Nizam was a sovereign in his own territory. In this case the Appellant was arrested under a warrant issued by a British Magistrate of Simla and endorsed by authority of the British Resident in Hyderabad, at a railway station within Nizam's dominions and was taken to Simla. The Nizam had ceded the land along the railway and of the railway yards and stations to the Government of India for purposes of railway jurisdiction. Their Lordships of the Judicial Committee held that the cession of land for purposes of railway jurisdiction did not authorise the Government of India or their representative to execute within such area a warrant issued for a criminal offence committed in British India and that the warrant should have been executed through the sovereign of the territory. This case shows that the Indian Princes of Nizam's status are regarded as sovereigns so far as their internal administration is concerned. So far as their foreign or international status is concerned, they are, however, regarded as Rulers of Protected States as above defined.

Still Rulers of Protected States in India owe very definite obligations to the Paramount Power. In the case of mal-administration, civil disorder, the Paramount Power has, in the

interest of the Ruling Chief's subjects or in the interest of peace and order, very legitimate rights of interference. It was for such reasons that the Government of India have in the past intervened and deposed the Ruling Chiefs of Baroda, Nabha, and quite recently offered the alternative of voluntary abdication or enquiry by a Commission to the Ruling Chief of Holkar. Besides these extraordinary powers, the Paramount Power claims, through practice and usage, the right of consultation and approval with regard to certain matters of internal administration, for instance, with regard to confirmation of death sentences passed by the State Courts. The Paramount Power has also to be consulted with regard to succession to the Chief, especially when the same is in dispute. In the matter of the choice of the Chief Minister of the Ruler, the Paramount Power claims to be consulted. With regard to this, however, some of the Indian Ruling Princes claim that their choice of ministers should be unfettered and the Government of India have not, in recent times, insisted on consultation and previous sanction in all cases. Besides these, in some other matters of internal affairs, such as in respect of the grant of forest or mining leases within the Protected State, final sanction of the Paramount Power is required. Whatever limitations may thus have been imposed on the Ruling Chiefs of India by practice and usage by the Paramount Power, the former are regarded in the eyes of the law as sovereigns in their own states so far as internal administration is concerned. So the word semi-sovereign would not be generally applicable to all the Protected Princes of India.

Now, we turn to the legality and propriety of the judgment of the Privy Council in the Swaziland case. A perusal of the facts will show that the decision of the Privy Council and the Court below may be technically justified under the Foreign Jurisdiction Act (53 & 54 Vict., Ch. 37), or the Orders by His Majesty in Council or as an act of State, but is wholly unjustifiable according to fundamental notions of equity or justice or international morality or law. Here the sovereign of Swaziland in 1889 granted to two European adventurers some limited rights in land for a limited period, expressly saying the rights that his subjects had enjoyed within the same land from time immemorial. In 1894 Swaziland was not annexed by the Boers, but under a convention to

which the British Government was a party, the Boers acquired rights of protection and certain jurisdictions including that of legislation and administration. But the convention expressly guaranteed that the grazing and agricultural rights of the natives of Swaziland were thereafter never to be interfered with by any legislation. We are prepared to concede that the Foreign Jurisdiction Act of 1890 has been used, as their Lordships say, by the British power to acquire foreign territory as by conquest. But what troubles us is that when the British power was a party to the convention and to the guarantee that was given never to interfere with the agricultural and grazing rights of the subjects of the Swazi Chief, is it just or moral to deprive them of such rights either under the said Act or by Orders in Council. The previous reservation of the same rights of his subjects by the Swazi King in 1889 in the concession given to two Europeans cannot also be legally ignored. The decision of the Judicial Committee limiting concessions to their original and legitimate purposes as in *Yusuf-ud-din's* case (2 C. W. N. 1) is not without its bearing on the present case. Their Lordships' judgment, therefore, seems to us to be halting, unsatisfactory and unconvincing with regard to this crucial question at issue. Certainly from a powerful foreign sovereign no portion of his territory can be acquired except by force of arms. But from a weak foreign sovereign who cannot possibly defend himself against British arms, his territory or the land of his subjects may be acquired by the Crown under the provisions of the Foreign Jurisdiction Act. This means might is right. Even the highest Judiciary in the British Empire, with all its traditions of justice, equity and fair play, is powerless to interfere. This also reveals the very anomalous position of the Judicial Committee of the Privy Council in relation to His Majesty's Executive Council. It is powerless to interfere or modify the executive decree of the Council. Surely, there ought to be some reserve judicial power somewhere in the British constitution to reverse unjust and arbitrary executive orders or decrees. It is a very sad commentary on the British policy and British administration that there is no machinery of State to protect weak and helpless communities against such unjust decrees.

The relevant sections of the Foreign Jurisdiction Act in this connection will be a revelation

to many who are not aware how British Empire has been made to grow under its operation in obscure parts of this wide world. Sec. 1 of the Act says :—

“ It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or at any time hereafter might have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.”

Then sec. 3 goes on to provide :—

“ Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.”

The means by which these drastic powers are acquired by the British Crown are Orders by His Majesty in Council. Sec. 11 of the Act provides :—

“ Every Order in Council made in pursuance of this Act shall be laid before both Houses of Parliament forthwith after it is made, if Parliament be then in Session, and if not, forthwith after the commencement of the next Session of Parliament, and shall have effect as if it were enacted in this Act.”

Thus this formality being observed, the British Crown may acquire as ample rights over foreign countries and foreign subjects as by right of conquest.

Their Lordships of the Judicial Committee have now held that such Orders in Council are lawful and legitimate means of acquiring foreign territories for the British Crown and extinguishing rights of states and their subjects even when they are guaranteed by conventions which are akin to treaty obligations. It would, however, be interesting to know the views of the League of Nations with regard to the conquests made for the British Crown under the curious provisions of this English statute, should any such question at any time hereafter come up before the League.

BENAMI PURCHASE AT AUCTION SALE.

(By MATHURANATH HALDER.)

(Continued from p. clxxv.)

The Plaintiff urged that if she was in possession, then, according to the ruling in 23 Cal. 699, sec. 66 (old sec. 317) was no bar to her suit. But the learned Judge in criticising the judgment of Macpherson and Hill, JJ., remarked : “ Neither do I understand what is meant by a

title resting on existing possession. I am myself of opinion that it is immaterial whether the Plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession. In either case sec. 66 applies.”

Now, in the case under review, upon the facts as found by the lower Appellate Court, the Plaintiff was not in possession; whereas in the case of *Sashthi Charan v. Annapurna* (23 Cal. 699), the Plaintiff was in possession. Thus there was a vital difference between the two cases on the *factum* of possession at the date of suit.

The ruling in 23 Cal. 699 was not followed in 23 All. 175. It was also doubted in 40 Cal. 20—26 and referred to in 50 I. C. 546. In the case of *Hanuman Prosad Thakur v. Jadunandan* (43 Cal. 20), it was pointed out by Coxe, J., that if the ruling in 23 Cal. 699 be accepted as good law, it would practically violate against the plain words of sec. 317 (66).

Now let us see what is the real import of sec. 66 of the present Code. Changes introduced into this section under the amending Code are merely verbal ones. Or. 21, r. 94 lays down that on the sale becoming absolute, the Court shall grant a certificate of sale specifying the name of the person who at the time of the sale is declared to be the purchaser. The *benamdar* purchases the property and he is declared to be the purchaser at the time of the sale and the certificate is granted in his name. Sec. 65 prescribes the time of vesting of the property sold in the auction-purchaser. The real purchaser remains behind the scene and allows the *benamdar* purchaser to represent him before the Court and the public. The beneficial owner allows the *benamdar* to represent him in all documentary transactions of the property and even in suits in Court. The *benamdar* purchaser always bears some antecedent relation—either a relative, a *gomoshta*, a friend, a pleader, a clerk, a spiritual guide, a co-sharer in other properties or the like—to the real purchaser. The beneficial owner feels no apprehension in extending the doctrine of representation to its extreme, himself remaining in possession of the property and the sale-certificate and subsequent documents relating to the property remaining with him. *Benami* transactions are very popular in this country. There is ordinarily speaking not the remotest idea of utilising the position for the purpose of perpetrating fraud.

(To be continued.)

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APPELLATE SIDE.

annual salary of £4,000 each, of which half the amount would be charged to Indian revenue and the remaining half to the British Exchequer. This Bill was rejected by the Legislative Assembly. But matters have come to such a pass in the Judicial Committee of the Privy Council that Judges are not available there in sufficient strength to dispose of Indian appeals. A Bill was therefore introduced and passed in the House of Lords last session for the appointment of two members of the Judicial Committee from amongst those who have served as Judges in British India or practised as barristers or advocates in British India for at least fourteen years, to whom an annual salary of £2,000 a year will be paid out of the British Exchequer.

The House of Commons has been busy this year with labour-troubles, such as, the general strike, coal strike and other serious domestic affairs and has not been able to spare time for other matters of comparatively minor importance. But since the Judicial Committee Bill has been passed by the House of Lords, we are sure the House of Commons will pass it as well and after Royal assent it will become a statute. When Canada and the other Dominions do not contribute any portion of the salary of the members of the Judicial Committee, we may claim that the whole of the salary of the members of the Judicial Committee for the disposal of Indian appeals should be paid out of the British Exchequer. His Majesty in Council discharges through the Judicial Committee an imperial obligation to the Empire and for that no charge should be levied on the Indian revenue any more than on the Dominions and Colonies.

Apart from the question of the propriety of requiring India to contribute in this behalf, the debate in the House of Lords discloses that in order to bring the Judicial Committee to a high order of efficiency, it would not be enough to appoint only two members of the Judicial Committee as is proposed in the Bill. Viscount Haldane pointed out that it would be necessary to appoint more Lords of Appeal. At present there are only six Lords of Appeal. Their ordinary duty is to sit in the Judicial Committee of the House of Lords with the Lord Chancellor to form a panel of seven

Judges. The Judicial Committee of the Privy Council often sits in two Divisions, one for hearing Dominion and Colonial appeals and the other for hearing Indian appeals, in panels of five Judges. But for the services lent by Law Lords and ex-Lord Chancellors, it would be impossible for the two Divisions of the Judicial Committee to sit simultaneously. In the past it was usual for a panel of five Judges to sit in only one Division for hearing both Indian and Colonial appeals. But now it is often found that Indian appeals are disposed of by only three Judges, one of whom is the Rt. Hon'ble Mr. Ameer Ali, another Sir John Edge, who is now dead and any one of the Law Lords or ex-Lord Chancellors who may be available.

We complained about this only a short time ago. We find that Lord Haldane is no less keen that the Judicial Committee of the Privy Council should be so strengthened that a panel of five Judges may take the appeals from India and the Colonies in two Divisions. His Lordship suggests that this cannot be done unless the number of Law Lords are increased from six to fifteen. In that case seven of them may sit in the Judicial Committee of the House of Lords and five each in the Judicial Committee of the Privy Council. But we are sure the House of Commons would never agree to pay for fifteen Law Lords. If, however, a few more Law Lords are appointed, it may be possible with ex-Lord Chancellors and ex-Law Lords, together with the two members of the Judicial Committee who may be appointed hereafter under the Judicial Committee Bill, to form a strong panel of five Judges for hearing the Indian appeals. If the Parliament would appoint some more Law Lords for strengthening the Judicial Committees of the House of Lords and the Privy Council as well, then the Indian legislature may be very reasonably asked to pay half the salary of the members of the Judicial Committee, who may be appointed for helping the English Judges in disposing of the Indian appeals.

In this connection, it would not be out of place to mention that Lord Sinha's appointment to the Judicial Committee will not carry with it any salary. His Lordship has been

appointed in place of Lord Parmoor, as one of the hereditary peers entitled to sit in the Judicial Committee, the other being Lord Asquith. This is a unique honour conferred on him. The Rt. Hon'ble Mr. Ameer Ali, at his present age and in his present state of health, cannot be expected to sit regularly. We may suggest that the services of Sir John Woodroffe may be availed of, when the Bill becomes law.

BENAMI PURCHASE AT AUCTION SALE.

(By MATHURANATH HALDER.)

(Continued from p. CLXXX.)

In the case under review, the Plaintiff was not in possession and she could not legally make a prayer for confirmation of possession. Being fully apprehensive of this difficulty, she prayed that if by any circumstance it was found that she was not in possession, then she might recover possession. But as she was not actually in possession, she could not rely on the ruling in 23 Cal. 699. It was really a case where the Plaintiff relying on a sale-certificate sought to obtain a decree for possession against the ostensible purchaser. In our opinion the real scope of sec. 66 should be limited to cases where the real purchaser, effacing the vestige of every element of title, allows the *benamdar* to be in possession of the property and documents. In many cases, such transactions are resorted to with a view to commit some fraud. In such cases if the *benamdar* subsequently turns refractory and traitorous, the real purchaser must suffer the consequences of his own act and the law will not allow him to recover possession of the property on his secret title. In our opinion the real scope of sec. 66 should be limited to such and such cases alone. In cases of the nature reported in 23 Cal. 699, suits for declaration of title and confirmation of possession is, it is submitted, still maintainable.

(Concluded.)

Correspondence.

RIGHT OF UNREGISTERED TRANSFEREES OF OCCUPANCY HOLDINGS TO AVOID SALES OF HOLDINGS BY DEPOSIT.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

The recent Full Bench decision in the case of *Jharu Mondal v. Kshetra Mohan Bera* (30 C. W. N. 729) is of considerable importance to unrecognised purchasers of occupancy holdings. It has withdrawn the protection under sec. 170 (3), Bengal Tenancy Act, enjoyed by them for the last 15 years and rehabilitated, on a new ground, the old state of things that prevailed in the days of absolute non-transferability of occupancy holdings. In spite of the rigour of the law, the Bengal raiyat's right of transfer has, of late, made great headway towards judicial recognition and with the gradual lifting of the ban on the transfer, the purchaser has been given almost all the rights of ownership, except a direct recognition at the hands of an unwilling landlord. But all these acquisitions are worth nothing, if the law does not give the purchaser the elementary right of protecting his property from sale by paying in the decretal dues.

Even in the darkest days of absolute non-transferability of occupancy holdings, the purchaser's right of depositing the decretal dues under sec. 170 (3) was universally recognised in Bengal. The right of deposit was never denied in any reported case except perhaps in the case of *Behari Lal v. Fakir Chand* (12 C. W. N. CCXXXI), on the ground that a voidable interest under that section refers to an incumbrance as defined in sec. 161. The view taken by Doss, J., in *Behari Lal v. Fakir Chand* was not followed in any other case and it was against the weight of authority at the time. The only other case in which the right was denied is *Nalini Behari v. Fulmani* (16 C. W. N. 421), but this was on the ground that the purchaser had acquired no interest whatsoever. The leading case to the contrary which recognised the purchaser's right of deposit is *Tarak Das Pal Chowdhury v. Harish Chandra Banerji* (17 C. W. N. 163). The Full Bench case of *Doyamoyi v. Ananda Mohan* (18 C. W. N. 971) may truly be called the turning-point in

the history of the law of transfer of occupancy holdings. It confirmed the principle in *Tarak Das v. Harish Chandra* and overruled that in *Nalini v. Fulmani* and laid down authoritatively that a purchaser of an occupancy holding acquires substantial interest therein. Since then sales of occupancy holdings have been placed on a firmer footing and the purchaser's right of deposit under sec. 170 (3) has received uniform judicial recognition. The contrary note was struck after ten years in the cases of *Mahammad Ismail v. Satyesh* (26 C. W. N. clxx) and *Narendra v. Abdul* (27 C. W. N. clxxv). The first fully reported case was *Barada Prasad v. Foizaddi* (28 C. W. N. 845), which has now been followed up by the Full Bench case of *Jharu Mondal v. Kshetra Mohan* (30 C. W. N. 729).

Sec. 170 (3) gives the right of deposit to a person who has, in the tenure or holding advertised for sale, an interest voidable on the sale. The expression "interest voidable on the sale" evidently means and includes any interest which is likely to be avoided either by the sale itself or as the result of possible subsequent proceedings. The expression was evidently understood in this sense by the learned Judges who decided the case of *Tarak v. Harish*. Their Lordships refused to take the term "interest" as synonymous with the much narrower term "incumbrance" and observed that the language used by the legislature is comprehensive and should not be narrowly construed in view of the obvious object of the section. The same view has since been taken in *Sahdeo Sing v. Kuldeep Sing* (18 C. W. N. ccxix) and *Ahamadulla v. Prayag Saho* (20 C. W. N. 39). In the recent Full Bench case of *Jharu Mondal*, (Chatterjea, J.,) observed that the learned Judges who decided the aforesaid cases lost sight of the point that an interest in order to be voidable on sale must subsist after the sale and, in this view of the matter, his Lordship held that "an interest voidable on the sale" refers to an incumbrance as defined in sec. 161. His Lordship evidently understood the term "voidable" to mean voidable at the option of the execution-purchaser. This is made clearer by Page, J., when his Lordship says: "The words 'interest voidable on the sale' in sec. 170 (3) of the Bengal Tenancy Act connote that such interest may or may not be avoided by the auction-purchaser at his election." The term "voidable" seems to be a word to conjure with. We no doubt hear of

voidable contracts and voidable transfers which, in legal phraseology, imply an element of option. But cannot the unhappy term be taken in its ordinary sense of "capable of being avoided" or "liable to be avoided" or in the mere sense of "avoidable," with no necessary element of option? It is for the Judges and Jurists to answer. What is dreaded by laymen is a jugglery of words in law, and it is an irony of fate that with the evident object of protecting persons who are rendered helpless by the stringency of a hard law, the legislature should use a term or an expression which can be invoked for refusing the very protection intended to be given. The life of law, it has been said, is not logic but experience. The poor purchaser will have no consolation until he finds this dictum truly translated into legislative action.

A reference has been made by their Lordships to Mr. Sen's commentaries on the Bengal Tenancy Act, which mention a large number of decisions which support the view taken by them. With all respect for that learned author, it must be said that the cases on the point are not well-arranged, in his otherwise admirable treatise. In advocating the view taken by him, the learned author has not noticed the actual course of changes in the law of transfer of occupancy holdings and the long gap of 10 years between the decisions of *Nalini Behari v. Fulmani* and *Mahammad Ismail v. Satyesh*, during which judicial opinion was uniformly in favour of the purchaser. The very important part played by *Doyamoyi's* Full Bench case in diverting the course of judicial opinion in Bengal deserves mention in this connection. One may well refer to the comprehensive judgment of Mullick, J., in the Patna Special Bench case (*Mahadeo v. Langat*, 2 Pat. L. J. 457) as showing the history of the law. Non-transferability of occupancy holdings is one of the die-hards in the tenancy law of Bengal and it is high time that the legislature should put the matter beyond the uncertainty of judicial opinions.

DWIJENDRA NATH PAL, M.A.; B.L.

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REPORTS (See Index.)

We are on the eve of a general election of the Provincial Councils and the Legislative Assembly in India. It would seem that the election is going to be fought more on the personal and communal interest of parties, communities and individuals than on any broad basis of our common national interest or well-being. All parties seem to be agreed that their goal is *Swaraj* for India. Six long years have been wasted in fruitless controversy as to the meaning of the word *Swaraj*. After a lot of beating about the bush, it is now conceded even by the party who claim an exclusive title to that term that it means the attainment of Dominion status for India. The eminent political leaders who preceded them, whose souls are now at eternal rest, had precisely placed the same ideal before the public all through their epoch-making career and devoted their lives in preparing the nation to work up to that ideal. The new political parties that have sprung up in India have not been able to evolve any different ideal. But they are now engaged in the no more profitable controversy about the method by which the goal is to be attained. Armed insurrection or revolution is no longer put forward by them as a practical means for the attainment of the end. When their late leader attempted to bluff the powers-that-be by suggesting that there is in Bengal a revolutionary movement, more serious than the Government was aware of, Lord Oliver silenced him by pointing

out that modern warfare had undergone such scientific and technical developments in recent years that any attempt at the extortion of political concessions by armed insurrection was not within the range of practical politics. The bluff having failed they attempted to extort concessions by wholesale obstruction. This programme of wholesale obstruction has also been found unworkable in practice, abortive of results and was ultimately reduced to the offering of obstruction to the formation of any Ministry in some Provincial Legislatures. The Government of India Act provides for the transfer of the administration of a Minister's department to an Executive Councillor on such a contingency, and it has been so done in Bengal and elsewhere as a result of the obstructive policy. The obstructionists try to mislead the public by professing that Dyarchy is dead. But those who are not blinded by such bluff can see clearly that the result of such obstruction is to restore autocracy and strengthen the bureaucracy. Those who have studied the progress of responsible government in the Colonies and Dominions know that the only constitutional means by which autonomous self-government has been attained there is by the formation of Ministry.

Even the Government of India Act says that a Minister is not a Government servant. He is in fact a servant of the Legislature. He is the representative and mouthpiece of the majority party in the Council. He can oppose any policy or measure of the Executive Government which is not approved by the Legislature. When he is backed by a majority in the House, he can bring about a reversal of the Government policy or measure by opposition in the Council and bring about a dissolution. His master, as also of that of every member of Council, is the electorate and if after the dissolution the Minister and his party are returned in the majority, the Governor is bound to climb down. For, in that case, the

Governor cannot form a Ministry which cannot command a majority in the House. If he attempted to do it, his nominees would be defeated and his policy or measure with them. This is known as constitutional opposition which is well-recognised in every system of responsible government and is quite different from senseless obstruction. Mr. Ramsay MacDonald, when he was Prime Minister, said that the British people who have long been accustomed to constitutional government regard indiscriminate obstruction in the light of incapacity for working the constitution. The Parliamentary system of government has been evolved in Great Britain and the Dominions by working defective constitutions. Canada is the oldest of the self-governing Dominions in the British Empire. We give an instance below, how a constitutional crisis has recently arisen there between the Governor-General and the Liberal Ministry and how the question is being sought to be solved by an appeal to the electorate. We also invite attention to a most extraordinary claim of General Hertzog for the recognition of South Africa as a Sovereign State by the British Government. It is to be noted that this claim is not backed by threat of armed insurrection but by arguments and reasons brought out of the armoury of constitutional and international law. After the lessons of the general strike in England and the recent communal conflicts in India, we do not hear much about civil disobedience, in any near or remote future, as being a short cut to *Swaraj*. Thus, after all, the methods that have served to mislead many from the straight path stand discredited to-day and we are sure the country will ere long revert to the ideals and methods of our great leaders of the past.

Can the Governor-General of Canada refuse dissolution in disregard of Minister's advice?

A question of great constitutional importance has recently been raised in Canada by Mr. Mackenzie King, the late Liberal Prime Minister of Canada. Early in July last Mr. King, the Premier and leader of the Coalition Party of Liberals and Progressives, was defeated by the Conservative Party led by Mr. Meighen by one vote in the Canadian House of Commons. This defeat was not over any general policy of

the Minister but on the failure of the Ministry to prevent liquor-smuggling across the Canadian frontier to the United States. Mr. King thereupon asked Lord Byng, the Governor-General of Canada, to dissolve the Parliament so that the opinion of the electorate might be taken on this issue. Lord Byng refused dissolution on the ground that the general election had only taken place a few months ago, and, it may be, also because he did not consider the issue as one of general public policy but one of departmental administration. Thereupon Mr. King resigned by way of protest against the action of the Governor-General in not accepting his advice. He maintained that since it is an established convention of the British Parliament that the Crown dissolves the Parliament on the advice of His Majesty's Ministers, the Governor-General should act likewise in the Dominions. The *Times* in an article of the 21st July last tries to show that the practice is not so uniform in the Dominions as in the United Kingdom of Great Britain. But all the same it concedes that if Canada is keen on establishing such a convention, it would be unwise on the part of the Governor-General to oppose it.

It is worth mentioning in this connection that it is not merely in India that Governors-General or Provincial Governors act sometime arbitrarily and unconstitutionally, but the history of the Dominions would show that they have done so on many occasions there as well. But the Dominion Ministers and their party members do not take these arbitrary acts lying down. They fight out these constitutional issues with the Colonial Office, and often with the support of the electorate. The incident mentioned is an instance of the kind. Although Lord Byng was not far wrong in refusing to dissolve the House on a snap vote of the kind referred to, yet his subsequent conduct in connection with the offer of Ministry to Mr. Meighen cannot be justified. Not only did he offer the Ministry to the Conservative leader Mr. Meighen but allowed him to appoint Honorary Ministers and entrust them with portfolios in flagrant violation of the constitution. The Canadian constitution requires that a Minister on accepting office must resign his seat and seek re-election, as was the practice in England till its abolition by a recent statute. The reason why Mr. Meighen did not recommend any Ministers to

be appointed in the regular way was that he had defeated his predecessor Mr. Mackenzie King by only one vote and now if one or more of the members of Mr. Meighen's party were appointed Ministers, they would have to resign their seats and might not get re-elected, and in that case he would get defeated by his opponent. Lord Byng in permitting him to violate the constitution in this way surely acted arbitrarily.

Mr. Meighen, however, could not remain in power for long even by such a device. He was soon defeated by his opponent by an adverse vote of the House. But this vote was not on any matter of administrative detail but on a demand for supply. Lord Byng, thereupon, instead of calling upon him to resign, at the request of Mr. Meighen dissolved the House and ordered a general election. The conduct of Lord Byng has caused considerable discontent in Canada and whatever might be the result of the general election now being held there, the question as to whether the Governor-General can constitutionally reject the advice of a Dominion Premier for dissolution is sure to be raised at the Imperial Conference. It is not so much over the discrimination made between Mr. King and Mr. Meighen by Lord Byng that the conduct of the Governor-General is being questioned as in connection with the larger constitutional issue, whether the degree of the responsible government enjoyed by Canada is or is not as complete as that of Great Britain. Canada has not yet raised the question like South Africa that it is a Sovereign State, but it has for many years past claimed an independent international status. It refused to recognise the Lausanne Treaty, concluded between Great Britain and Turkey, as binding on her and declined to sign it. The policy pursued by Great Britain since the war is very conciliatory with regard to the Dominions. The spirit of the times is to settle differences by negotiations and it would be wise of us to fall into line with it.

South African interpretation of Dominion Status.

Reuter wired from Capetown on the 7th September last that "General Hertzog on the eve of his departure to attend the Imperial Conference in London stated in a speech that if the

Committee on the Flag Bill should recommend the inclusion of the Crown in it, he was confident that the Government would approve of it. He said also that he intended to urge that steps should be taken so that South Africa's national status which was equal to that of Great Britain and other Dominions, be entitled to international recognition and it should be so declared and published to the world." This claim of South Africa for being recognised internationally as a Sovereign State requires some explanation for being properly appreciated. The Flag Bill contemplates that the South African Union should have a National Flag of its own to replace the Union Jack which flies over all the Dominions. We therefore take it that the compromise he suggests is that the emblem of the Crown may be inserted on the South African Flag. This would not in his view be derogatory to the status of South Africa, as would appear from a fuller review of his speech at the introduction of the Flag Bill which we publish below. His and his predecessor General Smuts's view that the constitutional position of the Dominions is that of a Sovereign State will also find an explanation from the criticism of their views which appeared in the columns of the *English Law Journal* sometime ago. Both the gallant generals base their view chiefly on the fact that South Africa was a signatory to the Treaty of Versailles in 1919 and that South Africa was given a direct representation in the League of Nations. But, the untenability of their argument would be at once evident when we remember that India was a signatory to that treaty as well and has also been assigned a permanent seat in the League of Nations, although she has yet to attain the Dominion status.

Our contemporary of the *Law Journal* says with regard to the claims of General Hertzog in his previous speech in the South African Parliament in this connection :—

He claimed that ever since the Treaty of Versailles, which the self-governing Dominions signed as separate international entities, and which was followed by the allotment to them of independent national representation in the Assembly of the League of Nations, each of the British Dominions is, in international law, an independent Sovereign State, connected with Great Britain only by the fact that the Monarch of the United Kingdom is also the King of Canada, Australia, New Zealand, Newfoundland, Rhodesia, and the Union of South Africa. In other words, he claimed for the Dominions the same status as was possessed by Scotland between the Union of the Crown in 1603 and the union of the Parliament in 1707. If this theory was correct, the Imperial Parliament would have no legal power

to legislate for a Dominion—except so far as the constitution of the Dominion confers or retains such rights—but the King and the Judicial Committee would still retain all their existing legal rights unless and until the Dominion Parliament (with the Royal assent) altered or abrogated these. That is practically the same claim which was put forward by the thirteen revolting American colonies in 1772, but was declared unsound by all English constitutional authorities. The older precedents, however, according to South African constitutionalists, do not apply to the status of Dominions since 1919; for the Treaty of Versailles, they claim, by necessary implication, although not in express terms, recognised the separate sovereignty of each Dominion, and this treaty was ratified by an Imperial Act of Parliament. Of course, General Hertzsog is not the author of this novel doctrine of constitutional law. It was formulated by General Smuts so long ago as 1920, and has ever since been known as General Smuts's theory of the constitution. As General Smuts is a very able and scholarly lawyer—in the words of Lord Shaw, one of the greatest legists of the age—the doctrine cannot be dismissed as fantastic or obviously wrong: but most English constitutional lawyers will hesitate to accept the revolutionary view that a subordinate colony can be granted the independent status of a Sovereign State merely by necessary implication from the provisions of a statutory treaty.

How the Press brought about legal reform in England.

The further extracts given below from the very learned article entitled *The English struggle for procedural reform* given below to which we referred in a previous issue will be found interesting. They vividly show the great service rendered by the press to the cause of procedural reform which in one sense was a national awakening. The newspapers carried on the offensive campaign in the struggle while the defence was entrusted to the law journals. Referring to the newspapers the learned writer says:—

Nothing in the legal development of modern society is more dramatic than the long war of liberation waged in England against the tyranny of inherited legal traditions. The nineteenth century opened upon a legal system which had inspired the most extravagant eulogies from the bench and bar. The sonorous and resounding phrases of Blackstone still echoed throughout the realm, extolling 'its solid foundations,' 'its extensive plan,' 'the harmonious concurrence of its several parts' and 'the elegant proportion of the whole.' 4 Blackstone, Comm. 443. Legal writers still found it difficult to speak with moderation of a system 'so wisely contrived, so strongly raised, and so highly finished.' 1644. The refinements of its logic were demonstrated and defended by a group of legal authors who doubtless believed that they were dealing with a procedure based upon principles of ultimate validity.—Williams in his learned notes of *Saunders's Reports*, Tidd in his *Practice in the King's Bench*, Stephen and Chitty in their classic works on pleading, and Lord Redesdale in a book on equity pleading which was considered so perfect that, in the words of the American editor, 'the adding of matter to this treatise would be like painting refined gold.' And as the political head of the legal cult, Lord Eldon sat on the woolsack for almost a generation, keen, alert, steadfast, tireless, fearful of innovations, devoting all the resources of a powerful and technical mind to the preservation of the current practice of his day.

Against the chorus of professional praise had been raised the almost solitary voice of Bentham, but it was a voice crying in the wilderness.

The striking characteristic of the British revolt against the apotheosis of legal formalism was its popular origin and support. The *Edinburgh Review*, which seems to have led the way, continued for seventy years to argue the cause of law reform in issue after issue, with a tenacity of purpose, an unflinching optimism, and a mastery of ability which commands our unstinted admiration.

The *Westminster Review* began publication in 1824, and, although it, also, was a general magazine for the lay public, in its first number it launched an attack on the Court of Chancery as a notorious scandal and took up a critical study of the rather undramatic subject of special juries. In its first ten years it published twenty-eight articles on various technical subjects in the field of procedural law, attacking and explaining with astonishing boldness and skill the anomalies in the jurisdiction of Courts, the absurdities in the rules of evidence, the atrocious technicalities of pleading, the improper use of juries, specific, preventable causes of delay, the scandal of judicial patronage, the extortionate expense of litigation, and the shocking want of education at the bar. For half a century this remarkable journal was an unwavering champion of the public in its struggle for judicial reform.

In the same way the *London Spectator* and the *Saturday Review* took a strong position in support of the movement for reform in judicial procedure, patiently explaining facts, clearly discussing principles, and courageously advising appropriate action.

Even such a magazine as the *Illustrated London News* found itself drawn into the fight. In its opening number, in 1842, by way of announcement of editorial policy, it said: 'In keeping our eye upon the action of daily life, we shall most narrowly watch the administration of justice. The decisions of our magistrates, be it once declared, shall be branded if they be not just. Coroner's inquests, and the civil and criminal trials, will command no small part of our attention.' Faithful to its word, it ran from two to four and a half columns of Court news every week, with frequent editorials and leading articles on the maladministration of justice.

Still more significant was the course of the *London Times*. In 1845 it was a small newspaper running only twelve columns of reading matter, but even at that early stage of the war against judicial abuses it considered the subject so important, and presumably so interesting to its readers, that it devoted one-third of its entire space every day to reporting the doings of the Courts. By 1850 the *Times* was giving its readers a little over thirty columns of news, and, of this, from six to eleven columns were filled with daily reports of the law Courts. These reports were not sensational but gave a simple and readable account of what was actually going on in the various Courts of the kingdom, familiarizing the reader with the personality and professional activity of the judges and lawyers, with the nature of the procedure, the delays, the costs, the technicalities, and the net accomplishments of the system. For a hundred years the *Times* has maintained this extraordinary service, so that the English layman has probably been better acquainted with the work of the Courts than the layman of any other country in the world.

Nor did the *Times* rest content with news reports on the administration of the law. Its editorial columns thundered against the abuses of the system and the beneficiaries of those abuses. Year after year it kept public attention fixed upon the vital function of the Courts in a free country, and in the name of the people warned the profession and the government that resistance might postpone but could not defeat the demand of the people for an adequate system of justice. By 1850 the *Times* was devoting more editorial con-

sideration to judicial reform than to any other subject of public concern. In the single month of December, in that year, for example, it had seven leading editorials on the administration of justice, averaging nearly a column and a half each, and other months duplicated that record. In the course of the long struggle it published literally hundreds of columns of editorial criticism of legal procedure, in addition to hundreds of columns of reports of parliamentary debates upon the innumerable bills by which the public attempted to secure, and the legal profession to prevent, a thorough reconstruction of remedial law.

APPLICABILITY OF OR. IX TO APPLICATIONS FOR SETTING ASIDE SALES.

In the recent decision reported in 30 C. W. N. 570, their Lordships Cuming, J. and Page, J., have attempted to set at rest the conflicting decisions as to the applicability of Or. 9 to proceedings for setting aside sales. Though Page, J., was once almost inclined to refer the question to the Full Bench, still in view of the fact that applicants in such cases have other remedies and especially as his Lordship formed a clear opinion as to what his decision should be, the point was decided independently without reference to a Full Bench.

Before discussing the reasons assigned by their Lordships, it may be pointed out here that in view of the usual course of proceedings in which such applications are disposed of, their Lordships' suggestion that fresh application lies is more academical than practical; for the applicant files his application within 30 days either from the date of the sale or from his knowledge thereof and when his application is dismissed for default, a fresh application generally goes more than 30 days beyond either date.

In deciding the question as to whether Or. 9 applies to such cases, their Lordships have held that in view of the Privy Council ruling in 22 I. A. 44 and a few other decisions of the Calcutta High Court, it is now settled law and should be followed that Or. 9 does not apply to such cases. The main and perhaps the only reason of their Lordships' decision was an analysis of the history of sec. 141, and the construction of sec. 647 by their Lordships of the Judicial Committee as expressed in 22 I. A.

It would be convenient therefore to examine the exact scope of sec. 647 upon which the entire question hinges. It is needless to say that apart from sec. 141, the Code does not prescribe any special procedure for cases like these. Sec. 647 as it stood in 1882 ran

thus: "The procedure herein prescribed . . . in all proceedings in any Court of Civil Jurisdiction other than suits and appeals." To quote the language of Page, J.: "Divergent views having been expressed by the Courts as to whether sec. 647 extended the provisions of the Codes relating to suits to execution proceedings, the legislature added to sec. 647 the following:—Explanation—'This section does not apply to applications for the execution of decrees which are proceedings in suit.'" It is clear that any divergence that arose was in connection with the procedure applicable to "application for execution" or what his Lordship calls "execution proceedings," and it is further clear that owing to this divergence only the explanation, that the section does not include application for execution, was thought necessary. In view of the subject-matter of the said divergence and the language of the said explanation to sec. 647, it would not be unreasonable to hold that the only result of the explanation was to exclude "applications for execution of decree" from the operation of sec. 647. Proceedings in execution and proceedings arising out of execution are expressions not unknown to the legislature and if the explanations were intended to exclude such proceedings also, one might expect suitable words to that effect. Referring to the facts of the case in 22 I. A. the same view will be supported. Their Lordships of the Judicial Committee in that case observed that the whole Chap. XIX (corresponding to Or. 21) was devoted to "procedure in execution" of decrees, and that the procedure laid down for the suits is mostly unsuitable to executions and that sec. 647 was never intended to include executions. There can be no doubt that the whole Chap. XIX was meant to lay down the procedure for execution of decrees, nor can there be any doubt that the procedure in suits is mostly unsuitable to applications for execution of decrees. But do we really find any justification for the view that sec. 647, as explained in 1892 or as construed by their Lordships in 22 I. A., excluded not only applications for execution of decrees but all sorts of proceedings arising out of such executions? Is any procedure laid down in Chap. XIX for such miscellaneous proceedings? Can it be said that the procedure for suits is unsuitable to such proceedings? If there still remains any doubt as to the solution of these questions, it is made sufficiently clear when, in the latter part of the judgment of their Lordships in

1894, their Lordships' attention being drawn to the explanation added by the legislature in 1892. their Lordships observed that it did nothing more than express the true meaning of the Code. If therefore the explanation in 1892 expresses the true meaning of sec. 647, we need not go further than the explanation itself to find out its meaning. It excludes application for execution of decrees for which special provisions have been made in Or. 21. Cuming, J., says that merely because sec. 311 (Or. 21, r. 90) happens to be one of the sections of Chap. XIX, it is excluded by sec. 647. Their Lordships of the Judicial Committee, however, nowhere say that all proceedings coming within the purview of Chap. XIX are thus excluded. What their Lordships decided, with reference to the question before them, was that Chap. XIX did not apply to execution proceedings and that the entire chapter was devoted to the procedure in execution and that the explanation added in 1892 expressed the true meaning of the sec. 647.

On an analysis of Or. 21 and Chap. XIX of the old Code it will be apparent that the principle object of the legislature is to prescribe the procedure to be followed in disposing of applications for execution of decrees, though occasionally some substantive rights are reserved at certain stages of the proceedings for the benefit of persons prejudicially affected, *e.g.*, a third person may come and prefer a claim, a judgment-debtor or any person having some sort of interest may come and apply for setting aside a sale, etc. But the order itself has nowhere within its four corners laid down the procedure to be followed in deciding such a claim or application. If it could be argued that the procedure relating to suits does not apply to such proceedings, the result would be in many ways disastrous, for example, the Court would have to dispose of these cases as soon as they would be filed, for it has no power to adjourn them from time to time, Or. 17 being applicable only to suits; nor can the Court summon witnesses. Technically speaking, it might be also contended that owing to the non-appearance of the claimant or the applicant, the Court could not dismiss these cases for default, for Or. IX apparently applies only to suits. Assuming that inherent power may be invoked entitling the Court to dismiss such cases for default, there is no reason why such power cannot be resorted to in restoring them. Page, J., felt

the situation and observed at p. 575 :—" Proceedings in execution are not controlled . . . by reason of sec. 141." Procedure relating to suits are being every day followed in proceedings arising out of applications for execution. His Lordship did not say how it is thus made applicable. If it is made applicable not by sec. 141, we doubt if it is at all authorised otherwise by the Code.

In view of this uncertainty as to the law of procedure, it is desirable that the matter should be considered by a Full Bench.

SATISH CHANDRA DHAR, B. L.

Correspondence.

To

THE EDITOR, "CALCUTTA WEEKLY NOTES."

SIR,

In mofussil Criminal Courts many cases are instituted at the instance of a Court or public servant that often go unprosecuted. Such cases are generally those mentioned in sec. 195 of the Criminal Procedure Code and as such the Crown is the prosecutor. When the prosecution relates to a police case or is of special public importance, the police Court staff or a public prosecutor is engaged. But in what is called unimportant cases the Court has got to conduct the prosecution itself. Such cases are mostly summons cases and where the accused pleads guilty to the charge, he can be readily convicted. But in cases where the accused does not make any admission and claims to be tried, evidence is to be heard. In such a case, in the absence of the prosecutor, is it proper and legal for the Court to conduct the prosecution both by examining-in-chief the prosecution witnesses and cross-examining the defence witnesses? Under section 165 of the Evidence Act, the Court can ask any question of any witness at any time in order to ascertain the truth, but does it extend so far as to allow the Court to conduct the examinations itself? Sec. 138 of the Act lays down that the witnesses shall first be examined-in-chief, next cross-examined and then re-examined. Sec. 137 says that the examination of a witness by the party who calls him is called his examination-in-chief and the examination by the adverse party his cross-examination. By leading the examination-in-chief of prosecution witnesses and cross-examination of defence witnesses, the Court identifies itself with a party. Crown is as much a party as a private individual and does not the

conduct of the Court in such a case tends to violate its impartial character, and cannot the accused in such a case object to the Court conducting the prosecution?

In such a case when actually no prosecutor is engaged or forthcoming, what is the Court to do? Is it not the duty of the public servant or Court at whose instance the prosecution was started to arrange for the prosecution? Cannot the District Magistrate or the Sub-divisional Magistrate appoint, in such a case, any person other than the public prosecutor under sec. 492 (2) of the Criminal Procedure Code? What is the scope of the expression "in absence of the public prosecutor" in this section?

Yours truly,
S. K. GHOSH.

To

THE EDITOR, CALCUTTA WEEKLY NOTES.

SIR,

In the amended clause 8 of section 526 of the Cr. P. C. it has been enacted that the Court *shall* adjourn a case if in the course of an inquiry or trial an application under this section is made. The expression "trial" has nowhere been defined in the Code. The question that now arises is, whether the Court is bound to adjourn the case where an application is made after evidence on both sides was heard and nothing remains except the pronouncement of the judgment or final order.

Macleay, C. J., in 25 Cal. 863, in explaining "trial," indicated the stage at which it begins. That definition, however, does not help us in determining whether the word "trial" in sec. 526 includes the passing of the judgment.

One is inclined to hold that the word "trial" has been used in the Code to mean the stage prior to the delivery of judgment. If so, then the Court is not bound to adjourn the case if an application under sec. 526 is made "at any time after the conclusion of the trial" and "before judgment is delivered."

Yours faithfully,
PIORODH GOPAL MUKERJEE.

Review.

LAW RELATING TO PRIVATE COMPANIES IN INDIA.. By Alexander Kinney, Administrator and Official Trustee, Bengal. Messrs. Thacker, Spink & Co., Calcutta.

The second edition of this work just issued makes many improvements over the first. The case-law has been brought up-to-date. The

tabular statements, which follow Ch. IV, set out succinctly the obligations, liabilities and penalties of managing agents, secretaries and others concerned with private companies and will be helpful to them in the management of its affairs, as they can look them up at a glance. As the statement of the law in India is supplemented by references to the provisions of the English Act as also to the leading cases thereon, this hand-book will prove very useful to those who are desirous of acquiring & working knowledge of the subject. The book is very well got up.

Notes of Cases

CALCUTTA HIGH COURT.

Recent decisions not yet reported

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before PANTON AND CHAKRAVARTI, JJ. APPEAL FROM APPELLATE DECREE No. 1414 OF 1924. RAM LAL PANJA and others, Defendants Nos. 1 to 4, Appellants v. SHIBA PROSAD PANJA and others, Plaintiffs and Defendant No. 5, Respondents. The 13th August 1926.

Limitation—Possession of trespassers during the subsistence of the mortgage, usufructuary, if adverse to the mortgagors also.

The Plaintiffs-Respondents brought a suit for recovery of possession of land upon declaration of their title. While in possession they mortgaged the same by conditional sale to one Ram Chand in 1892 and shortly afterwards put him in possession of the land to enable him to realise the mortgage money from its usufruct. They then brought a suit for redemption in 1909 and got a final decree in March 1915. Having been resisted by the Defendants when they went to obtain possession in execution, the Plaintiff brought this suit in August 1921.

The defence was that the land appertained to the Defendants' *jote*, that they were in possession since long and that the suit was time-barred. The trial Court found that the suit-land appertained to the Defendants' *jote*, that they were in possession thereof for over fifteen years, the suit was barred by limitation and dismissed the suit. The Appellate Court found that the major portion of the suit-land apper-

tained to the Plaintiffs' and not to the Defendants' *jote*, but the land was in the Defendants' possession for over fifteen years before suit. Limitation, however, was no bar to the Plaintiffs' suit, because limitation could not run against them until March 1915, when they got final decree in the redemption suit and modified the decree of the trial Court.

The Defendants-Appellants' contention was that their possession during the subsistence of the mortgage of Ram Chand was not only adverse to the mortgagee Ram Chand but also to the mortgagors, the Plaintiffs-Respondents, and the suit was consequently barred :

Held—That the suit for possession brought in August 1921 was not barred by limitation because the Plaintiffs-Respondents, mortgagors, could not bring a suit for possession before the final decree for redemption was made in March 1915 and possession of the Defendants could not be adverse to the mortgagors before March 1915, and the suit was not barred.

Mr. S. C. Bose (*Advocate*) with Babu Gopendra Nath Das for the Appellants.

Dr. S. C. Basack (*Advocate*) with Babu Punchanan Ghose for the Respondents.

H. D. C. *Appeal dismissed with costs.*

[END OF VOL. XXX.]



